IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION

PIETERMARITZBURG

CASE NO: 8653 / 24P

Before: Honourable Ncube J

Heard on: 17 April 2025

Delivered on: 04 September 2024

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED: YES / NO ………………… ……………………… DATE SIGNATURE

In the matter between:

FIRST RAND BANK LIMITED Applicant

and

JACOBUS JOHANNES ODENDAAL Respondent

ORDER

In the result I make the following order:

1. The Respondent's application to strike out certain sentences from the founding affidavit deposed to by Shashika Ramtahal is refused.

2. The Respondent is ordered to pay the sum of R6, 651,436.04 plus interest there on at the rate of prime (currently 11.75%) per annum compounded monthly in arears from 30 June 2023 to date of the final payment; and

3. Pay the sum of R4, 787, 658.34 plus interest thereon at the rate of Prime (currently 11.75%) plus 2.00% per annum compounded monthly in arrears from 30 June 2023 to date of final payment;

4. Pay Costs, including any reserved costs, on attorney and client scale.

JUDGMENT

NCUBE J

Introduction

[1] This is opposed application in which the Applicant applies for judgement sounding in money against the Respondent as surety for the obligations of the two principal debtors, being Sabi Construction Pty Ltd (''Sabi Construction'') and Sabicare (Pty) Ltd (''Sabicare''). The Respondent's indebtedness to the Applicant arises from an overdraft facility agreement concluded on 13 October 2022, the Covid

-19 loan agreement entered into on 25 June 2020, a suretyship executed by the Respondent in respect of Sabi Construction's obligations on 27 August 2021, a suretyship executed in respect of Sabicare's obligations on 03 May 2018 and a suretyship executed by the Respondent in respect of Sabicare's obligations on 20 June 2020. As per agreement between the parties, in respect of suretyships, a certificate signed by a manager of the Applicant, would be prima facie proof of the Respondent's liability for indebtedness. The Respondent has raised a preliminary issue which is to be determined first. That is the application to strike out certain sentences from the founding affidavit. I now deal with that issue.

Application to Strike Out

[2] The Respondent begs the indulgence of the court to strike out certain paragraphs and sentences from the founding affidavit deposed to by Miss Ramtahal on the basis that such affidavit amounts to inadmissible hearsay evidence for want of personal knowledge of the facts by the said Miss Ramtahal.

[3] The starting point of exercise will be Rule 6 (15) of the Uniform Rules of Court which provides:

> *''(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted".*

[4] It has been held that for the application to strike out to succeed, there are two requirements which must be satisfied. The first requirement is that the matter sought to be struck out must indeed be vexatious, scandalous or irrelevant. In the present application, the founding affidavit must indeed contain inadmissible hearsay evidence for lack of personal knowledge of the facts pleaded in the said affidavit. In

that regard, in **Beinash v Wixley**[1] Mahomed CJ expressed himself in the following terms:

> *''What is clear from this rule is that two requirements must be satisfied before an application to strike out the matter from any affidavit can succeed. First the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced"*

[5] The striking out procedure should not be used for purposes of raising useless technical objections. It is for this reason that a certain degree of prejudice should be shown to exist before the application to strike out can be granted. In **Anderson And Another v Port Elizabeth Municipality**[2] Raynold JP said:

> *''Suffice it to say this procedure was never intended to be utilised to make technical objections of no advantage to anyone and just increasing costs"*

[6] The gravemen of the Respondent is that the founding affidavit filed in this matter contains inadmissible hearsay evidence for want of personal knowledge of the facts by the deponent to the Founding Affidavit. The Respondent has indicated the sentences which should be struck out from the Founding Affidavit. Shashika Ramtahal (''Ramtahal'') is the deponent to the founding affidavit. For purposes of this judgement, it is important to quote paragraphs 1, 2 and 3 of Ramtahal's affidavit which states:

> *''1. I am a major female legal practitioner employed by the applicant as a recoveries manager at its offices situate at […]th floor a[…] H[…], [...] k[...] Drive, Umhlanga Rocks.*
>
> *2. The facts deposed to herein are within my personal knowledge and belief, save where indicated to the contrary or appears from the context and are both true and correct.*

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[1] 1997 (3) SA 721 (SCA) at 733 A -B

[2] 1954 (2) SA 299 (EDL)

3. By virtue of my position as a recoveries manager within the Applicant, I have acquired personal knowledge of the Applicant's claim against the Respondent. I have investigated the claim against the Respondent. For purposes of this application, I have also perused and considered the annextures to this affidavit"

[7] In case the Respondent's objection to the founding affidavit is upheld, as being hearsay because of want of personal knowledge of the facts, the entire founding affidavit, shall have to be discarded since the remaining information will make no case and it will be useless.

[8] This application to strike out is not an issue which must detain me for a long time. Parties to a contract should not desperately seek to be released from contract entered into freely and voluntarity for flimsy technical reasons. The *Pacta Sunt Servanda* is the fundamental principle of our law. This Principle entails that parties should honour and fulfil their contractual obligations. Once parties have entered into a valid contractual agreement, they are bound by its terms and they must uphold their promises. In **Barkhuizen v Napier**[3]**.** Ngcobo J writing for the majority, expressed himself in the following terms:

''……... On the other hand public policy, as informed by the constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed is the maxim Pacta Sunt Servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to control one's own affairs, even to one's own detriment, is the very essence of freedom and the vital part of dignity ………..."

[9] The overdraft facility, the loan and surety ship agreements signed by the parties in this case all have a similar clause which says:

[3] 2007 (5) SA 323 (cc) para 57

''A certificate signed by any manager (whose appointment, qualification or authority need not be proved) stating the amount of …….. indebtedness to the applicant, Prime Rate, rates or interest and other charges applicable would unless the country was proved be prima facie proof of the amount which …… owed to the Applicant …. and a valid document in any court to obtain provisional sentence, summary judgment, or judgment for any other purpose"

[10] In my view, there is nothing to be struck out from the founding affidavit deposed to by Ramtahal. The founding affidavit does not contain hearsay evidence even if it contained hearsay evidence, it the would be the type of hearsay evidence which the court can admit in the interest of justice in terms of section 3 (1) (c) of the Law Of Evidence Amendment Act[4]. In any event, as Mr Van Rooyen, Counsel for the Applicant submitted, a corporate deponent to an affidavit is not required to have first hand knowledge of every fact. This defence does not raise any triable issue. In **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**[5]**.** Navsa JA held**:**

''……………… There are diverse references to clauses to the agreements to the non - correlation between the dates of the tax certificates and the certification by the Agent what is conspicuously absent is the absence of a triable defence."

In *Casu,* I am also of the view that the Respondent's defence does not raise any triable defence.

Merits

[11] I now turn to deal with the merits of the application. The Respondent states in paragraph 15 of his answering affidavit dated 24 July 2024, that he does not deny having signed various documents, but he is not able to verify any signatures or documents. He avers further, that he is not prepared to admit copies of agreements

[4] Act 45 of 1988
[5] 2009 (5) SA 1 (SCA) at para 15

attached as annexures FA1 to FA5 to the founding affidavit. He says this despite the fact that his signature appears on all the agreements which he signed. Especially signatures on the of Deed of Suretyship which are not electronic signatures.

Indebtedness of the Respondent to the Applicant

[12] As stated earlier in this judgment, the Respondent's indebtedness arises from the breach of the following:

1. A written facility concluded on 13 October 2022 between the Applicant, Sabi Construction and Sabicare. This facility was repayable on demand

2. A Covid – 19 agreement which was concluded on the 25th of June 2020 between the Applicant and Sabicare

3. A suretyship executed by the Respondent in respect of Sabi Construction's obligations on 27 August 2021

4. A suretyship executed by the Respondent in respect of Sabicare's obligations on 3 May 2018

5. On 20 June 2020, the Respondent executed another suretyship in respect of Sabicare' obligations limited to the sum of R7 million.

[13] In respect of suretyships, it was one of the terms of the agreement that a certificate signed by any manager of the Applicant whose appointment need not be proven, would be *prima facie* proof of the Respondent's indebtedness or indebtness of Sabie Construction and Sabicare and as to any other fact in relation to any such in debtedness and would be sufficient for purposes of any application, action, judgement order or for any other purpose whatsoever.

Breach

[14] In terms of the agreement a breach would have occurred if:

(a) There was non-payment on due date of any amount under the facility, agreement, security documents or other agreement.

(b) If a meeting was proposed or convened, a resolution taken or passed, application made, or order is applied for or granted to commence any business rescue proceedings regarding Sabi Construction or any similar procedure.

(c) If there was a winding up order whether provisional or final, granted.

In case any of the above-mentioned events occurred, the Applicant was entitled to:

(a) Accelerate payment of all amounts even if the due date of payment had not occurred.

(b) Claim immediate repayment of all amounts outstanding under the facility agreement.

[15] On 09 January 2023, the Board of Directors of Sabicare took a resolution to place Sabicare under business rescue. On 10 November 2023, Sabicare was provisionally wound up. As per the terms of the agreement, the business rescue and provisional winding up of Sabicare led to the acceleration of the repayment of the full outstanding balance. The Applicant's attorneys demanded payment of the Sabicare indebtedness from the Respondent. The respondent's indebtedness to the Applicant in respect of Sabi Construction is R6 651 436.04. The Indebtedness in respect of Sabicare is R4 787 658.34.

[16] Apart from technicalities, the Respondent does not have a defence against the Applicant's claim. The Respondent does not aver that the amount claimed is wrong or that the claim is a false claim. In **Cape Town Transitional Metropolitan Substructure v LLco Homes**[6]. Duminy AJ said:

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[6] 1996 (3) SA 472 (c) at 498 F-G.

‘’The objection taken to their affidavit is not followed up by any assertion that the amount claimed in the combined summons and particular of claim is wrong, or that any of the allegations or facts set out there in are false. It is clear from Mr Joshua’s opposing affidavit that the defendant indeed does not dispute the correctness of these facts giving rise to its liability for rates and the calculations relied upon by the plaintiff. Its defences are that payment of rates is not yet due and that it has the counterclaim mentioned above. That makes the attack on Mr Leonerd’s ability to depose to the verifying affidavit despite his oath that he has personal knowledge of the facts and circumstances rather pointless.’’

<u>Alleged Prejudice</u>

[17] The Respondent contends that the Applicant prejudiced the Respondent’s ability to make payments in terms of suretyship. This contention does not hold water as the Respondent abandoned the right of excursion in respect of all suretyships. As Mr Van Rooyen, Counsel for the Applicant argued, correctly in my view, there is no general prejudice principle in South African law which releases the surety from his obligations. The alleged prejudice must at least arise from the breach of a legal duty or obligation which arises from the principal agreement or the deed of suretyship. To that extent, in **Absa Bank Ltd v Davidson**[7] Olivier JA expressed himself in the following terms:

> ‘’As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime source of a creditor’s rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer ………’’

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[7] 200 (1) SA 1117 (SCA) para 19

The above statement of the law is clear and straight forward. I need not say more.

The Respondent's intended Counter Claim

[18] The Respondent contends in his answering affidavit that he has a counter claim against the Applicant. From what is stated in the answering affidavit, it sounds like the counter claim will be based on pure economic loss. I have not seen the counter claim and I need not say much about it.

Order

[19] In the result, I make the following order

1. The Respondent's application to strike out certain sentences from the founding affidavit deposed to by Shashika Ramtahal is refused.

2. The Respondent is ordered to pay the sum of R6, 651,436.04 plus interest there on at the rate of prime (currently 11.75%) per annum compounded monthly in arears from 30 June 2023 to date of the final payment; and

3. Pay the sum of R4, 787, 658.34 plus interest thereon at the rate Prime (currently 11.75%) plus 2.00% per annum compounded monthly in arrears from 30 June 2023 to date of final payment;

4. Pay Costs, including any reserved costs, on attorney and client scale.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION

PIETERMARITZBURG

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