

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 032786/2023

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
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DATE	

In the matter between:

BODYSHOP EQUIPMENT SOLUTIONS (PTY) LTD

Applicant

and

DEVILLIERS EN NAGEL (PTY) LTD
t/a WEST RAND PANEL BEATERS

1st Respondent

NAGEL MARK PIETER

2nd Respondent

JUDGMENT

MAKUME J:

[1] In this matter the Applicant prays for an order that first and second Respondents pay the Applicant an amount of R1 525 133.17 plus

interest at the rate of 12,75% per annum to be calculated from the 15th March 2023 including costs on attorney and client scale.

- [2] Judgement is sought against the second Respondent jointly and severally with the first Respondent on the basis that the second Respondent bound himself as Surety and Co-principal Debtor in favour of the Applicant in respect of the liabilities of the first Respondent.
- [3] The background facts leading to this matter are largely common cause or not seriously contested. It is common cause that during or about the year 2020 the Applicant and the first Respondent concluded an investment marketing agreement in terms of which the Applicant injected a cash amount into the business of the first Respondent.
- [4] It was an agreed term of the agreement that repayment of the advanced amount would be effected by the first Respondent buying products of an associated company of the Applicant. Such purchases would then result in the reduction of the capital amount advanced.
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- [5] During or about 2022 the first Respondent indicated that it no longer wanted to make purchase of the products of the Applicants associates.
- [6] The Applicant calculated the amount due being R1 525 133.17 and awaited payment which never came. On the 23 August 2022 the

Applicant addressed a letter to the first Respondent which reads as follows:

“It has been brought to my attention that you wish to cancel the existing supply agreement entered into for West Rand Panel Beater and Pride Autobody Works. Please see attached schedules to this letter as supporting evidence of the settlement values:

De Villiers Nagel (Pty) Ltd t/a West Rand Panel Beaters	R1 525 133.17
Pride Autobody Works (Pty) Ltd	<u>R 584 438.95</u>
Total	<u>R2 109 572.12</u>

Kindly make payments.

- [7] During March 2023 the Applicant sent to the Respondent a certificate of balance in the amount of R1 525 133.17 due by the Respondent to the Applicant.
- [8] On the 16th March 2023 the Applicant's attorneys sent a letter of demand for payment of the sum of R1 525 133.17 by not later than the 24th March 2023 failing which legal action will commence.

[9] Nothing happened as a result the Applicant launched these motion proceedings on the basis that there was no dispute that the amount of R1 525 133.17 was due and owing.

[10] The Applicant conducts business as a financier of equipment utilised by panel beaters whilst the first Respondent conducts business as a panel beater.

[11] Two companies that are associated with the Applicant being Allied Paint Solutions (Pty) Ltd (APS) as well as Top Coat Automotive (Pty) Ltd (Top Coat) are wholesalers and distributors of a brand of automotive refinishing paint used by panel beaters.

[12] The Respondents have refused to pay and have raised the following defences in their Answering Affidavit:

12.1 Firstly that the amount claimed is disputed thus raising a dispute of fact which cannot be resolved in motion court proceedings.

12.2 Secondly that the Applicant has failed to take into account that the Respondent made a payment of R500 000.00 (Five Hundred Thousand) during December 2022 in reduction of the amount owing.

12.3 Thirdly that as regard the Deed of Suretyship Mr Nagel the

second Respondent maintains that when he signed the deed he was not given an opportunity to read same and understand what he was committing himself to.

12.4 Fourth that the Applicant is not a registered Financier in terms of the National Credit Act number 34 of 2005 which means that the Agreement concluded by the parties is unenforceable.

12.5 That in the event that it is proven that the Applicant is registered with the NCA then the Applicant failed to send the statutory letter of demand in terms of Section 129(1) of the NCA to the second Respondent.

12.6 Lastly that the Deponent to the Applicant's Founding Affidavit lacks the authority also that Applicants registered number and business address are unknown.

[13] In its Replying Affidavit the Applicant attached a copy of its NCR Credit Provider Certificate number NCRCP 4241. It was accordingly not surprising that at the hearing of this application Counsel for the Respondent abandoned any defence based on the NCA. What in effect remained is whether there is a genuine dispute of fact and secondly whether the Deed of Suretyship is valid or not.

- [14] In dealing with the issue whether or not a factual dispute exists in this matter, I take cognisance of what was said by Harms JA in **Cadaz (Pty) Ltd v Webber 2011 ALL SA reports 343 SCA** that motion proceedings are principally for the resolution of legal issues and are not geared to deal with factual disputes.
- [15] The Answering Affidavit in this matter consists mainly of bare denials and an avoidance of issues by relying on technical and vague points.
- [16] In the heads of argument filed by the Respondents previous Counsel it is argued that the failure by the Applicant to mention payment of the sum of R500 000.00 as well as failure by the Applicant to indicate how the amount claimed was calculated or arrived at amounts to a dispute of fact.
- [17] Before dealing with the legal position as far as dispute of fact is concerned it needs be recorded that shortly after the Respondent intimate that it wished to explore new suppliers the Applicant send to the Respondent on the 23rd August 2022 a letter indicating how much was due by the Respondent. The Respondent did not dispute that amount instead during or about November 2022 at a meeting held between the parties' representatives the Respondents indicated that they want to make payment and requested Applicant to draw up a payment plan and an Admission Of Debt Agreement (AOD).

[18] During December 2022 the second Respondent made a payment of R500 000.00 to the Applicant. All this time nothing was said about the correctness of the amount being claimed by the Applicant.

[19] On the 16th March 2023 when no further payment's were forthcoming a letter of demand was sent by Applicant's attorneys demanding payment of R1 525 133.17 and still no response or dispute was raised.

[20] Price JP in **Soffiantini v Mould 1956 (4) EDCC page 150 at page 154**
G said the following:

“It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavit.”

[21] In this matter the Respondent have failed to disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after the hearing of oral evidence. The mere fact that a dispute about the quantum of the claim is raised for the first time in the Answering Affidavit when demand of the same amount was communicated to the Respondent in August 2022 means that this is a

frivolous assertion meant to delay the obvious. There is no genuine dispute of fact.

[22] In **Williams v Tunstall 1949 (3) SACR 835** the Court held that a judgement could and should be granted on motion for a money sum when the Respondents only defence was an objection, as a matter of procedure to such a course. The only test to be applied is the existence or non-existence of a *bona fide* dispute on a material fact.

[23] The other defences raised being the authority of the deponent as well as the registration of the Applicants were not seriously pursued in the submission and fell aside. There is in any event sufficient proof on the annexure attached that the Applicant is a registered company and that the deponent is duly authorised by the Applicant to dispose to the Founding as well as the Replying Affidavit.

[24] The only issue remaining is the validity or otherwise of the Deed of Suretyship. The Deed of Suretyship is attached to the Founding Affidavit and is marked FA1. It consists of six pages and was signed on the last pages by the second Respondent and witnesses by Mr Rory Kilroe from one of the Applicants Associated companies. Mr Nagel does not dispute that he signed the Deed of Suretyship.

[25] The second Respondent's defence in respect of the Suretyship is captured in the paragraph 26 in the following words:

“ [26.1] It is denied that a valid contract of Suretyship has been entered into between the Applicant and the second Respondent.

[26.2] Under no circumstances did I have the intention to enter into a surety agreement with the Applicant. I was never provided with a copy of the signed document and was not provided with an opportunity to properly read and understand the terms of the document, Surety is denied.”

[26] The Respondent argued that this defence also constitutes a dispute of fact and should be referred to oral evidence. This in my view is not a bona fide defence. The essential question is whether on all the evidence there is a reasonable possibility of the Respondent's version being substantially true. I have no hesitation to dismiss that version for reasons stated hereunder.

[27] The Respondent Mr Nagel signed and executed a similar document in respect of his other associate company Pride Auto Body Worx on the same date. Secondly during August 2022 both Deeds of Suretyship were sent to Mr Nagel and he raised no issue about the contents thereof which means that if he had not read the documents on date of signature he certainly had sight of the two Deeds of Suretyship in August 2022 and still he raised no objection on their validity. To make matters worse he and his partner Mr Stopforth entered into negotiations to settle the amount owing to the Applicant. He further on his own

makes a payment of R500 000.00 (Five Hundred Thousand Rand) in December 2022. He was making payment in compliance with his acknowledgement of indebtedness founded on the Deed of Suretyship.

[28] What is further surprising is that Mr Nagel admits having signed the Marketing Investment agreement a document which is much longer than the Deed Suretyship. He does not allege that he signed it without having read it nor that he did not understand it or that it was never explained. In paragraph 9 of the Marketing Investment agreement, it is specifically mentioned that the first Respondent will furnish “BES with an unlimited Suretyship executed in its favour by the Directors or members or partners of the customer.”

[29] The leading case on signature of business documents has always been one of the earlier decision of the Appellant Division which is the matter of **George v Fairmead (Pty) Ltd 1958 (2) SA 465 (AD)** and at **page 472A** the Court said the following:

“When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify by doing so, his assent to whatever words appear above his signature.”

[30] In **Afrox Healthcare Beperk v Strydom 2002 (6) SA 21 SCA** the Respondent in that matter who had been the successful Plaintiff in the Court a *qou* argued that the exemption clause was in conflict with

principles of good faith or bona fide also that the admission clerk at the hospital had a legal duty to draw his attention to the relevant clause.

The SCA at paragraph 36 held as follows:

“Derhalwe kan nie gese word dat ‘n bepaling soos klousule 2.2 in die toelatings dokument objektief gresproke onverwags was nie.” Bygevolg was daar geen regsplig op Buitendag om dit pertinent onder die Repondent se aandag te gebring het nie. Derhalwe is die Respondent aan die terme van die klousule gebonde asof hy dit gelees en uitdruklik daartoe ingestem het.”

[31] The Answering Affidavit contains no allegations that Mr Nagel was mistaken or was misled when he signed the suretyship and that he now wishes to resile therefrom.

[32] In **Sonap Petroleum Sa (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 240 D to E** it was held that a contract will be upheld in spite of the lack of consensus if the party wishing to resile has been to blame in the sense that by his conduct he led the other party to believe that he was assenting to the terms proposed by that other party.

[33] Mr Nagel by his conduct after receiving the Deed of Suretyship and later arrangements to pay and in fact did make payment led the Applicant to believe that what had been agreed upon was in order. In

the result I have come to the conclusion that there was in fact no genuine dispute of fact secondly the Deed of Suretyship was properly executed with the full knowledge and participation of Mr Nagel the second Respondent. This application succeeds and I make the following order:

ORDER

33.1 Judgement is hereby granted in favour of the Applicant against the Respondents jointly and severally the one paying the other to be absolved for:

- a) Payment of the amount of R1 525 133.16 (One million Five hundred and Twenty-Five Thousand One hundred and Thirty-three Rands and seventeen cents).
- b) Interest on the said amount at the rate of 12,75% per annum calculated from 15th March 2023 to date of final payment.
- c) Costs on a party and party scale in respect of the first Respondent.

- d) Costs on attorney and client scale in respect of the second Respondent.

DATED at JOHANNESBURG this the 4th day of March 2024.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

DATE OF HEARING : 26 February 2024

DATE OF JUDGMENT : 04 March 2024

FOR APPLICANT : ADVJG BOTHA

INSTRUCTED BY : MESSRS COETZEE DUVENAGE INC.

FOR 1ST RESPONDENT : NO APPEARANCE

INSTRUCTED BY :

FOR 2ND RESPONDENT : ADV L MULAUDZI

INSTRUCTED BY : MESSRS NOURSE INCORPORATED