

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021/52787

Reportable: No	
Of interest to other Judges: No	
Judge Kuny	19 September
2023	

In the matter between:

SB GUARANTEE COMPANY (RF) PROPRIETARY LTD Plaintiff/Applicant

and

BAROVILLE TRADE & INVESTMENTS (PTY) LTD First Defendant/Respondent

MARIUS STRYDOM Second Defendant/Respondent

Judgment handed down electronically and uploaded to Caselines

JUDGMENT

KUNY J

- 1 The applicant, SB Guarantee Company (RF) Proprietary Limited, issued summons on 5 November 2021 against the first defendant, Baroville Trade and Investments (Pty) Ltd and the second defendant, Marius Strydom. The plaintiff's claim against the first defendant, inter alia, is for payment of monies in terms of an indemnity and covering mortgage bond. Its claim against the

second defendant is based on a suretyship given in respect of the first defendant's indebtedness to the plaintiff arising from the above instruments.

- 2 On 14 February 2022 the plaintiff filed a notice of bar. The defendants entered a plea on 18 February 2022. On 9 March 2022 the plaintiff applied for summary judgment seeking:

As against the first defendant:

- 1 Payment of the amount of R798,870.56.
- 2 Interest on the amount referred to above at the rate of 6.38% per annum from 24 August 2021 to date of payment, both dates inclusive.
- 3 An immovable property described as Portion 10 Erf 3406 Northcliff Extension 25 Township Registration Division I.Q. Province of Gauteng be declared executable for the aforesaid amount.
- 4 An order authorising the issuing of a writ of execution in terms of Rule 46 as read with Rule 46(A) for the attachment of the immovable property.
- 5 That a reserve price be set for the sale of the property, at a sale in execution, at a value to be determined by the Honourable Court.
- 6 Costs of suit on the attorney and client scale.

As against the second defendant:

- 1 Payment of the amount of R750 000.
 - 2 Interest on the aforesaid amount at the rate of 6.38% per annum from 09 November 2021 to date of payment both dates inclusive.
 - 3 costs of suit on the attorney and client scale.
 - 4 further and/or alternative relief.
- 3 A defendant who opposes a claim for summary judgment is required to satisfy the court by affidavit that he has a bona fide defence to the plaintiff's claims. The court is required to decide whether on the facts so disclosed, the

defendant has a defence which is both bona fide and good in law.¹

PLAINTIFF'S PARTICULARS OF CLAIM

- 4 The particulars of claim allege that on or about 7 March 2019, at Pretoria, the Standard Bank of South Africa Ltd (“the Bank”) and the first defendant entered into a home loan agreement (“the home loan agreement”). In terms of this agreement the Bank agreed to lend and advance the first defendant an amount of R750 000. The total amount of the principle debt in respect of this agreement was recorded as R763 013.16.
- 5 The home loan agreement was conditional upon:
 - 5.1 The plaintiff furnishing a guarantee to the Bank, undertaking to pay the amount owing in terms of the home loan agreement in the event that the first defendant defaulted under the said agreement.
 - 5.2 The first defendant indemnifying the plaintiff against any claim by the Bank under the aforesaid guarantee.
 - 5.3 The registration by the first defendant of a mortgage bond in favour of the plaintiff for an amount of R750 000 over Portion 10 Erf 3406 Northcliff Extension 25 Township Registration Division I.Q. Province of Gauteng (“the immovable property”).
- 6 On 7 March 2019, the second defendant acting on behalf of the first defendant, signed a document entitled “INDEMNITY BY THE BORROWER IN FAVOUR OF THE GUARANTOR” (“the Indemnity”). In terms of this agreement the first defendant indemnified and held the plaintiff harmless against all loss, damage, costs, expenses and liabilities which it may suffer or incur as a result of or in connection with any claims by the Bank against the plaintiff arising out of the guarantee.

1 Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A), at p426

7 The guarantee was defined in clause 1.1.5 in the Indemnity as:

“.... a written guarantee given by the Guarantor in favour of the Bank or the Transferee in terms of which the Guarantor guarantees to the Bank or the Transferee, the fulfilment of the obligations of the Borrower in terms of the Loan Agreement subject to the terms and conditions of such Guarantee”

8 On 1 March 2015, the Bank and the plaintiff purported to enter into the Common Terms Guarantee Agreement. Clause 3.1 of this agreement provides:

3.1 In consideration for each Debtor granting the indemnity and, the Mortgage Bond to the Guarantor, and with effect from the date of registration of the relevant Mortgage Bond granted by each Debtor to the Guarantor over the Property purchased by that Debtor pursuant to the Home Loan Agreement, the Guarantor guarantees, subject to the terms and conditions of this Common Terms Agreement, the due and punctual payment of all sums now and subsequently due by each Debtor to the Creditor pursuant to each Debtor's individual, Home Loan Agreement, which guarantee the Creditor accepts.

9 “Guarantee” in the Common Terms Guarantee Agreement was defined as an individual guarantee issued pursuant to and under this Common Terms Agreement in the form set out in Schedule “A”. The guarantor was defined as the plaintiff, the creditor as the Bank and the debtor as the individual or legal entity that borrowed money from the Bank.

10 On 7 March 2019, the plaintiff issued a separate guarantee in favour of the Bank. The guarantee is headed “Form of Guarantee” and it appears as Schedule “A” to the Common Terms Guarantee. No provision is made in the guarantee for the signature of the document by the Bank and it was signed by the plaintiff only.

11 On 27 March 2019, the first defendant registered a continuing covering mortgage bond over the immovable property in favour of the plaintiff as security for the fulfilment of the first defendant's obligations to the plaintiff in terms, inter alia, of the following:

11.1 The Indemnity.

11.2 Any loss, liability, damage, claim, cost or expense of whatever nature which the plaintiff may incur under or in connection with the guarantee, as amended, varied, restated, re-issued or novated from time to time.

11.3 Disbursements made or costs incurred by the plaintiff in connection with the continuing covering mortgage bond.

12 On 7 March 2019 the second defendant bound himself as surety and co-principal debtor to the plaintiff for the payment, when due, of all the present and future indebtedness of the first defendant to the plaintiff in respect, inter alia, of the Indemnity.

13 The plaintiff alleges in its particulars of claim that it is required to discharge its obligations to the Bank in terms of its guarantee by claiming payment from the first defendant in terms of the Indemnity and by foreclosing on the mortgage bond.²

DEFENDANTS' PLEA

14 The defendants plead as follows:

14.1 They admit the conclusion of the home loan agreement. However, they deny that the person who purported to sign the said agreement on behalf of the Bank had the authority to do so. They allege, in the absence of proof of authority, that the home loan agreement is void and unenforceable.

14.2 The defendants admit the registration of the continuing covering

2 See paragraph 29.2 of the plaintiff's particulars of claim, Caselines p003-30

mortgage bond. However, they allege that the bond is void and unenforceable on the basis that the home loan agreement is invalid and unenforceable.

14.3 The defendants admit the conclusion of the Indemnity. However, they allege that the Indemnity is unenforceable on the basis that the home loan agreement and mortgage bond are invalid and unenforceable.

14.4 The second defendant admits the conclusion of the suretyship. However, he contends that it is unenforceable because the plaintiff's claim against the first defendant is unenforceable.

14.5 The defendants allege that the Common Terms Agreement (entered into between the plaintiff and the Bank) is unenforceable on the basis that the person who purported to sign this agreement on behalf of the Bank did not have authority to do so.

14.6 The defendants allege that the Form of Guarantee, furnished by the plaintiff to the Bank on 7 March 2019, is invalid on the basis that the person who purported to sign the guarantee on behalf of the Bank did not have authority to do so (The guarantee was not in fact signed by the Bank).³

14.7 The first defendant admits that it did not make payment in terms of the home loan agreement. However, it alleges that it has no obligation to make payment in terms of the home loan agreement, Indemnity, and covering mortgage bond on the basis that they are all invalid and unenforceable.

3 In terms of section 6 of the General Law Amendment Act 50 of 1956 to be valid, a suretyship must be embodied in a written document and be signed by or on behalf of the surety. There is no requirement in law that it be signed by the creditor in whose favor the suretyship is given

14.8 The defendants deny that written letters of demand were sent to them. However, if they were sent, the first defendant denies having received a letter of demand.

14.9 The first defendant alleges that it has no source of income and that it is unable to pay the monthly installments alleged to be payable in terms of the home loan agreement. It pleads that it is not in a position to satisfy its alleged indebtedness.

15 The defendants filed an opposing affidavit in which it reiterates their defences in relation to the lack of authority on the part of the Bank in the conclusion of the Common Terms Guarantee and the home loan agreement. However, they do not deal with their defence that the notices sent by the plaintiff were either not sent or received by the first defendant.

ALLEGED INVALIDITY OF THE AGREEMENTS

16 The following pertains to the Indemnity:

16.1 The Indemnity imposes an independent primary obligation on the first defendant to indemnify and hold the plaintiff harmless against all loss, damage, costs, expenses and liability that the plaintiff may suffer or incur as a result of or in connection with any claims by the Bank arising from the guarantee.⁴

16.2 The Indemnity provides that the plaintiff has provided or will provide a guarantee in favour of the Bank, guaranteeing the fulfilment of the obligations of first defendant in terms of the home loan agreement.⁵

16.3 Clause 3.3 of the Indemnity provides for the delivery of a written

4 Clause 3.1 of the Indemnity, Caselines p003-74

5 Clause 2.2 of the Indemnity, Caselines p003-74

notice to the first defendant stating the amount payable in terms of the Indemnity, whereupon the first defendant is obliged to satisfy the amount owed in terms of the demand.

16.4 The first defendant's obligations in terms of the Indemnity are to be secured by the registration of a mortgage bond over the immovable property.⁶ A continuing covering mortgage bond was in fact registered. The rights acquired by the plaintiff in respect of the bond, are independent of any defect that may exist in the underlying agreement that gave rise to the bond.⁷

16.5 In terms of 3.7.1 of the Indemnity, the first defendant shall remain bounded to the full extent of the Indemnity despite any unenforceability, illegality or invalidity of any obligation under the home loan agreement or security agreements.⁸

17 The guarantee issued by the plaintiff on 7 March 2019 was furnished to the Bank in consideration for the first defendant granting the Indemnity and registering a mortgage bond in the plaintiff's favour. The plaintiff guaranteed to the Bank the due and punctual payment by the first defendant of its obligations in terms of the home loan agreement. Clause 3.2, 3.4, 3.5 and 3.6 of the Common Terms Guarantee are deemed to have been incorporated into the Form of Guarantee. They provide as follows:

3.2 On signature of a Home Loan Agreement, the indemnity and a power of attorney authorising registration of the Mortgage Bond relating to such Home Loan Agreement in the relevant Deeds Registry, the Guarantor will sign or will procure that it is signed on its behalf and will deliver to the Creditor of (sic) a Guarantee in the form of Schedule "A".

.....

6 Clause 2.3 of the Indemnity, Caselines p003-74

7 Legator McKenna Inc v Shea 2010 (1) SA 35 (SCA), paragraph [22]

8 Indemnity, clause 3.7.1, Caselines p003-74

3.4 Notwithstanding anything to the contrary contained in the Common Terms Agreement, and in particular (without limitation) this clause 3, if for any reason whatsoever a guarantee is not signed in respect of the any Home Loan Agreement, indemnity and Mortgage Bond, the Creditor shall be entitled, by written notice to the Guarantor, to notify the Guarantor of the details of any Home Loan Agreement as set out in clause 3.3 in respect of which no Guarantee is signed, in which event, and as from the date of the registration of the relevant Mortgage Bond, a Guarantee, on the terms and conditions set out in the Common Terms Agreement and Schedule "A" and for the amounts specified in such notice, shall be deemed to come into effect, in respect of such Home Loan Agreement, Mortgage Bond and indemnity, and the Guarantor shall forthwith on receipt of such notice procure that a Guarantee is signed and delivered to the Creditor.

18 The various agreements entered between the first defendant, the Bank and the plaintiff cannot, in my view, been considered in isolation. The Bank and the plaintiff have a complete commonality of interests to ensure that the borrower (the first defendant) repays the monies loaned to it by the Bank. They are related parties in the transaction.

19 The difference between a guarantee and a suretyship is discussed in Caney's the Law of Suretyship, 5th Ed, p30. A surety undertakes an accessory obligation that is dependent on the existence of a valid principle obligation. However, in a contract of guarantee, the guarantor undertakes a principal obligation on the happening of a certain event (in this case the default by the first defendant). The following is stated:

"the guarantor's obligation, as an obligation independent of that of the debtor, is to indemnify the creditor in respect of losses suffered through the debtor's non performance, whereas the surety, as we have seen, is only liable for losses resulting from the debtor's breach of contract. Thus if the creditor suffers grave losses when it turns out that the debtor's contract is invalid, the guarantor's obligation remains in force and he will have to pay those losses but the surety's obligation falls away and he will not have to pay a penny⁹

9 Caney, the Law of Suretyship (supra), p32 and the case of Hutchinson v Hylton Holdings and another 1993 (2) SA 405 (T) cited in footnote 23

- 20 The person who signed the Common Terms Guarantee on behalf of the Bank warranted that he or she had authority to do so. The provision of a guarantee together with an indemnity and the registration of a mortgage bond, was the mechanism implemented by the Bank in 2015 to secure the obligations of borrowers in terms of home loan agreements. Given this fact, and the inter-related nature of the agreements in issue, it is difficult to envisage that any dispute would arise in relation to Bank acceptance of the benefit conferred on it in terms of the Common Terms Guarantee (in 2015) and the subsequent individual guarantee issued by the plaintiff (in 2019).
- 21 In any event, in my view, the guarantee provided by the plaintiff in favour of the Bank on 7 March 2019 is a separate, self-contained guarantee. Its existence does not depend on whether the person who signed the Common Terms Guarantee Agreement on behalf of the Bank had the necessary authority to do so. The Bank relies explicitly upon this guarantee to be recompensed for the monies it lent the first defendant and it has clearly accepted the guarantee and shown an intention to give effect to it. The contention that the guarantee cannot be enforced because the person who signed the Common Terms Guarantee on behalf of the Bank was not authorised to do so, in my view, is untenable.
- 22 In my view, the validity and enforceability of the Indemnity and the mortgage bond is not dependent on the enforceability of the home loan agreement. On the contrary, the Indemnity and the mortgage bond were required by the Bank to meet the eventuality that first defendant may default in its payments to the plaintiff. These instruments were required to ensure the Bank could, by calling upon the plaintiff obtain payment of the guaranteed amount, recover the monies it lent the first defendant and avoid suffering a loss.
- 23 The first defendant in the Indemnity specified its domicilium address at Wedgewood Villa 38 278 Jean Ave, Die Howes, Ext 16, 0157. The second defendant specified the same address in the suretyship. In the mortgage bond the first defendant's domicilium was specified at 34 Vin Rouge

Crescent, Hurlingham Ext 5, Sandton. The plaintiff sent letters of demand to these addresses by registered post. The registered slips and tracking reports were annexed to the particulars of claim. The letters were also emailed to the second defendant at the email address he furnished in the Indemnity and suretyship. He personally does not challenge the receipt of these letters. The defendants do not in their opposing affidavit challenge the plaintiff's allegations in regard to the giving of notice. In my view, there is no factual basis for this defence that notice was not given and it is rejected.

24 The defendants admit that the provisions of the National Credit Act 34 of 2005 do not apply to the agreements in issue.

25 The only defence raised in respect of the suretyship is that the first defendant is not indebted to the plaintiff on the basis of the invalidity of the agreements referred to above. However, in my view the first defendant has not established a valid defence to the plaintiff's claim for payment in terms of the Indemnity and the mortgage bond.

26 For the reasons set out above I find that the first defendant had not disclosed a bona fide defence. In the circumstances, the plaintiff is entitled to judgment in respect of the payment of the monies claimed against both the first and second defendant.

27 Execution against the immovable property is not a matter that can or should be determined in summary judgment proceedings and I decline to grant the plaintiff this relief.

28 There is no provision in the Indemnity or the suretyship for the payment of legal costs on an attorney and client scale. In my view, the costs should be payable on a party and party scale.

29 In the circumstances I make the following order:

- 1 The first defendant is liable to the plaintiff for:
 - 1.1 Payment of the amount of R798,870.56.
 - 1.2 Interest on the amount referred to immediately above at the rate of 6.38% per annum from 24 August 2021 to date of payment, both dates inclusive.

- 2 The second defendant is in jointly and severally liable together with first defendant, the one paying the other to be absolved, to the plaintiff for:
 - 1.1 Payment of the amount of R750 000.
 - 1.2 Interest on the aforesaid amount at the rate of 6.38% per annum from 09 November 2021 to date of payment, both dates inclusive.

- 3 The first and second defendant are jointly and severally liable for the costs of suit.

JUDGE S KUNY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 23 February 2023

Date of judgment: 19 September 2023

Plaintiff's counsel: Adv H Salani

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