

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 31039/2019

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

1 Dec 2020

Signature

In the matter between:

BUSINESS PARTNERS LIMITED

Applicant

And

SECURO TRADERS (PTY) LTD

First Respondent

(Registration Number 2007/020841/07)

SHAUN GRANT

Second

Respondent

(Identity Number 720520 5059 080)

ADELE GRANT

Third Respondent

(Identity Number 730803 0171 086)

OSTIPROP 1216 (PTY) LTD

Fourth Respondent

(Registration Number 2002/0185886/07)

SECURO SYSTEMS CC

Fifth Respondent

(Registration Number 1998/060599/23)

JUDGMENT

COWEN, AJ:

Introduction

[1] This is an application for summary judgment. The applicant is Business Partners Limited. The applicant seeks judgment against the respondents, jointly and severally, for payment of the sum of R819 129.64 with interest and costs. It also seeks judgment against the fourth respondent declaring certain immovable property in Oakdene, Johannesburg, specially executable in favour of the plaintiff. Only the fourth respondent opposes the application.

[2] The applicant's claim is for repayment of a loan it made to the first respondent. The amount loaned was R3 million. The loan agreement is not subject to the provisions of the National Credit Act 34 of 2005. As security for the loan, the second, third, fourth and fifth respondents all concluded suretyship agreements in terms of which they bound themselves as sureties and co-principal debtors for the

first respondent's debt. As additional security for the amount advanced, the fourth respondent caused a mortgage bond to be registered over certain immovable property, being the subject of the summary judgment order sought.¹ Following the first defendant's default in payment, and in September 2019, the applicants instituted action proceedings to reclaim the outstanding debt. The fourth respondent entered a notice of intention to defend the proceedings and, on 14 May 2020, filed a plea.

[3] In the plea, it is alleged that the first and fifth respondents have been liquidated and the second and third respondents sequestrated. The fourth respondent pleads further that while it was unaware of the first respondent's indebtedness when summons was issued, it immediately placed the property on the open market for sale. An offer to purchase in the amount of R1 200 000 was forthcoming and on 26 March 2020, the purchaser obtained an approved mortgage loan for the amount of R1 100 000. It pleads further that it will shortly be in a position to pay the debt and that any judgment granted against it would render it insolvent.

[4] The applicant instituted summary judgment proceedings on 3 June 2020. On 3 August 2020, the application came before Judge Yacoob on the unopposed roll. The matter was removed from the roll as it had become opposed: the fourth respondent had filed an opposing affidavit on 28 July 2020. In the opposing affidavit, the fourth respondent again explains that the property has been sold in order to satisfy the first respondent's debt to the applicant. The affidavit goes on

¹ In light of *FirstRand Bank Limited v Folscher and another and Similar matters* 2011(4) SA 314 (GNP), the encumbered property cannot serve as a primary residence, fourth respondent being a juristic person.

to explain that on 20 July 2020, fourth respondent's attorneys presented the applicant's attorney with two guarantees that were issued by ABSA Bank in favour of the applicant for the amounts of (a) R819 129.64 plus interest and (b) R280 870.36 (representing R1 100 000 less the capital amount and interest), to be paid into the fourth respondent's attorney's trust account on the date of registration. The fourth respondent filed a supplementary affidavit on 20 November 2020 deposed to by a Mr Christiaan Morton. Mr Morton is an attorney at CCM attorneys and is both the attorney of record acting on behalf of the fourth respondent in these proceedings and the attorney attending to the transfer of the property mandated by the fourth respondent. Mr Morton explains that there has been an unexpected delay in the transfer of the property which relates to obtaining municipal clearance figures and explaining the steps taken on behalf of the fourth respondent to obtain them and to speed up the process. Mr Morton explains that in September 2020, the municipality informed him that it would take three months to issue the rates clearance figures and that transfer is thus likely to take place during January 2021. The affidavit sought to emphasise that it is not the fourth respondent who is delaying transfer.

- [5] The application came before me on 25 November 2020 on the opposed roll. Ms Markram-Jooste appeared for the applicant. Mr Nel appeared for the fourth respondent. The application was argued by video-conference on Microsoft-Teams in view of the ongoing COVID-19 pandemic.

[6] Mr Nel conceded that the fourth respondent does not have a defence to the claim. Rather, he submitted that his client has, by way of production of the two guarantees, provided security as contemplated by Rule 32 and that in these circumstances the Court should grant an order postponing the application to allow the security to be realised. In the alternative he submitted that the Court should postpone the application for three months to allow for the transfer of the property and payment of the debt. Ms Markram-Jooste submitted that the guarantees do not constitute security as contemplated by Rule 32 having regard to the purpose of the Rule and the nature of the guarantees. To the extent that the Court is inclined to afford the applicant any indulgence to allow the transfer of the property to go through, she submitted that this would appropriately be accommodated by granting summary judgment and suspending the Court's order in terms of Rule 45A of the Rules of Court.

[7] Two issues arise for decision:

- (a) Whether the fourth respondent has provided adequate security to the plaintiff as contemplated by Rule 32 as amended.
- (b) If not, whether the court should postpone the application or suspend its order in view of the imminent transfer of the property and resultant availability of funds to settle the fourth respondent's debt to the plaintiff.

Security

[8] Rule 32 (3) of the Uniform Rules provides that: *'Upon the hearing of an application for summary judgment, the defendant may (a) give security to the plaintiff to the satisfaction of the Court for any judgment including costs which may be given'*.

[9] Ms Markram Jooste, on behalf of the applicant, did not take issue with the amounts that are subject to the ABSA guarantees and accepted that the amounts guaranteed are adequate for purposes of Rule 32. Rather, she submitted that the guarantees do not serve the purposes of Rule 32 and are in any event inadequate to meet the demands set out in the summons because they are bank guarantees provided at the behest of a third party, the purchaser. Thus, if for any reason the sale and transfer does not proceed, they will fall away. She submitted further that while there is no reason to believe that the sale and transfer will not proceed, there is only scant information before the Court regarding the imminent sale as the sale agreement is not attached and nothing is known of the purchaser and the circumstances of the sale. Mr Nel, for the fourth respondent submitted that the security provided was adequate as it effectively constitutes an acknowledgement of debt and the transferring attorney would be obliged to pay the monies owed, once received, to the applicant.

[10] In my view, it is not necessary for me to decide whether the facts that the guarantees are provided at the behest of a third party and serve to guarantee that third party's liability to the fourth respondent on transfer, are bars to the successful invocation of Rule 32(3)(a) in this case. This is because even if there is no such bar, there is inadequate information upon which this Court can evaluate whether there is any real risk that the sale agreement might fail, with the result, as Ms Markram-Jooste pointed out, the guarantees would simply fall away. I accordingly

conclude that on the facts of this case the fourth respondent has in any event failed to satisfy the Court that the guarantees can provide satisfactory security.

The second issue: postponement or suspension

[11] As mentioned, Mr Nel accepted that the fourth respondent has no defence to the claim. The remaining issue is whether this court should make provision to allow the transfer to go through as expected in January 2020 either by postponing the application for summary judgment or by granting summary judgment but suspending its order in terms of Rule 45A. Mr Nel urged the court to adopt the former course and postpone the matter for three months. One consideration, he submitted is the adverse consequences for the fourth respondent's credit record should judgment be entered against it in circumstances where he is not to blame for the delays. Mr Nel emphasised that the conduct of the fourth respondent was of a party seeking to honour its obligations and, importantly, that the delay in transfer was not of the fourth respondent's making. Ms Markram-Jooste submitted that the Court should adopt the latter course, grant summary judgment and suspend an order for a period of three months. She submitted that it is desirable that the credit industry is aware of the credit worthiness of corporate bodies. The parties were *ad idem* that if the Court were to adopt the former course and postpone the application, the applicant would be entitled to the costs of suit to date including in respect of appearances on 25 November 2020.

[12] In my view, the application for summary judgment should be postponed for a limited period (no more than three months) to allow the transfer to go through. On the information before me the fourth respondent has, since the institution of proceedings

when it became aware of the debt, sought diligently to honour its obligations and is not to blame for the delay in transfer. Through attorneys, it has sought third party assistance to progress matters with the municipality. The delays have, furthermore, occurred in circumstances of the COVID-19 pandemic which has presented public and private bodies alike with unprecedented challenges. The parties' respective submissions on the fourth respondent's creditworthiness may have theoretical traction, but the Court is not apprised with sufficient information upon which to assess whether, factually, the balance of interests weighs in favour of the fourth respondent or the applicant in this regard. Notably, however, the applicant accepts that the property is probably worth more than the current sale value reflects. Moreover, the fourth respondent has conceded that it should pay the applicant's costs of suit to date claimed on an attorney and client scale in line with what was contractually agreed.

[13] I make the following order:

- (a) The application for summary judgment is postponed *sine die*.
- (b) The applicant may re-enrol the application after the lapse of a period of three months from the date of this order.
- (c) The respondents / defendants are ordered, jointly and severally, to pay the applicant's costs to date, including costs of suit and costs of the summary judgment application, on an attorney and client scale.

S COWEN (Ms)

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG**Electronically submitted therefore unsigned**

The judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/ legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand down is deemed to be 1 December 2020.

Date of hearing: 25 November 2020

Judgment delivered: 1 December 2020

APPEARANCES:**In the case number 34482/2018**

For the Applicant:	Adv Markram-Jooste
Instructed by:	Strydom Britz Mohalatsi Inc
For the Respondent:	Adv Nel
Instructed by:	CMM Attorneys Inc