REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-091608

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

15/9/25 [redacted]
DATE SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

GITANKUMAR KANTILAL Respondent

JUDGMENT

FISHER, J

Introduction

[1] The applicant Bank (the Bank) seeks to enforce claims that arise under two security guarantees.

[2] The principal debtor is DSCM Consultants cc (DSCM).

[3] The principal liability comprises the following transactions concluded between the Bank and DSCM: instalment sale agreements in respect of 164 vehicles subject to a Master Instalment Sale Agreement; rental agreements in respect of 135 vehicles subject to a Master Rental Agreement; a Fleet Management facility; an overdraft facility with a credit limit of R800 000; a Vehicle and Asset Finance facility with a credit limit of R14.9 million; a Liquidating Credit facility with a credit limit of R7 382 100; a Fleet Management Services facility with a credit limit of R 500 000.

[4] In terms of the two guarantees relied on which were concluded on 17 November 2022 (the first guarantee) and 27 February 2023 (the second guarantee) respectively, the respondent guaranteed and undertook, as a principle and independent obligation in favour of the Bank in respect of all debts which DSCM owed or may in the future owe in connection with agreements between the Bank and DSCM. Recovery under the first guarantee was limited to 25 million together with interest and costs and to R47.8 million together with interest and costs under the second guarantee.

[5] The Bank alleges that DSCM defaulted on the agreements and has produced certificates of balance in respect of the indebtedness under the guarantees for the amounts claimed.

[6] This indebtedness is challenged only by way of the raising of legal points under rule 6(5)(d)(iii).

The points taken

[7] The defendant raises the following arguments:

a. The Bank has not proved that it is a registered credit provider for the period under which the guarantee was concluded in that it has neglected to file a certificate for all relevant periods affecting the span of the agreements.

b. Whilst all the agreements have, on their face, been terminated due to effluxion of time, the Bank allowed the principal debtor to stay in possession of some of the rented vehicles for “many months” whilst still accepting rental payments from the principal debtor which brought about a tacit relocation of some the lease agreements.

c. Clause 1.3 of each of the guarantees states that the respondent shall immediately pay, on receipt of a first written demand from the Bank, “all or any cash flow shortfalls” recorded in the demand. The defendant contends that because the demand only sets out the amount owing and does not specifically make reference to the term “cash flow shortfalls” this renders the demand “fatally defective”.

d. The Bank provides no proof that it afforded the principal debtor 7 days to remedy the breach as provided for in the agreements before instituting the proceedings.

e. Whilst the Bank states that the respondent provided it with the guarantees it “fails to make the necessary allegations as to how the guarantees were signed”. The respondent points out that the signatures appearing on each of the guarantees look different and that they seem to be electronic.

[8] The defendant seeks that if the points or any of them do not succeed that he be allowed to file an answering affidavit.

[9] I will deal serially with the law points raised.

<u>The Bank has not attached proof of it being a credit provider for the relevant period.</u>

[10] The Bank’s assertion that it is a credit provider, in the absence of evidence to the contrary or a substantive raising of this dispute, suffices.

[11] In any event, the NCA does not apply to any of the agreements as the principal debtor is a juristic person whose annual turnover and net asset value at the time when each of the agreements were concluded exceeded the threshold of R 1 million provided for in Section 4(1)(a)(i) read with Section 7(1) of the Act.

Tacit relocation

[12] It is not disputed that the rental agreements have, on their face, terminated due to effluxion of time.

[13] The defendant raises that the Bank allowed the principal debtor to stay in possession of the vehicles for "many months" after the expiry of the agreements whilst still accepting rental payments. He thus, contends for tacit relocation of the lease agreements.

[14] He concedes that of the 135 rental agreements only 97 were then terminated by notice thus leaving the remaining 38 tacitly relocated leases extant. Thus, in respect of those leases there is no termination.

[15] There is no evidence that the Bank continued accepting rental payments. This is the onus of the defendant to establish. Thus, no defence is made out on this basis.

Failure to not specifically make reference to the term "cash flow shortfalls"

[16] Clearly the demands properly and sensibly construed are for a shortfall in payment.

No proof of the affording of 7 days before institution of action

[17] Again, the premature institution of action is a matter which would have to have been raised by the defendant with a factual basis. This has not been done.

Failure to allege details as to the signatures

[18] Again, it suffices for the Bank to have raised that the guarantees were given to it for the principal indebtedness. If the signature of the documents is disputed this is for the defendant to raise and prove.

Discussion

[19] All the points raised are without merit.

[20] It seems to me that the opposition to the claim is an exercise in delay. There is no defence raised on the merits.

[21] The decision to not file an affidavit shapes the extent of the arguments. The points raised purport to be like an exception – i.e. if submissions are not substantiated with documentary evidence, then the Bank has not made out a case.

[22] This approach fails to take account of the fact that application proceedings require engagement with evidence. The failure to raise real disputes on the facts or issues of law which have substance is fatal to the defence.

Request for the right to file an affidavit.

[23] It is sought by the respondent that he should now be given the opportunity to file an answering affidavit. The application is brought, informally, from the Bar.

[24] A court has a discretion in relation to allowing the filing of an affidavit. A court will however be loath to exercise this discretion if it is of the view that that the respondent is acting mala fide. To my mind this is manifestly the case here.

[25] There is no explanation for the failure to file an affidavit on the merits in the first place and, given the obvious lack of merit in in the purported law points raised, this court can only reach the conclusion that the request to file an answering affidavit is merely a further manifestation of attempts to delay the process.

Costs

[26] The agreements in issue provide for recovery of attorney and client costs

Order

[27] The respondent is ordered to pay to the applicant:

1. The sum of R759 682.15 together with interest at the rate of 15.7% per annum calculated daily and compounded monthly in arrears from 25 April 2024 to date of final payment.

2. The sum of R15 281 759.74 together with interest as provided for in each of the rental agreements.

3. The sum of R304 055.74 together with interest at the rate of 13.75% per annum, which interest is to be calculated daily and compounded monthly in arrears.

4. The costs of the application on the scale as between attorney and client.

[redacted]

FISHER J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Heard:	3/9/25
Delivered:	15/9/25
For the Applicant:	
Adv.A.J Venter	Instructed by
	Martins Weir- Smith
For the Respondent:	
Adv. N Strydom	Instructed by
	Hahn & Hahn Attorneys