



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

Case No.: 2846/2024

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

FIRST FORTUNE INVESTMENTS 14 CC
t/a TOTAL OXFORD

First Respondent

ALLI MOHAMED SOOMAR

Second Respondent

GULAM MOHAMED SOOMAR

Third Respondent

JUDGMENT

COLLETT J:

Introduction

[1] The applicant, FirstRand Bank Limited (hereinafter referred to as the '*Bank*') seeks payment of an amount alleged to be owing pursuant to an overdraft facility extended to the first respondent, First Fortune Investments 14 CC. The second and third respondents

are cited in their capacities as sureties and co-principal debtors for the obligations of the first respondent.

- [2] The *Bank* seeks payment of R522 706.43, together with interest calculated at the contractual rate of prime plus 9% per annum, calculated daily and compounded monthly in arrears from 17 May 2024 to date of payment . The amount claimed represents the indebtedness alleged to have arisen under the first respondent's overdraft facility.

- [3] The liability of the third respondent is limited under his deed of suretyship to R250 000.00 together with the applicable interest. The aggregate limits of the suretyships relied upon against the second respondent amount to R600 001, together with interest and therefore exceed the amount presently claimed.

- [4] The application is opposed on several grounds. The respondents contend firstly, that the *Bank*, by its conduct, waived its right to rely upon non-compliance with the terms of the facility, secondly, that the *National Credit Act 34 of 2005* (hereinafter referred to as the '*NCA*') applies and that the requisite statutory procedures were not followed, thirdly, that the certificate of balance does not establish the amount claimed and lastly, that the *Bank* has failed to establish the execution and enforceability of the deeds of suretyship.

- [5] The respondents contend that these matters give rise to genuine disputes of fact. They submit that the application should accordingly be dismissed alternatively referred to trial in terms of *Rule 6(5)(g)* of the *Uniform Rules of Court* (hereinafter referred to as the '*Rules*').

- [6] The mere existence of a denial does not establish a real, genuine and *bona fide* dispute of fact. The existence of such a dispute depends upon the nature of the allegation, the manner in which it is answered and the evidence reasonably available to the party disputing it. Accordingly, it is necessary to examine each defence against the affidavits and the documentary material before the Court.

Factual matrix

- [7] On 19 March 2020 the *Bank* and the first respondent concluded a written facility agreement (hereinafter referred to as the '*agreement*'). The first respondent was represented in concluding the agreement by the second respondent being its sole member. In terms of the *agreement*, the *Bank* afforded the first respondent an overdraft facility with a limit of R500 000. The facility was repayable on demand and attracted interest in accordance with the terms of the agreement.
- [8] The *agreement* contained provisions regulating, *inter alia*, to default, interest, waiver and proof of indebtedness. It provided that a certificate signed by a manager of the *Bank* stating the amount owing would constitute *prima facie* proof of the matters stated therein unless the contrary was proved.
- [9] The first respondent's obligations were secured by deeds of suretyship furnished by the second and third respondents. *Schedule 2* to the *agreement* expressly identified those suretyships as security for the first respondent's obligations. The second respondent's existing suretyships were recorded in amounts of R100 000, R250 000 and R250 001 respectively whilst that of the third respondent was recorded in an amount of R250 000.
- [10] During March 2024 the first respondent's indebtedness exceeded the R500 000 facility limit. On 18 March 2024 the *Bank* called up the facility and demanded payment from the first respondent. The amount then outstanding was stated to be R505 157.75. Payment was not made by the first respondent.
- [11] On 23 April 2024 a certificate of balance reflected the first respondent's indebtedness as R516 242.74. On 2 May 2024 the *Bank's* attorneys addressed a further demand to the respondents for payment of that amount together with contractual interest. A further certificate dated 16 May 2024 reflected the indebtedness as R522 706.43 together with interest at the contractual rate from 17 May 2024. It is that amount which the *Bank* now seeks to recover in these proceedings.

The alleged waiver

- [12] The respondents contend that the *Bank* waived its right to rely upon strict compliance with the R500 000 facility limit. They rely upon what they describe as a longstanding course of dealing between the parties in terms of which the first respondent was permitted, over a period of approximately ten years, to exceed the agreed facility limit with the *Bank* thereafter increasing the facility or accepting payment sufficient to regularise the account. On this basis they contend that the *Bank's* previous conduct was inconsistent with an intention to enforce strict compliance with the facility limit.
- [13] Waiver is the deliberate abandonment of a known right. It is not lightly inferred with the onus resting upon the party alleging it.¹ The test is an objective assessment as to whether the conduct relied upon is plainly inconsistent with an intention to enforce the right in question and justifies the conclusion that the holder of the right, with knowledge thereof, intended to surrender it.
- [14] In *Phoenix Salt Industries (Pty) Ltd v Lubavitch Foundation of Southern Africa*,² the Supreme Court of Appeal emphasised the distinction between contractual variation and waiver. A conventional non-variation clause does not, merely because it prohibits oral variation, necessarily preclude the unilateral waiver of a right and the occurrence of such waiver remains a matter of evidence. That distinction is important as the *Bank* cannot succeed merely by pointing to the existence of a non-variation clause. The wording of the *agreement* must be considered together with the respondents' factual case of waiver.
- [15] The *agreement* addresses the consequences of indulgence. It provides that no relaxation, indulgence or extension granted by the *Bank* to the client will operate as an estoppel against the *Bank* or as a waiver of any of its rights nor will any such relaxation or indulgence constitute a novation of the agreement. The respondents' reliance upon the *Bank's* previous tolerance of excesses over the facility limit must be considered against that express contractual provision.

¹ *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) paras 15–19; *Laws v Rutherford* 1924 AD 261 at 263.

² 2012 (3) SA 294 (SCA) at paras 21–23

- [16] Fundamentally, the answering affidavit does not identify conduct from which a deliberate abandonment by the *Bank* of its right to recover the overdraft indebtedness can reasonably be inferred. The fact that a bank may tolerate deviations from the facility limit, afford indulgences or permit the continued operation of an account does not establish an intention permanently to abandon its contractual right to repayment.
- [17] The respondents' description of that conduct as a '*course of dealing*' does not alter its legal effect. Even accepting the conduct relied upon by the respondents it does not establish that the *Bank* abandoned its contractual right to call up the facility and recover the amount owing.
- [18] The objective conduct points in the opposite direction. The facility was repayable on demand. The *Bank* ultimately exercised that right when it called up the facility and demanded payment. There is no evidence of an agreement that the indebtedness need not be repaid nor of conduct sufficiently unequivocal to establish the abandonment of the *Bank's* right to demand repayment.
- [19] Accordingly, the waiver defence cannot succeed. Furthermore, the conduct relied upon does not give rise to a genuine dispute of fact requiring oral evidence.

The National Credit Act

- [20] The respondents further contended that the *NCA* applies to the facility agreement and that the *Bank* has failed to establish compliance with the Act particularly in relation to the requirements of *section 129* thereof.
- [21] *Section 4(1)(a)(i)* of the *NCA* excludes from its operation a credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover, together with that of related juristic persons, at the time the agreement is made, equals or exceeds the threshold determined by the Minister in terms of *section 7(1)*. The threshold applicable at the relevant time was R1 million.³

³ General Notice 713 of 2006, Government Gazette 28893 of 1 June 2006.

- [22] The financial statements furnished by the first respondent in connection with the facility reflect, for the financial year preceding the conclusion of the agreement, an annual turnover exceeding R39.5 million and total assets exceeding R2.9 million. Those figures substantially exceed the statutory threshold. However, the respondents objected to reliance upon those statements on the basis that they were introduced in reply.
- [23] The conclusion does not depend upon those financial statements. *Section 4(1)(b)* excludes a large agreement, as contemplated in *section 9(4)*, where the consumer is a juristic person whose asset value or annual turnover falls below the threshold contemplated in *section 7(1)*. For purposes of determining whether a credit facility constitutes a large agreement, *section 7(2)* provides that the principal debt is the credit limit under that facility.
- [24] In *Nedbank Ltd v Wizard Asset Holdings (Pty) Ltd and Others*,⁴ it was held that the *NCA* does not apply to a large agreement concluded with a juristic person irrespective of whether its asset value or annual turnover falls above or below the R1 million threshold. In the case of a credit facility, the credit limit constitutes the principal debt for purposes of determining the applicable threshold. The credit limit in the present matter was R500 000 and thus exceeded the applicable R250 000 threshold. Hence, even if the respondents' objection to reliance upon the financial statements were upheld, the facility constituted a large agreement and fell outside the operation of the *NCA*.
- [25] *Section 4(2)(c)* provides that the *NCA* applies to a credit guarantee only to the extent that the Act applies to the credit facility or credit transaction in respect of which the guarantee is granted. Since the *NCA* does not apply to the facility agreement, it does not apply independently to the suretyships securing that indebtedness.⁵ The respondents' reliance upon the *NCA* is accordingly without merit and the absence of notices in terms of *section 129* affords them no defence to the relief sought.

⁴ 2010 (5) SA 523 (GSJ) at paras 5-8

⁵ *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) at paras 18-24.

The certificate of balance and quantum

- [26] The *agreement* provides that a certificate signed by a manager of the *Bank*, whose appointment, qualification or authority need not be proved, stating the first respondent's indebtedness, the applicable interest rate or other charges constitutes *prima facie* proof of the matters stated therein unless the contrary is proved.
- [27] The evidential effect of such a certificate arises from the agreement between the parties. In *Absa Bank Ltd v Le Roux and Others*,⁶ the Court explained that the purpose of a certificate clause is to create an evidential onus upon the party disputing the indebtedness to negate the bank's allegations as to the debt and its quantum. The certificate stands as *prima facie* proof because the parties have contractually agreed that it should have that effect. A certificate of balance is not by reason merely of its existence incontrovertible proof of indebtedness. Where the parties have agreed that such a certificate constitutes *prima facie* proof, it establishes the amount reflected therein unless displaced by sufficient evidence to the contrary.
- [28] The papers contain a certificate dated 23 April 2024 reflecting an indebtedness of R516 242.74, together with contractual interest from 24 April 2024. A later certificate, dated 16 May 2024 records the indebtedness as R522 706.43, together with interest at prime, then recorded as 11.75%, plus 9% per annum, calculated daily and compounded monthly in arrears from 17 May 2024 until date of payment. It is the latter certificate upon which the monetary relief presently sought is based.
- [29] The respondents allege that the certificate inflates the indebtedness, interest and charges and fails properly to credit payments. However, they do not identify a payment which has not been credited, an incorrect debit, an erroneous interest calculation or an alternative balance which they contend is owing nor is any documentary material produced which contradicts the certified balance.

⁶ 2014 (1) SA 475 (WCC) at para 16; see also *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 381H–383A.

- [30] That contention does not displace the evidential effect which the parties agreed the certificate would have. The respondents were not required to reconstruct the *Bank's* account or establish the correct balance themselves. However, they were required to place before the Court some factual basis upon which the correctness of the certified indebtedness could genuinely be called into question.
- [31] The respondents sought to meet this difficulty by submitting that the underlying transactional records are in the possession of the *Bank* and ought to be produced so that the account may be reconstructed and tested. That submission does not answer the evidential position created by the *agreement* and the certificate. The respondents cannot overcome the agreed *prima facie* evidential effect of the certificate merely by contending that records in the *Bank's* possession might, upon further investigation, reveal a basis upon which to challenge it. They were required to identify some factual basis for disputing the certificate of indebtedness which they have failed to do.
- [32] The fact that the amount reflected in the certificate of 16 May 2024 exceeds that contained in the earlier certificate does not create a dispute of fact. The facility continued to attract contractual interest and charges. Significantly, the respondents identify no particular component of the later balance which they contend was impermissibly included nor do they advance any calculation demonstrating that the certified balance is incorrect.
- [33] A contractual certificate constituting *prima facie* proof does not reverse the ultimate onus resting upon the *Bank* to establish its claim. However, it does have the evidential consequence agreed upon by the parties. In the absence of evidence capable of disturbing that *prima facie* proof a mere unsupported assertion that the balance is incorrect is insufficient.
- [34] In the circumstances, the respondents have not adduced evidence sufficient to displace the *prima facie* proof afforded by the certificate of balance. The *Bank* has accordingly established the first respondent's indebtedness in the amount of R522 706.43.

The suretyships and the alleged disputes of fact

- [35] The second and third respondents' liability arises from deeds of suretyship concluded in favour of the *Bank* in respect of the first respondent's indebtedness. The *Bank* relies upon the deeds as having been executed by the second and third respondents. The respondents dispute their execution and enforceability and contend that the disputes arising in that regard preclude the grant of final relief.
- [36] Although the deeds pre-date the *agreement* of 19 March 2020 they expressly constitute continuing security for indebtedness then owing or which might thereafter become owing by the first respondent to the *Bank*. *Schedule 2* to the 2020 facility agreement identifies those deeds as security for the first respondent's obligations under the facility. In terms of these instruments the sureties bound themselves, subject to their respective limits, as sureties and co-principal debtors for the indebtedness of the first respondent.
- [37] In their answering papers the respondents challenge the authenticity, validity and authority associated with the execution of the suretyships. The second respondent denies that the signatures are those of himself and the third respondent. The third respondent confirms the answering affidavit. Their case is that the *Bank* bears the onus of establishing execution and that the dispute cannot properly be determined on affidavit. It was submitted that in the absence of evidence from the witnesses to the suretyships or expert handwriting evidence, the *Bank* has failed to discharge the onus.
- [38] A court should be slow to resolve a genuine dispute concerning the execution of a material document merely by comparing signatures or choosing between competing probabilities on affidavit. However, the question which arises before that enquiry is whether the respondents have raised a real, genuine and *bona fide* dispute concerning execution at all.
- [39] Where final relief is sought in motion proceedings factual disputes are ordinarily determined in accordance with the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.⁷ The facts stated by the respondent, together with those admitted by

⁷ 1984 (3) SA 623 (A) at 634E–635C.

the respondent in the applicant's affidavits ordinarily provide the factual basis upon which the application is determined. However, a respondent's version may be rejected on the papers where it does not raise a real, genuine and *bona fide* dispute of fact or where it is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers.

- [40] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,⁸ the Supreme Court of Appeal explained that a real, genuine and *bona fide* dispute of fact exists only where the party purporting to raise it has seriously and unambiguously addressed the fact said to be disputed. A bare or ambiguous denial will not suffice. The Court recognised that the level of detail which may reasonably be expected of a respondent depends upon the circumstances and the respondent's knowledge of the facts. Where the facts are such that the respondent must necessarily possess knowledge of them and be able to provide an answer, a failure to do so may justify the conclusion that no genuine dispute of fact has been raised.
- [41] The distinction is important. The Court is not called upon to reject a properly substantiated version merely because the *Bank's* version appears more probable. The anterior question is whether the respondents have placed before the Court a sufficiently substantive version to create the factual dispute upon which their *Rule 6(5)(g)* argument depends.
- [42] The second respondent was the sole member of the first respondent and represented it in concluding the facility *agreement*. That *agreement* expressly identified the second and third respondents and the existing deeds of suretyship furnished by them as security for the facility.
- [43] The second respondent was therefore not a stranger to the transaction or to the security arrangements upon which the *Bank* relied. The existence of the deeds of suretyship was expressly recorded in the facility *agreement* which he concluded on behalf of the first respondent. His answering affidavit is silent as to how, if neither he nor the third respondent had executed those deeds, they came to be identified and accepted as

⁸ 2008 (3) SA 371 (SCA) at para 13

security for the facility. Moreover, he does not allege that he objected to, queried or corrected that record when concluding the facility agreement relating thereto.

- [44] The answering affidavit provides no factual account of what occurred in relation to that security. It does not explain what security, if any, the second respondent understood had been furnished to enable the facility to be implemented nor does it explain how the *Bank* came to hold the deeds upon which it relies or what, on the respondents' version, occurred when the security contemplated by the facility was procured.
- [45] The difficulty for the respondents is more fundamental because whether they executed the deeds is a matter peculiarly within their knowledge. Their answer does not meaningfully engage with the surrounding transaction or provide a factual version capable of explaining the security documentation upon which the *Bank* relies. Instead, their case rests substantially upon the denial of the signatures coupled with the assertion that the *Bank* must prove them.
- [46] This Court does not accept the *Bank's* submission, to the extent that it was advanced, that a denial of signature necessarily implies an allegation of fraud on the part of the *Bank*. That conclusion does not follow as a matter of necessity and is not required to determine the dispute.
- [47] Furthermore, this Court does not place decisive weight upon a visual comparison between the signatures appearing on the suretyships and signatures appearing elsewhere in the papers. A court is not a handwriting expert and in the circumstances of this matter the authenticity of the deeds need not be determined by judicial comparison of signatures.
- [48] This is not a case in which two detailed and mutually destructive factual versions confront the Court. The *Bank* relies not only upon the deeds but upon the 2020 facility agreement, signed on behalf of the first respondent by the second respondent, which expressly identifies those deeds as security for the facility. The respondents provide no factual account addressing that documentary matrix. They merely deny execution and require the *Bank* to prove it.

[49] Considered in that context, the denial does not seriously and unambiguously engage with facts which the respondents were in a position to address. This is not a case in which nothing more could reasonably have been expected of them. *Wightman* draws precisely that distinction. Accordingly, this Court finds that the respondents have not raised a real, genuine and *bona fide* dispute of fact concerning the execution of the suretyships.

Referral to trial

[50] The respondents nonetheless submitted that the application should be dismissed or, alternatively, referred to trial in terms of *Rule 6(5)(g)*. They contended that oral evidence, discovery and production of the underlying banking records were necessary to resolve the disputes concerning the indebtedness, the course of dealing between the parties and the execution of the suretyships.

[51] *Rule 6(5)(g)* confers a discretion upon a court where an application cannot properly be decided on affidavit. That discretion arises where there is a genuine dispute of fact material to the determination of the application which cannot satisfactorily be resolved on the papers. A referral to oral evidence or trial is not warranted merely because a respondent asserts that a dispute exists. In applying the principles referred to above the dispute must be real, genuine and *bona fide*.

[52] In the present matter that threshold has not been met. The respondents have failed to identified a genuine dispute concerning the first respondent's indebtedness or its quantum which requires oral evidence nor have they raised a sufficiently substantive factual dispute concerning the execution of the suretyships. In essence, the proposed referral would serve to afford the respondents an opportunity through discovery and oral evidence to seek out a factual basis for challenges which have not adequately been raised on the papers. *Rule 6(5)(g)* does not serve that purpose.

[53] *Rule 6(5)(g)* does not entitle a litigant to a referral merely because allegations have been denied or because oral evidence and discovery might permit further investigation of a defence. The dispute said to require referral must first genuinely arise on the affidavits.

The respondents have not established a material factual dispute which renders determination of the application on the papers inappropriate.

- [54] There is accordingly no basis to dismiss the application by reason of a dispute of fact or to refer it to oral evidence or trial.

Liability of the sureties

- [55] Consequently, the *Bank* has established the liability of the second and third respondents under their respective deeds of suretyship. Their liability is accessory to the indebtedness of the first respondent. Both the second and third respondents bound themselves as surety and co-principal debtor for the obligations of the first respondent, secured by their respective deed subject to the terms and limits thereof.

- [56] The *Bank* has established indebtedness in the amount of R522 706.43. The aggregate limits of the suretyships furnished by the second respondent exceed that amount and his liability thus extends to the full amount claimed. The third respondent's liability in respect of the principal indebtedness is limited to R250 000, together with interest, costs and other charges recoverable in terms of his deed of suretyship. Within those respective limits their liability is joint and several with that of the first respondent, the one paying the others to be absolved.

Costs

- [57] The *Bank* seeks costs on the attorney and own client scale and the relevant agreements expressly provide for the recovery of costs on that scale. In particular, the deeds of suretyship provide for the recovery of legal costs as between attorney and own client incurred in enforcing the suretyships. Whilst a contractual provision as to costs does not oust the Court's discretion, there is no reason in the circumstances of this matter not to give effect to the parties' agreement.
- [58] Accordingly, costs will follow the result on an attorney and own client scale subject to the respective contractual limits of liability applicable to the second and third respondents.

[59] In the circumstances, the following order is made:

1. The first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant the sum of R522 706.43.
2. The third respondent is ordered jointly and severally with the first and second respondents, the one paying the others to be absolved, to pay the applicant an amount in respect of principle indebtedness limited to R250 000.00
3. Interest is payable on the amounts referred to in paragraphs 1 and 2 above at the rate of prime plus 9% per annum, calculated daily and compounded monthly in arrears, from 17 May 2024 to date of final payment.
4. The respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the applicant's costs on an attorney and own client scale.

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JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant	:	<i>Adv. Coutts</i>
Instructed by	:	Messrs Wheeldon Rushmere & Cole 119 High Street MAKHANDA (Ref.: Mr Van Der Veen)
For the Respondent	:	<i>Adv. Chetty</i>
Instructed by	:	Netteltons Attorneys 118A High Street MAKHANDA (Ref.: Ms Sykes/Sam)
Date heard	:	27 August 2026
Date judgment delivered	:	08 September 2026