



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 4620/2021

In the matter between:

FIRSTRAND BANK LTD

Applicant

and

JANETTE VAN DEN HEEVER

1st Respondent

THEODORUS I VAN DEN HEEVER

2nd Respondent

THERESE VAN DEN HEEVER

3rd Respondent

JUDGMENT BY: AK RAMLAL, AJ

HEARD ON: 10 FEBRUARY 2022

DELIVERED ON: 29 APRIL 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13h30 on 29 April 2022.

- [1] The application before this court is for a judgment sounding in money against the Respondents, jointly and severally, the one to pay, the other(s) to be absolved, in their capacities as sureties and co-principal debtors.
- [2] The Respondents also apply for condonation for the late filing of their Answering Affidavit.¹
- [3] The Applicant concluded an agreement with Heever Boerdery CC (in liquidation) (*“the principal debtor”*) on or about 12 July 2018 in terms of which the Applicant made available a credit facility to the principal debtor, limited to the capital amount of R197 000.00²
- [4] The Applicant has complied with its obligation in terms of the agreement.³
- [5] The principal debtor failed to maintain the minimum monthly instalments in terms of the agreement and the last payment made by the principal debtor was on 24 March 2021⁴
- [6] Notwithstanding written demand, which was duly served on the principal debtor, the principal debtor has failed to pay the outstanding amount due to the Applicant under the credit facility.⁵
- [7] The principal debtor is accordingly indebted to the Applicant in the amount of R205 884.78 plus interest calculated daily and compounded monthly in arrears from 1 September 2021.⁶
- [8] In terms of the suretyship agreements concluded between the Applicant and the First, Second and Third Respondents, the Respondents bound themselves as sureties and co-principal debtors *in solidum* to the Applicant

¹ Order of Court dated 25 November 2021 Paginated page 78

² Paginated pages 12 and 85 of the record

³ Pages 15 and 85 of the record

⁴ Pages 15 and 85 of the record

⁵ Pages 16 and 85 of the record

⁶ Annexure “FA 10” page 39 of the record

for the repayment of the amounts that may from time to time become due in terms of the credit facility advanced by the Applicant to the principal debtor.⁷

[9] The first defence raised by the Respondent's to the Applicant's claim is that on 10 May 2021, Mr Oosthuizen (a creditor of the principal debtor) lodged an application to place the principal debtor under business rescue.⁸ This business rescue application was heard on 4 November 2021 and the judgment has to date not been handed down.⁹

[10] The Respondents have been advised that Section 133(2) of the Companies Act 71 of 2008, provides for a moratorium on the legal proceedings against the sureties of a company which is placed under business rescue and because there is a possibility that the principal debtor might be placed under business rescue, it would be prudent for the present application to be stayed, alternatively, dismissed.¹⁰

[11] Section 133(2) of the Companies Act 71 of 2008 reads:

"During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with the terms the court considers just and equitable in the circumstances"

[12] A plain reading of Section 132(2)¹¹ is that it is a provision that deals specifically with the enforcement of claims against a company based on guarantees and suretyships, and it contains a stipulation that in such cases the claims against the company may be enforced only with the leave of the court.

See Investec Bank Ltd v Bruyns 2021 (5) SA 430 (WCC)

⁷ Annexures "FA15", "FA18" and "FA21"

⁸ Para 4.1.1 page 83 of the Record

⁹ Para 4.1.3 page 83 of the Record

¹⁰ Para 4.1.5 page 84 of the record

¹¹ Companies Act 71 of 2008

- [13] The possible granting of the business rescue application will have no effect on the Respondents' indebtedness to the Applicant. All three Respondents, have specifically entered into suretyship agreements which contain clauses which preserve the rights of the Applicant to recover the balance owing from the Respondents in the event of it being unable to recover the full amount from the principal debtor.¹²
- [14] The second defence raised by the Respondents is that the principal debtor is in liquidation and a liquidator has been appointed.¹³ It is not clear to the Respondents whether the Applicant has submitted a claim in the liquidation at the first meeting of creditors that was held on 21 April 2021,¹⁴ and that the Applicant is not entitled to lodge a successful claim against both the closed corporation and obtain judgment against the sureties.¹⁵
- [15] All three Respondents have bound themselves, in favour of the Applicant, as sureties and co-principal debtors, jointly and severally.¹⁶ The Applicant herein therefor has the choice and can decide on whether to proceed against one or more of the Respondents in their capacities as co-principal debtors.
- [16] Sight must further not be lost of the fact that all three Respondents in this case have renounced the benefits of excussion¹⁷ in their respective agreements of suretyship, thus entitling the Applicant to proceed with its claim against any or all of the sureties and the sureties are in turn precluded from dictating that the Applicant must first excuss the principal debtor.
- [17] In respect of the application for the condonation of the late filing of the Respondents Answering Affidavit, the Respondents explain:

¹² Clauses 1 and 11 of Annexures "FA15", "FA18" and "FA21"

¹³ Para 6.1.1 page 85

¹⁴ Para 6.1.3 page 86

¹⁵ Para 6.1.4 page 86

¹⁶ Clause 1 of Annexures "FA15", "FA18" and "FA21"

¹⁷ Clause 31 of Annexures "FA15", "FA18" and "FA21"

- 17.1 that a day before the issuing of this application, this Court heard an opposed motion, in which two of the principal debtor's creditors applied for orders against the principal debtor: One for the placing of the principal debtor under business rescue and the other, for the resolution passed by the principal debtor to be placed under voluntary liquidation, to be set aside;
- 17.2 The Respondents anticipated that the judgment in the aforesaid opposed motion would be given by this Court prior to the date on which they were required to file their answering affidavit and that this expectation led to the delay in the filing of the answering affidavit;
- 17.3 There were severe logistical constraints that the Respondents endured that resulted in their inability to serve and file their answering affidavit within the stipulated time. These are:
- 17.3.1 That the first and Second Respondents reside in Senekal in the Free State Province, which is two to three hours' drive from Bloemfontein;¹⁸
- 17.3.2 That the Third Respondent was in Bethlehem in the Free State Province which is two to three hours' drive from Bloemfontein and she could not obtain leave from her employer to attend to the signing and commissioning of a confirmatory affidavit;¹⁹and
- 17.3.3 That the attorney of record of the Respondents is situated in Pretoria, which further made the practical logistical arrangements extremely difficult and cumbersome²⁰

[18] The factors relevant to the Court's discretion to grant or refuse an application for condonation include:

¹⁸ Paginated page 114 of record

¹⁹ Paginated page 115 of record

²⁰ Paginated page 115 of record

“the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court, the convenience of the court and the avoidance of unnecessary delay in the administration of justice”²¹

- [19] It is expected of a party seeking condonation for the non-observance of the Rules of Court to tender a reasonable and acceptable explanation and to try to remedy the non-compliance as soon as possible. A consideration of the Applicants prospects of success in the main action is a relevant factor in the exercise of the discretion of the court on whether the application for condonation must succeed, but it is not the only factor. A flagrant disregard of the Rules, even if there are reasonable prospects of success, should result in the application for condonation not being granted.²²
- [20] The evidence by the Respondents that they did not file their answering affidavit because they anticipated that the judgment in the opposed motion would be given prior to the date on which they were required to serve and file their answering affidavit confirms that the Respondents freely and voluntarily took the decision to refrain from acting in accordance with the Rules of Court and that their default was willful.
- [21] The Respondents have placed reliance on the severe logistical constraints that were experienced. However the grounds on which the Respondents rely lack sufficient detail and substance in the form of why alternate arrangements could not be made, for example, in the form of the use of correspondent attorneys, after hours available services for the commissioning of documents and even the use of other electronic or virtual and digital platforms that could have been utilized to circumvent the alleged hinderances. In particular, the Respondents tender no explanation as to why they did not, at the earliest available opportunity, apply for an extension of time in which to file their answering affidavit.

²¹ Dengetenge Holdings (Pty)Ltd v Southern Sphere Mining Development Company Ltd & others[2013]2AllSA251(SCA) at para 11

²² Darries v Sheriff, Magistrate’s Court Wynberg & another 1998(3) SA 34 SCA at 40-41E

[22] The failure of the Respondents to address these logistical challenges with more vigour and conscientiousness cannot be overlooked. The Respondents have not persuaded the Court that their application for condonation is *bona fide* and the reasons provided are not deemed to be reasonable or acceptable for the non-compliance with the Rules of Court. No good cause has also been shown for the granting of the application for condonation.

[23] All the aspects that the Applicant is required to prove in order to obtain judgment in the main action have been admitted by the Respondents.²³ The defences raised by the Respondents (as discussed above) are not sound in law and must therefore fail.

[24] In the result the following order is made:

1. The application for condonation is dismissed, with costs.
2. Judgment is granted against the Respondents, jointly and severally, the one paying the others to be absolved, for the sum of R205 884.78 plus interest thereon at the prime rate, plus 11% per annum, calculated daily and compounded monthly in arrears from 1 September 2021, until the date of payment, both days, inclusive
3. The Respondent is directed to pay the costs of this application on the scale of attorney and client.

A.K RAMLAL, AJ

²³ Para 6 page 85 of the record

On behalf of the Applicant : Adv. R R van der Merwe
Instructed by : Honey Attorneys
BLOEMFONTEIN

On behalf of the Respondent: Adv J B Cilliers
Instructed by : Viljoen Attorneys
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