REPUBLIC OF SOUTH AFRICA

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

Case No: 2022/9043

DELETE WHICHEVER IS NOT APPLICABLE

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

21 April 2023 .....
DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED **APPLICANT**

and

JDI RESEARCH (PTY) LIMITED **FIRST RESPONDENT**

DIANE BYERLEY **SECOND RESPONDENT**

PASCHA ANN JANSE VAN RENSBURG **THIRD RESPONDENT**

Neutral Citation: *Firstrand Bank Limited Trading Inter Alia as First National Bank v JDI Research (Pty) Ltd, Diane Byerley and Pascha Ann Janse Van Rensburg* (Case No: 2022/9043) [2023] ZAGPJHC 573 (21 April 2023)

JUDGMENT

BERGER AJ:

[1] The applicant (FNB) launched this application, seeking a money judgment against the first respondent (JDI), the second respondent (Ms Byerley), and the third respondent (Ms Janse Van Rensburg).

[2] The applicant sought an order for the payment of R936 256.03, together with interest and costs, from all three respondents, jointly and severally, the one paying the others to be absolved.

[3] On 8 June 2022, this Court granted the applicant the relief sought against the first and second respondents. The applicant now seeks to supplement that order with an order against the third respondent in the same terms. This is opposed by the third respondent.

[4] The basis of FNB's claim against Ms Janse Van Rensburg is a deed of suretyship signed by her, on 24 March 2018, in favour of FNB.

[5] To complete the factual matrix, I note that the second respondent also signed a deed of suretyship, on 24 March 2018, containing identical terms to the deed of suretyship signed by the third respondent.

[6] Both deeds of suretyship were executed as security for the debts of the first respondent in terms of an overdraft facility made available to JDI by agreement with FNB in the sum of R702 000.00.

[7] It is not disputed by the third respondent that JDI breached its agreement with FNB regarding the overdraft facility and that, as a result of the breach, the total amount outstanding being R936 256 03, became due and payable.

[8] The third respondent admits that she signed the deed of suretyship. However, she disputes her liability to FNB on the following grounds: First, she contends that FNB has not complied with Uniform Rule 41A. Second, she contends that FNB has not complied with the National Credit Act 34 of 2005 (NCA). Third, she contends that she was an employee of JDI at the time of signing and was only appointed an alternate director for purposes of signing documents if her employer was not available at the time to sign. She adds that she was forced to sign the suretyship under duress and that she was unaware of the extent of the document.

[9] I shall deal with each of the three grounds in turn.

Rule 41A

[10] Rule 41A deals with mediation as a dispute resolution mechanism. It requires every applicant to serve on each respondent, together with the notice of motion, a notice indicating whether the applicant agrees to, or opposes, referral of the dispute to mediation. The applicant is also required to indicate the reasons for its belief that the dispute is or is not capable of being mediated.

[11] Together with its notice of motion, FNB served on the respondents a notice in terms of Rule 41A, in which it stated that it opposed the referral of the matter to mediation. FNB also set out its reasons for its belief that the dispute was not capable of being mediated.

[12] Nothing more was required of FNB in terms of Rule 41A. Indeed, the third respondent was required to file a similar notice indicating whether she agreed to, or opposed, referral of the dispute to mediation. No such notice was filed by the third respondent.

[13] There is therefore no merit in the third respondent's contention that FNB failed to comply with Rule 41A.

The National Credit Act 34 of 2005

[14] The simple answer to the contention that FNB did not comply with the NCA, is that the NCA does not apply to the facts of this case.

[15] Sections 4(1)(a) and (b) of the NCA provide that the Act does not apply where the consumer is a juristic person whose asset value or annual turnover exceeds a determined amount, or where the credit agreement is a large agreement, as defined, and the consumer is a juristic person whose asset value or annual turnover is below the determined amount.

[16] There is a dispute on the papers as to whether JDI's asset value or annual turnover exceeds the amount determined in terms of section 7(1)(a) of the NCA. However, it is clear that JDI is a juristic person and that the overdraft facility is a large agreement, as defined in the NCA.

[17] Accordingly, the NCA does not apply in this case.

[18] Mr Kelly, on behalf of the third respondent, argued that the NCA ought to apply to persons such as the third respondent, particularly where she signed the deed of suretyship whilst an employee of JDI, and did not receive any financial benefit other than her monthly salary. In support of his argument Mr Kelly relied on the unreported judgment of *Absa Bank Ltd v Lowting and Others* (case number 39029/2011) [2013] ZAGPPHC 265.

[19] The decision in *Lowting* does not assist the third respondent. There the Court found the NCA did not apply but that the issue of individuals signing suretyships for banks "*is an issue which should clearly be investigated further by courts.*" I agree with Mr De Oliveira, who appeared for FNB, that the issue is one which the legislature may want to take up. In the absence of an amendment to the NCA, the law is clear: in the circumstances of this case, the NCA has no application.

Duress and Mistake

[20] The crux of the third respondent's defence is that she commenced employment with JDI on 23 May 2012 as an office manager. She was then appointed as an alternate director, which she says was for purposes of signing documents.

[21] The third respondent resigned from her employment on 29 November 2019. She states that when she resigned, it was agreed that the first respondent and the second respondent would ensure that "*my surety as signed, would be cancelled, and transferred to the second respondent solely.*"

[22] The third respondent contends that the suretyship was never explained to her by JDI, that she was unaware of the extent of the suretyship or its consequences, and that she was threatened with dismissal if she did not sign. She also states that she was "*threatened that my inaction would result in a negative reaction from the South African Revenue Services.*"

[23] It is not clear what is meant by a negative reaction from SARS. Nothing more is said about this by the third respondent. In my view, nothing can be made of this statement.

[24] What is clear from the third respondent's affidavit is that she was well aware, when she signed the deed of suretyship, that she was signing such a document. Although there is no evidence that her suretyship was cancelled and transferred to the second respondent, she believed that would happen when she resigned from her employment. If there was such an agreement between them, the third respondent could take it up with the first and second respondents.

[25] Furthermore, when she signed the deed of suretyship, the third respondent could only have missed the introductory paragraph if she had elected not to read any part of the document at all. She does not, however, say that she closed her eyes to the contents of the document. The introductory paragraph is clear, and would have set off alarm bells requiring the third respondent to understand the import of what she was signing.

[26] In my view, the third respondent has not proved that her mistake in signing the deed of suretyship (if she made a mistake at all) was reasonable. She does not say why she failed to appreciate the extent of the undertaking set out in the document. She knew that

she was signing a deed of suretyship in favour of FNB, as security for JDI's debts arising from the overdraft facility.

[27] The third respondent does not lay any blame at FNB's door. Instead, she says that JDI threatened her with dismissal if she did not sign. In any event, economic duress is not recognised in our law.

[28] I therefore find that the third respondent has not discharged the *onus* of proving either mistake or duress of such a nature that would entitle her to resile from the deed of suretyship. I am satisfied that FNB has made out a proper case for enforcing the deed of suretyship against the third respondent.

[29] Accordingly, I grant an order in the terms set out in the draft order which appears at Caselines 010-7 and 010-8.

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D I Berger

ACTING JUDGE
OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 21 April *2023.*

Appearances:

For the Applicant:	Mr M De Oliveira
For the Third Respondent:	Mr S Kelly

Heard on : 17 April 2023

Delivered: 21 April 2023