IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)

Case No.: 2238/2021
Date heard: 8 March 2022
Date delivered: 19 May 2022

In the matter between:

JOHN PHILIP BOTHA Plaintiff

and

MIBIT (PTY) LTD First Defendant

IVAN LUDICK Second Defendant

JUDGMENT

ZIETSMAN AJ:

[1] Plaintiff instituted action against the defendants based on an agreement and acknowledgment of debt, termed an "*Investment Agreement, Admission of Liability and Instalment Agreement*", entered into between the parties. Second defendant bound himself "*as surety and co-principal debtor with the [first defendant] for the due performance of any obligation of the [first defendant] and/or payment for any amounts which may now or at any time be or become owing to [plaintiff], from whatsoever cause arising*".

[2] A notice of intention to defend was filed on behalf of both defendants, however only second defendant filed a plea. Subsequent to the delivery of the plea, plaintiff applied for summary judgment, but against both defendants, jointly and severally. I raised this with plaintiff's counsel at the commencement of the hearing of the matter.

He confirmed that plaintiff only persists with the application against second defendant and withdraws the application against the first defendant (although no formal notice of withdrawal was handed up). Second Defendant appeared in person.

[3] The application for summary judgment was initially set down for 15 February 2022. It appears from the order, issued on 15 February 2022, that second defendant appeared in person, and the matter was postponed to 8 March 2022, with second defendant to file his answering affidavit by 1 March 2022. Second Defendant was ordered to pay the costs occasioned by the postponement. There was no appearance for the first defendant.

[4] A notice of intention to oppose the application for summary judgment was filed, referring to both defendants, but only signed by second defendant. Subsequent thereto an affidavit, deposed to by second defendant, was filed in opposition to the application, however reference is made to the first defendant and that it is allegedly in liquidation. From the affidavit it is not apparent on what basis second defendant is authorised to depose to the affidavit on behalf of the first defendant. Having regard to the Lexis WinDeed report attached to plaintiff's affidavit, it is apparent that second defendant is not a director of the first defendant. The report reflects his status as "resigned" and the resignation date as 26 July 2021.

Legal principles

[5] In the matter of *Standard Bank of South Africa Limited and Another v Five Strand Media (Pty) Ltd and Others*[1] Ronaasen AJ succinctly set out the material amendments to Uniform Rule 32, which came into operation on 1 July 2019, and the requirements in terms of the rule. I do not deem it necessary to repeat it.

[6] The proper approach to applications for summary judgment as stated in the well-known judgment of *Maharaj v Barclays National bank Ltd*[2] still applies.[3] In other words, nothing has changed in this regard and the defendant still has to disclose a *bona fide* defence. As stated in *Maharaj*:[4]

[1] [2020] ZAECPEHC 33 (7 September 2020) at paras [8] to [14].
[2] 1976 (1) SA 418 (A).
[3] *NPGS Protection & Security Services CC and Another v Firstrand Bank Ltd* 2020 (1) SA 494 (SCA) at para [14].
[4] At 426 A – E.

"*…while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bone fide defence.*"

[7] A defendant's affidavit resisting a summary judgment application should disclose fully the nature and grounds of the defence and the material facts relied upon therefore.

[8] Plaintiff's affidavit in support of summary judgment complies with the provisions of rule 32. Plaintiff also explains why second defendant's "defence" as pleaded does not raise any issue for trial.

The plea

[9] Second defendant admits that:[5]

"*[9.1] On or about the 8th of June 2020 at or around Pretoria, the Plaintiff Mr John Phillip Botha concluded a written agreement with the 2nd Defendant, who duly represented the 1st Defendant. The agreement is attached …. 'Annexure A'.*

[9.2] The 1st Defendant acknowledged and agreed that it is indebted to the Plaintiff in the amount of R570 000.00.

[9.3.] That the debt will be paid as follows:

[9.3.1] Payment in the amount of R200 000.00 on or before the 31st December 2020;

[9.3.2] Payment in the amount of R92 500.00 on the 31st of March 2021;

[9.3.3] Payment in the amount of R92 500.00 on the 30th of June 2021;

[9.3.4] Payment in the amount of R92 500.00 on the 31st of August 2021;

[9.3.5] Payment in the amount of R92 500.00 on the 31st of December 2021;

[5] Quoted from paras 4 and 5 of particulars of claim; admitted by second defendant in paras 6 and 8 of his plea.

[9.4.] The 1st Defendant further accepted and agreed that the calculation of the amount for which it is indebted for is correct and agreed that the Plaintiff has a lawful claim.

[9.5.] The 1st Defendant agreed that if it fails to make payment in terms of the agreement that the Plaintiff may without any notice apply for judgment for the whole amount outstanding in terms of the agreement together with costs on attorney and client scale."

[10] Second defendant's "defence" in respect of the claim against him, as surety, is threefold:

[10.1] Firstly, that the agreement is void for the following reasons:[6]

"*[10.1.1] Plaintiff is Bakkies Botha, an adult male, former Springbok Lock Forward rugby player, in excess of 2.1 metres in height, with a body mass in excess of 150kgs;*

[10.1.2] Second defendant is 180cm in height with a body mass of 74kgs;

[10.1.3] At all material times, second defendant was not allowed legal representation nor requested and advised to obtain such;

[10.1.4] At all material times, plaintiff was represented by Mr J Jacobs, his present day attorney of record;

[10.1.5] Plaintiff had during his rugby career on and off the field demonstrated his inhuman brutality and physical strength;

[10.1.6] At all material times the attorney of record supported and created an environment conducive to plaintiff to demonstrate his inhuman brutality and physical strength (hereinafter referred to as 'the threat of imminent death or serious bodily injury and irreparable harm');

[10.1.7] Second defendant pleads that before and at the time of the presentation procedure of the agreement for signature the threat of imminent death or serious bodily injury and irreparable harm prevailed, endured and dictated the signature proceedings;

[6] Quoted from second defendant's plea, paras 7.1 to 7.11.

[10.1.8] *Second defendant pleads that plaintiff, duly supported by his attorney of record, acquired an undue influence over him, his physical integrity and fear which weakened and nullified his resistance and existence;*

[10.1.9] *Second defendant pleads that plaintiff's threat of imminent death or serious bodily injury and irreparable harm made his will pliable;*

[10.1.10] *Second defendant pleads that plaintiff used his influence in a unscrupulous manner to persuade and order him to agree to the agreement to his detriment and sign the agreement;*

[10.1.11] *Second defendant pleads that save for the threat of imminent death or serious bodily injury and irreparable harm resulted in him not having a normal freedom of will and that he would not have entered into the agreement and sign the same but for this undue influence and the threat.*"

[10.2] Secondly, that Plaintiff failed to comply with the National Credit Act 34 of 2005 ("the NCA") and that "*summons was prematurely issued and of no force and effect*".

[10.3] Thirdly, that the clause relating to suretyship does not bind him, alternatively it is "*vague and embarrassing, and is voidable*".

[11] I pause to mention that it is common cause that plaintiff signed the agreement in Pretoria, and second defendant in Port Elizabeth (as it was previously called).

Undue influence

[12] A defendant is entitled to plead any facts which support the conclusion that his consent was obtained improperly.

[13] A defendant may avoid or rescind a contract if it was concluded as a result of undue influence. In order to do so he will have to allege and prove that:[7]

[13.1] the other party obtained an influence over him;

[7] *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 492G-H; and Van Huyssteen et al *Contract General Principles* 5th Edition (2016) at 4.75 – 4.76.

[13.2] this influence weakened his powers of resistance and made his will pliable; and

[13.3] that the other party used this influence in an unconscionable manner to persuade him to agree to a transaction which (a) was to his detriment, and (b) he would not have concluded if he had enjoyed normal freedom of will.

[14] Second defendant, in essence, alleges that due to plaintiff's stature, and weight, he obtained an influence over him, which weakened his powers, and resulted in the conclusion of the agreement, to his detriment. Save for the bald allegation of "*threat of imminent death or serious bodily injury*", second defendant does not plead when, where and how such threat was allegedly made. It is also not apparent why the agreement was to his detriment. The agreement is an acknowledgement of debt and, in terms of thereof, second defendant bound himself as surety and co-principal debtor with the first defendant. The heading of the agreement refers to "*Investment Agreement, Admission of Liability and Instalment Agreement*". In my view this presupposes that plaintiff advanced money to the first defendant.

[15] To put it differently, second defendant's "defence" of undue influence is in no way substantiated by facts. It is merely legal conclusions without any facts relied upon to substantiate such conclusions. His affidavit suffers the same deficiency. More of this below.

The NCA

[16] Second defendant also alleges that he is a natural person and did not receive a notice in terms of the NCA, and therefore plaintiff failed to comply with the NCA.

[17] In terms of the provisions of section 4 (1)(b) of the NCA, subject to sections 5 and 6, the NCA applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except a large agreement, which is an agreement above R250 000.00, in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below R1 000 000.00.

[18] For a contract of suretyship to be governed by the NCA, the underlying transaction must similarly be governed by the NCA.

[19] The agreement is a large agreement since the amount is above R250 000.00. No facts have been pleaded in respect of the first defendant's asset value or annual turnover.

[20] Second defendant fails to plead any facts to support the contention that the NCA is applicable. Accordingly, the contention that the NCA is applicable does not constitute a defence to the claim.

Suretyship

[21] Second defendant contends that "*on a normal reading of the [surety] clause it does not bestow any liability*" on him, alternatively the clause is vague and embarrassing and therefore "*voidable*".

[22] It is necessary to quote clause 10, which second defendant refers to, but before I do so I have to put this in context. On the first page of the agreement plaintiff is identified as "the Creditor", the first defendant as "the Company" and second defendant as "Surety". On the last page, the agreement is signed once, by second defendant, in each capacity, i.e. on behalf of the Company (the first defendant) and as surety (second defendant).

[23] I now turn to clause 10, which reads as follows:

> "*Surety*
>
> *10. I hereby bind myself in my personal capacity as surety and <u>co-principal Company</u> to be jointly and severally liable with <u>the Purchaser</u> for the due performance of any obligation of the Company and/or payment for any amounts which may now or at any time be or become owing to the Creditor, from whatsoever cause arising.*"[8]

[24] The vagueness which second defendant refers to relates to the underlined words "co-principal Company" and "the Purchaser". In other words, second defendant takes

[8] My own underlining.

issue with the identification of the three necessary parties, i.e. the creditor, the principal debtor and the surety.

[25] Counsel for plaintiff, in argument, submitted that the words should read "co-principal debtor" and "the Company" respectively, and that plaintiff seeks rectification of the clause under further and/or alternative relief. I will return to this below.

[26] Section 6 of the General Law Amendment Act 50 of 1956 ("the Act") provides as follows:

"*No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety …*"

[27] In *Inventive Labour Structuring (Pty) Ltd v Corfe*[9] the court held that:

"*[5] In the past, the word 'terms' in the section has been construed to include the identification of the three necessary parties, i.e. the creditor, the principal debtor and the surety. (Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 345A - D and Intercontinental Exports (Pty) Ltd (supra para [8] at 1051B).) If any one of the three parties is not identified ex facie the contract, it will be invalid for want of compliance with statutory requirements.*

…

[11] In a case where the contract being construed is capable of more than one interpretation, one meaning leading to invalidity and the other not, preference must be given to the latter meaning in order to save the contract from invalidity. That much is trite. Therefore, the present suretyship - when properly construed - complies with the formal requirements in s 6 of the Act."

[28] The creditor, the principal debtor and the surety are identified *ex facie* the agreement.

[29] In my view, the suretyship, when properly construed, complies with the formal requirements of the Act and is valid. In light of the conclusion I have reached it is not necessary to deal with the argument for rectification.

Second defendant's affidavit

[9] 2006 (3) SA 107 (SCA) at paras [5] and [11].

[30] Second defendant's affidavit, to a large extent, incorporates the terms of his plea. He, again, referred to conclusions of law, without substantiating such conclusions with facts. The only extent to which he elaborated on the "defence" of undue influence, was to allege that he intends to adduce evidence of witnesses and expert witnesses.

[31] Despite having had the opportunity to deal with the facts upon which he relies to conclude that the agreement was entered into as a result of undue influence, second defendant failed to do so. His failure to do so is telling.

[32] Second defendant also attempted to elaborate on the "defence" of undue influence, in argument, by wanting to refer to incidents in social media. Since he appeared in person, I explained that it was not permissible to refer to allegations which were not contained in the papers and, it would in all probability, be inadmissible on the basis of irrelevance.

[33] Second defendant contended that the summary judgment application was "procedurally deficient", but readily conceded (correctly so) that he had placed reliance on the old rule 32, prior to its amendment.

[34] Plaintiff's failure to attach the agreement to his affidavit in support of summary judgment was also raised in second defendant's affidavit. The agreement was attached to the particulars of claim. The failure to again attach it cannot prejudice second defendant and is, in my view, not fatal to the application. Such failure is, in any event, condonable.[10]

Further 'defence' raised in argument

[35] Second defendant, for the first time in argument, raised issue with the application for summary judgment in that he, apparently, only received it on 12 January 2022 when he picked it up in his garden, and the signature on the second page is plaintiff's signature, not his. This belated 'defence' was seemingly raised in an attempt to show that plaintiff's application was launched outside the 15 day period allowed in terms of the rule. Even if that was the case, it ought to have been raised in second defendant's

[10] *Absa Bank Ltd v Botha NO and Others* 2013 (5) SA 563 (GNP) at par [16].

affidavit, as a point *in limine*, and plaintiff could then have considered his position and whether it was necessary to file an application for condonation. In my view, this too does not constitute a defence.

Conclusion and costs

[36] Having had regard to the "defence" raised in the plea and affidavit resisting summary judgment, I am of the view that second defendant has not disclosed a *bona fide* defence to the action. There is no triable issue. I am not satisfied that second defendant has disclosed fully the nature and grounds of his defence and, in particular, the material facts relied upon therefore. There is no basis for me to exercise my discretion to refuse summary judgment.

[37] There is also no basis why costs should not follow the result. Whilst the agreement makes provision for costs on the attorney and client scale, plaintiff's counsel submitted in argument that plaintiff seeks costs on the party and party scale only.

[38] The following order is issued:

[38.1] Summary judgment is granted against second defendant for:

[38.1.1] Payment in the amount of R475 000.00;

[38.1.2] Interest, on the amount of R475 000.00, at the rate of 7% per annum from date of demand, 9 July 2021, to date of payment;

[38.1.3] Costs of the suit.

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T. Zietsman

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff:	Adv. I Lambrechts, instructed by JJ Jacobs Inc., Pretoria c/o Van Heerden Attorneys, Gqeberha
For First Defendant:	No appearance
For Second Defendant:	In person