REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

27/05/2022

CASE NO.: 42697/2020

In the matters between: -

FIRST NATIONAL BANK LTD **APPLICANT**

AND

PHILO FILMS (PTY) LTD **FIRST RESPONDENT**
[Reg. No.: 1999/003537/07]

PHILO CHRISTOPHER PIETERSE **SECOND RESPONDENT**
[Identity number: 431103 5017 083]

JUDGEMENT

MSIMANG, AJ

The Applicant brought an application for an order in the following terms:

[1] That judgement be granted in favour of the Applicant against the First and Second Respondents, jointly and severally, the one to pay the other to be absolved [the liability of the Second Respondent limited to payment of the sum of **R3 100 000.00** (Three Million One Hundred Thousand Rand) together with interest thereon as provided in 1.2 *infra*], for: -

1.1 Payment of the sum of R **3 302 359.04**;

1.2 Payment of interest on the amount of **R 3 325 359.04** at the prime rate (current 7.00%) per annum compounded monthly and calculated from the **1st of August 2020** until date of payment;

[2] That the First and Second Respondents pay the costs of this application on an attorney and own client scale as between attorney and own client, jointly and severally, the one to pay the other to be absolved;

THE FACTS

[3] The facts of the matter are common cause. They relate to an overdraft facility granted to the First Respondent by the Applicant and the Second Respondent signed a written suretyship as surety and co-principal debtor in favour of the Applicant in respect of the facility limited to the aggregate amount of R3 100 000.00 (Three Million One Hundred

Thousand Rand). In summary on the 30 September 2016 the Applicant and the First Respondent, the latter, duly represented by the Second Respondent concluded a written Facility Agreement in the following terms:

3.1 The Applicant made available to the First Respondent an overdraft facility of **R2 910 000.00** (Two Million Nine Hundred and Ten Thousand Rand) that is payable on demand;

3.2 Interest shall accrue at the prime rate;

3.3 The overdraft facility will expire on the 31 May 2017

3.4 A Certificate of Balance, issued by the Applicant, will be regarded as *prima facie* proof of its content.

[4] The First Respondent utilised the facility which expired on the 31 May 2017. The First Respondent did not service the overdraft facility. The Applicant was entitled to recall the facility in terms of the Agreement between the parties and as a result the parties held various meetings wherein the Second Respondent indicated that funding from investors would be forthcoming but that various delays were experienced in obtaining such funding. Various e-mails were exchanged pertaining to the delay.

THE BACKGROUND

[5] The background to the granting of the facility is that the Second Respondent is a world renowned film producer. The First Respondent was commissioned by Bush Baby The Film (Pty) Ltd (hereinafter referred as Bush Baby) to produce a wild life film entitled "*Bush baby*" a story of a baby rhinoceros that was orphaned when the poachers killed its mother. The Bush Baby owned the rights to the screenplay "*Bush baby*".

[6] Bush Baby approached Manna Trust Limitada (hereinafter referred to as Manna) a company registered in Mozambique for the Funding of the Screenplay which funding was apparently procured by Manna in the sum of the US $16 000 000 (Sixteen Million United States Dollar).

[7] Pursuant thereto on the 12 May 2016 an agreement was entered into between Manna, Bush Baby, the Second Respondent as the producer of Bush Baby and Hollard Insurance Company Limited in terms whereof:

7.1 The Second Respondent would produce in South Africa a screenplay "*Bush baby*" on behalf of Bush Baby.

7.2 Manna would finance the production in the sum of US $16 000 000 (Sixteen Million United States Dollar) through payments made to Hollard.

7.3 Hollard will dispense of the Funds under the Agreement in accordance with the budget and may at the request of the producer and in its sole discretion deviate from the budget in its dispensing of the funds.

7.4 Bush Baby warranted that the Funds received from Hollard shall exclusively and solely be allocated for the payment of expenses incurred in the production of "*Bush baby*" and the funds may not be commingled with those of any other project.

[8] No funds were ever received by Hollard and, as a result, there were various addendums and extensions to the 12 May 2016 Agreement. The film was to be produced in 2017 in South Africa. On the 25 October 2016 there was an addendum to the 12 May 2016 Agreement in terms whereof the parties agreed to a final extension of the funding date to the 31 December 2016. On the 26 April 2018 the parties concluded a second addendum to the 12 May 2016 Agreement and delayed the payment date by a further 20 months and amended the budget to US$, 17 600 000 (Seventeen Million Six Hundred US Dollar). There were further delays

and promises of various advances but to date no funding has been made available to the Respondents.

[9] Various reasons were given for the unavailability of funding such as the privity of contracts and the Covid Pandemic. The end result is that the Respondents have not received any funding and were unable to service and pay the facility. The Applicant granted the Respondents indulgencies all along. The partis engaged each other extensively at various times and over the entire period through e-mails and meetings.

[10] On the 5th November 2018 the Second Respondent sent an email to the Applicant indicating that the financiers confirmed that Platinum Film Productions (Pty) Ltd would receive **1 000 000 $** (One Million US Dollar) by 26 November 2018 and from which the Second Respondent would be able to immediately draw an amount of **R2 000 000.00** (Two Million Rand). The money was never deposited into the First Respondent's account and as on the 10 January 2019 the debit balance was **R2 889 194.63** (Two Million Eight Hundred and Eighty Nine Thousand One Hundred and Ninety Four Rand Sixty Three Cents). On the 31 July 2019 the closing balance was **R2 924 065.44** (Two Million Nine Hundred and Twenty Four Thousand Sixty Five Rand Forty Four Cents).

[11] On the 10 October 2019 the Applicant sent a demand to the First Respondent drawing the First Respondent attention to various meetings and indulgencies and that the full outstanding debit balance of **R3 058 550.69** (Three Million Fifty Eight Thousand Five Hundred and Fifty Rand Sixty Nine Cents) should be settled by no later than 31 October 2019. A further demand was sent on the 19 November 2019 to the Respondents to demand the outstanding balance.

[12] On the 27 November 2019 the Applicant sent an e-mail to the Second Respondent confirming an arrangement that was reached on the 26 November 2019 that the Second Respondent advised that the First Respondent is awaiting payment of funding which will be finalised soon and that a payment arrangement in respect of the outstanding indebtedness owing on the overdraft account by the First Respondent was reached. The letter read as follows:

"*Following our meeting held on 26/11/2019 at our Menlyn offices, we confirm your advises that you are currently awaiting payment of funding, which should be finalised soon.*

We confirm the payment arrangements on account number 62010089929:

1. *The amount of R1,500,000.00 to be received on account 62010089929 by latest 31/01/2020.*

2. *After receipt of the aforesaid payment, a further meeting will be held during February 2020 to discuss settlement of the balance.*

Please keep us informed of developments with regards to the funding and settlement of the account.

Kind regards".

[13] On the 30 January 2022 the Applicant wrote a further letter to the Respondent as follows:

"*We confirm that a **final** extension for payment of the amount of R1,500,000.00 is granted until 28/02/2020.*

Please note that should the payment not reflect in the account on 28/02/2020, we shall, without any further notice proceed with legal action herein."

[14] Subsequent arrangements were made for payment on 28 February 2020 of **R1 500 000.00** (One Million Five Hundred Thousand Rand) which payment was not made. Similarly, arrangements were made for payments on the 31 March 2020 and 30 April 2020 which were never met. A further arrangement was made for payment of **R1 500 000.00** (One Million Five Hundred Thousand Rand) which would be payable on 30 November 2020. None of the commitments made were fulfilled. The First Respondent failed to pay the **R1 500 000.00** (One Million Five Hundred Thousand Rand) and to sign the acknowledgement of debt which was a requirement of the Applicant for extending the facility.

[15] The Applicant issued and signed of Certificate of Balance in the sum of **R3 325 359.04** (Three Million Three Hundred and Twenty Five Thousand Three Hundred and Fifty Nine Rand Four Cents) as at 31 July 2020.

THE ISSUES

[16] Mr Mentjies the Counsel for the Applicant argued that the overdraft facility granted to the First Respondent is due and payable in the full amount and that the Second Respondent, as surety, is liable to the full extent of the surety agreement. Mr Vlok, Counsel for the Respondents, argued in defence of the First Respondent, that only part of the facility was repayable, i.e., an amount of **R1 500 000.00** (One Million Five Hundred Thousand Rand) as at 28 February 2020. The payment of the amount was dependent upon the amount flowing from a financial structure and that by virtue of the Covid-19 pandemic the flow of funds out of the said structure could not occur timeously, and the First Respondent is excused from timeous performance. The Second Respondents defence, he being surety, is ancillary to the First Respondent's defence.

[17] Mr Vlok argued that final extension for payment of the amount of R1 500,000.00 (One Million Five Hundred Thousand Rand) to the 28 February 2020 necessarily became a term of the Agreement between the Applicant and the First Respondent. Mr Mentjies, on the other hand, argued that the granting of the extension was not an amendment of the Facility Agreement. This is so, he further argued, because the Facility Agreement contains a non variation clause.

[18] The Facility Agreement between the parties contained clauses 17 and 19 which provided the following:

Clause 17

ENTIRE AGREEMENT AND NON VARIATION

The facility agreement sets out all the terms and conditions relating to the facility and the resulting loan (if any), and no variation or such terms and conditions shall be of any force or effect unless reduced to writing and signed on behalf of the Bank (by a duly authorised official) and the Client (see group member acknowledging that any such signature by the Client shall also bind the group member).

Clause 19

INDULGENCE

No relaxation, indulgence or extension of time shown from time to time by the Bank to the Client and/or a group member shall operate as an estoppel against the Bank or a waiver of the Bank's rights in terms hereof or any other rights that the Bank may have in law nor shall any relaxation or indulgence be deemed to be a novation hereof.

[19] It is clear from the non variation clause that the parties intended to impose restrictions on their own power of subsequent variation or cancellation of their contract. The objective was to achieve certainty and avoid disputes about whether a variation or cancellation has been agreed.[1] In *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifien*[2] the court held that a non variation clause was not against public policy and that no oral variation of the contract was effective if the clause entrenched both itself and all the other terms of the contract against oral variation.

[20] The non variation clause in the Facility Agreement is clear and succinct that the contract cannot be varied unless in writing. The Agreement further contained an Indulgence clause which specifically states that no relaxation, indulgence and extension from time to time shall operate as an estoppel or a waiver of the Banks right. The argument of Mr Vlok cannot stand.

[21] At the hearing Mr Vlok admitted, without conceding, that the debt was due. Notwithstanding all the indulgencies granted including the 26th February 2020 final extension no payment was received from the First Respondent. None of the various film productions relied upon by the Respondents for funding ever materialised. It is worse with "*Bush baby*"

[1] The Law of Contract 4th Edition RH Christie – 519;
The Law of Contract in South Africa Dale Hutchison 3rd Edition 263
[2] 1964 (4) SA 760 (A)

as even the baby rhinoceros may have, by now, overgrown the role of a baby.

[22] Mr Vlok argued further that the contract could not be performed because of the Covid Pandemic. He argued that the payment of R1 500 000.00 (One Million Five Hundred Thousand Rand) was dependent upon the flow of funds which were impeded by the Covid Pandemic. Payment was due in this matter from the time the facility expired on the 31 May 2017. The First Respondent was granted indulgencies all along. The Applicant entertained many proposals including the production of films unrelated to "*Bush baby*". The First Respondent has to date neither paid nor serviced the facility. The Pandemic had no effect to this agreement and this argument must fail.

[23] The Applicant filed the Replying Affidavit late and sought the indulgence of the court to condone the late filing of same. The court is satisfied that there was no wilful default on the part of the Applicant and the late filing of the Replying Affidavit be and is hereby condoned.

[24] There is no need to entertain any other defence raised by the Respondents.

[25] The Application succeeds and I therefore make the following order:

ORDER

1. The Application for the Condonation of the late filing of the Replying Affidavit is granted.

2. Judgement is granted in favour of the Applicant against the First and the Second Respondents, jointly and severally, the one paying the other to be absolved, [the liability of the Second Respondent limited to payment of the sum of R3 100 000.00 (Three Million One Hundred Thousand Rand) together with interest thereon as provided in 2.1 infra], for:

   2.1 Payment in the sum of **R3 325 359.04;**

   2.2 Payment of interest on the amount of **R3 325 359.04** at the prime rate (currently 7,0%) per annum compounded monthly and calculated from the **1st August 2020** until date of payment;

3. That the First and Second Respondents pay the costs of this application on an attorney and own client scale as between attorney and own client, jointly and severally, the one to pay the other to be absolved;

MSIMANG AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	28 February 2022
For the Applicant:	Adv L Mentjies
Instructed by:	Rothmann Phahlamohlaka Inc
For the First & Second Respondents:	Adv J Vlok
Instructed by:	Vermaak Beeslaar Attorneys Inc
Date of Judgment:	27 May 2022