**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 30927/2020**

| **DELETE WHICHEVER IS NOT APPLICABLE** |
|---|
| (1) NOT REPORTABLE |
| (2) NOT OF INTEREST TO OTHER JUDGES |
| (3) NOT REVISED |
| 14/10/2022 |

**FIRSTRAND BANK LIMITED** Applicant

And

**SCHEEPERS, MARTHINUS JACOBUS** First Respondent

**SCHEEPERS, ANDRIES** Second Respondent

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**JUDGMENT**

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**YACOOB J:**

1. The applicant seeks payment from the respondents to a maximum of R1,5 million each, in respect of debt incurred by a company in liquidation, Anmarkati VerspreidersCC, for which the respondents stood surety to a maximum of R1,5 million each.

2. The respondents oppose the application on the basis that:

   2.1. the applicant has levied a higher interest rate than agreed;

2.2. the applicant claims for unlawful charges;

2.3. the balance is inconsistent in different documents, and

2.4. the National Credit Act, 34 of 2005 ("the NCA") is unconstitutional to the extent that it does not apply to the suretyships.

3. The respondents contend that the application should be referred to trial, alternatively dismissed. They have also brought an application to strike out the whole of the applicant's replying affidavit on the basis that it is vexatious, scandalous and/or irrelevant.

4. The respondents also contend that the applicant should pay the costs of the application the applicant brought to compel heads, and that they, the respondents, should not have to pay costs even if they are unsuccessful.

5. There are a number of issues raised by the respondents which can be dealt with summarily and I proceed to do so before dealing with the striking out and the defences based on interest and charges.

**ISSUES NOT PURSUED OR NOT PROPERLY PLEADED**

6. In the answering affidavit the respondents raised a point about the authority of the deponent to depose to the founding affidavit. Nobody needs authority to depose to an affidavit if they have knowledge of the relevant facts and authority to institute proceedings was not challenged, nor was a Rule 7 notice filed. There is no merit in that point and it was not pursued in argument.

7. In written argument it was submitted that the suretyship agreements are draconian and therefore unconstitutional. However this was not pleaded. The paragraphs referred to in the heads of argument do not deal with this issue and no substantive submissions on how the agreements are draconian were made. I do not consider that issue any further.

8. As far as the constitutionality of the NCA is concerned, respondents' counsel conceded in argument that the issue has been dealt with by the Supreme Court of Appeal in *Shaw and Another v Mackintosh and Another*,[1] in which the SCA

[1] 2019 (1) SA 398 (SCA)

confirmed that the NCA applies to a suretyship only if it applies to the main credit agreement.

9. The concession was not, in my view, properly made. The SCA did not consider the constitutionality of the NCA and it is not clear from the judgment whether the question was even raised in that matter. However, the respondents did not join the National Credit Regulator or the relevant Minister, nor did they file a Rule 16A notice, despite being aware that they needed to do so.[2]

10. However, the respondents have not made out a case that, had the NCA applied to their suretyships, and an affordability test been carried out, they would not have qualified to secure R1,5 million each. The applicability of the NCA is therefore a red herring in this case, and I am satisfied that it would not assist the respondents and there is no need to consider it.

**THE STRIKING OUT APPLICATION**

11. The respondents seek the strike out of the replying affidavit, on the basis that a new case is sought to be made out in reply, and that some allegations are scandalous, vexatious, argumentative, irrelevant, or hearsay, or all of those things. They allege that they suffer prejudice because the replying affidavit is overwhelming, annoying, and has caused them to incur more legal costs than necessary.

12. I have considered thoroughly all the complaints contained in the founding affidavit in the striking out application, cross-referencing to the replying affidavit. I do not propose to deal with each allegation as it would make this judgment unduly lengthy.

13. As far as the allegations that a new case is sought to be made out in reply is concerned, the paragraphs referred to are a direct response to allegations contained in the answering affidavit. It is trite that the applicant is entitled to do so. Nevertheless, the applicant invited the respondents to file a further affidavit to respond to those issues, an invitation of which the respondents did not avail themselves.

[2] Evidence of their awareness is contained in the application to strike out.

14. To the extent that the respondents complain of the tone of the replying affidavit, there is no merit in that complaint. The respondents' own affidavits in my view suffer more from a want of tone than the replying affidavit does, and contain more argument than the applicant is accused of unjustifiably including in its replying affidavit.

15. I am satisfied that there is no merit in the striking out application, and that there is no prejudice to the respondents in the replying affidavit. That application is dismissed with costs.

**THE CALCULATION OF INTEREST**

16. The respondents contend that the applicant has calculated interest on the wrong basis. The rate applicable ought to have been prime plus 1% whereas the rate applied was prime plus 5%.

17. The applicant in reply demonstrates that the facility agreement entitled it to charge penalty interest on breach, that the liquidation of the company was a breach and therefore that penalty interest of 4% was charged after the liquidation. It also contends that it makes no difference to this case whether the rate applied is prime plus 1% or prime plus 5%, because either way the amount due is more than the combined maximum liability of the sureties, which is R3 million. It has annexed a calculation showing this.

18. This defence therefore does not assist the respondents.

**UNAUTHORISED OR IMPROPER CHARGES**

19. The account on which the applicant bases its claim includes charges debited for speedpoint service fees. The respondents submit that the applicant cannot claim for these charges because they are only claiming for money advanced, and charges cannot fall into that category.

20. In reply the applicant contends that the speedpoint charges emanate from an agreement that had not yet been cancelled, for rental of speed point terminals. The account at issue was nominated by the company for payment of monthly rentals to be debited. The debits were paid, and therefore they are part of the debt.

21. The respondents chose not to attempt to dispute this explanation, and I find no reason not to accept it. I do not find, therefore, that these charges assist the respondents in their defence. This would also apply, then, to the contention of interest being overcharged on balances inflated by overcharged interest.

22. The respondents also complain of untaxed legal fees being debited to the account. The applicant concedes that this was done incorrectly.

23. However, when the amount of R5 235.38 is removed, the total amount due is still more than R3 million.

**INCONSISTENT OR INCORRECT BALANCES**

24. The respondents contend that the applicant lodged a claim on for R3 264 054.48, and has obtained R1,2 million from a policy ceded to it as part of the security for the loan. They then allege that the applicant is wrongly alleging that its opening balance on 15 May 2020 is R4 174 137.07, just over R900 000 more than the claim lodged.

25. The applicant in reply points out that the respondents have misread the annexures to the founding affidavit. On examining the annexures this is confirmed to be the case.

26. It is clear that the claim lodged by the applicant in the liquidation was R3 991 073.11. The respondents seem to have assumed that the balance in the bank account used by the liquidator, which has a different account number than that of the account on which the applicant claims, was the amount of the claim lodged by the applicant.

27. There is clearly no merit in this defence.

**CONCLUSION**

28. For the reasons set out above there is no merit in any of the points raised by the respondents as a defence. The respondents have no defence to the claim. There is no merit in the contention that the disputes of fact are such that they ought to be referred to trial. I am satisfied that the applicant has made out a case for the relief sought.

29. I make the following order:

29.1. The striking out application is dismissed with costs.

29.2. The first respondent is to pay the applicant the sum of R1,500,000.00 together with interest thereon at the rate of prime plus 1.00%, calculated daily and compounded monthly in arrears from 1 June 2020 to date of payment, both days inclusive.

29.3. The second respondent is to pay the applicant the sum of R1,500,000.00 together with interest thereon at the rate of prime plus 1.00%, calculated daily and compounded monthly in arrears from 1 June 2020 to date of payment, both days inclusive.

29.4. The respondents are to pay the costs of the application on an attorney and client scale.

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**S. YACOOB**
**JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances**

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| Applicant's counsel: | C Gibson |
| Instructed by: | Werksmans attorneys |
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| Rspondent's representative: | M Webbstock |
| Instructed by: | J.C Van Der Merwe Attorneys |

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| Date of hearing: | 12 April 2022 |
| Date of judgment: | 14 October 2022 |