Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **18696/2022**

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

DATE _____ SIGNATURE _____

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

(Registration No: 1962/000738/06)

and

D G TYRES (PTY) LTD (In liquidation) **First** Defendant

(Registration No: 2015/246494/07)

ALETA CATHARINA Second Defendant

(ID No: […])

JUDGMENT

MKHABELA AJ:

Introduction

[1] This is an application for summary judgment against the second defendant for debts incurred by the first defendant under two instalment sale agreements which were concluded in respect of two motor vehicles.

[2] It is not in dispute that the first defendant has been liquidated and that the liability of the second defendant is pursuant to two surety agreements that the second defendant concluded for the punctual payment of the debts of the first defendant.

[3] The application is opposed by the second defendant on various grounds, *inter alia*, that the certificates of balance which specify the quantum have not been attached to the founding affidavit in support of the application for summary judgment.

[4] It follows therefore that since the application for summary judgment is opposed, the question that falls crisply for determination is whether the second defendant has raised a *bona fide* defence and concomitantly whether the affidavit in support of the application for summary judgment together with the particulars of claim contain sufficient averments which are necessary to sustain an application for summary judgment.

Background Facts

[5] The plaintiff and the first defendant concluded two written instalment sale agreements in respect of two motor vehicles. In turn, the second defendant and the plaintiff concluded two corresponding surety agreements for the debts of the first defendant pertaining to the purchase of the two motor vehicles.

The first instalment agreement

[6] The first instalment agreement between the plaintiff and the first defendant was concluded on 15 June 2017 in terms of which the plaintiff sold to the first defendant a 2017 Toyota Hilux 2.8 GD – 6 Raider 4x4 ("the first motor vehicle").

[7] The total cost arising from the first instalment agreement was in the sum of R950 428,80 which would be repaid by the first defendant by way of 71 (seventy-one) payments of R13 200,00 per month. The first payment was due on 1 August 2017 and the final instalment was expected to be on 1 July 2023.

[8] Ownership of the first motor vehicle would be vested with the plaintiff until the first defendant had paid all outstanding amounts.

The first suretyship agreement

[9] Consequent upon the conclusion of the first instalment agreement pertaining to the first motor vehicle, the second defendant bound herself as surety and co-principal debtor for the financial obligations of the first defendant.

The second instalment agreement

[10] On 20 July 2017, the plaintiff and the first defendant concluded the second instalment agreement in terms of which the plaintiff financed the purchase of a motor vehicle, a 2017 Toyota Hilux 2.4 GD – 6 RB SRXP/U with engine number 29D0309445 ("the second motor vehicle").

[11] The total cost of the second instalment agreement was in the sum of R641 452.40 which was payable by way of 71 (seventy-one) monthly instalments of R8 909.20. The first instalment was due on 1 September 2017 and the final instalment was expected to be on 1 August 2023.

The second suretyship agreement

[12] On 20 July 2017, the second defendant bound herself jointly and severally as surety and co-principal debtor for all the financial obligations of the first defendant arising from the second instalment agreement.

[13] Both the suretyship agreements for the first and second instalment agreements have been attached to the particulars of claim as annexures G and I respectively.

Breach of both the first and second instalment agreements

[14] It is common cause between the parties that the first defendant was liquidated and was therefore in default of its obligations in terms of the two instalment agreements. As a consequence of the first defendant's default, both agreements were subsequently cancelled.

[15] The amount owing to the plaintiff by the second defendant as surety in respect of the first instalment agreement is R406 120,56 and the amount owing in respect of the second instalment agreement is R311 467,93. These amounts arose because of the shortfall to extinguish the debt owed by the first defendant after the sale of the two motor vehicles.

[16] Default notices have been sent to the second defendant and notwithstanding such notices, the second defendant had failed or neglected to make the required payment arising from her obligation as surety and co-principal debtor for the first defendant's financial obligations.

[17] I pause to note that the plaintiff attached certificates of balance which confirm the amounts owing in respect of both suretyship agreements. Furthermore, the second defendant has renounced the benefits of excursion and division. Moreover,

she is a co-principal debtor for all financial obligations of the first defendant owed to the plaintiff.

The Plea

[18] As I have already stated, the second defendant raised various defences, inter alia, the following which pertain to the first instalment agreement and the first suretyship agreement:

a. She denied that the first defendant and the plaintiff concluded an instalment sale agreement on 15 June 2017 between the first defendant and the plaintiff.

b. She alleged further that the plaintiff has failed to provide any proof of registration as a credit provider in terms of Section 40 of the *National Credit Act*[1] and accordingly, the instalment sale agreements and deed of suretyship are not valid.

c. She alleged that the amount the plaintiff could recover from her as the second defendant and surety was not unlimited.

d. She alleged that the goods or motor vehicles were sold at an amount less than the market related value and also less than the forced sale value.

e. She denied that the first defendant or the second defendant is liable to the plaintiff, for the amounts claimed or any other amount at all.

[19] The second defendant's defences pertaining to the second instalment sale and the second suretyship agreements are similar to the ones advanced in respect of the first instalment and suretyship agreements.

---

1 34 of 2005.

a. The second defendant repeats her assertion that the agreements are not valid or enforceable and that they are not legal agreements owing to the allegation that the plaintiff is not a registered as a credit service provider as required by Section 40 of the *National Credit Act*.[2]

b. In addition, the second defendant admits signing the suretyship agreement pertaining to the first defendant's punctual performance in respect of the second instalment agreement but avers that when the parties signed the vehicle and asset finance agreement a novation occurred which replaced the two suretyship agreements for both the first and second instalment sale agreements.

The affidavit in support of the application for summary judgment

[20] The affidavit in support of the application for summary judgment was deposed to by one Mubeen Rahimtoola who verifies the plaintiff's cause of action and swears positively to the facts contained in the founding affidavit.

a. As far as the facts are concerned, Rahimtoola reiterates that the second defendant is indebted to the plaintiff by virtue of the corresponding suretyship agreements arising from the two instalment sale agreements.

b. Moreover, the affidavit asserts that the first defendant was wound up on 11 December 2019 by an order of this very Court and that the plaintiff had repossessed the two motor vehicles in question and sold them at an auction on 28 August 2016.

c. Unfortunately, for the second defendant, the proceeds from the sale of the two motor vehicles did not expunge the liability of the first defendant to the plaintiff. Consequently, the full outstanding balance in terms of the suretyship agreements are recoverable from the second defendant.

---

[2] 34 of 2005.

d. As a result, the plaintiff is claiming R406 120,56 in respect of the first suretyship agreement and R311 467,93 in respect of the second suretyship agreement together with interest at the rate of 13.55% for the amount of R406 120,56 and at the rate of 14.28% in respect of the amount of R311 467,93 from the date of summons to the date of payment.

The second defendant's affidavit resisting summary Judgment

[21] The second defendant denied that it does not have a *bona fide* defence.

a. The second defendant asserted that the plaintiff's claim is essentially the *actio ad exhibendum* in respect of the value of the vehicles. Since the *actio ad exhibendum* is a claim for damages, it is not allowed under Rule 32.

[22] In view of the approach that I adopt and coupled with the fact that the second defendant abandoned most of her pleaded defences during oral argument, it is not necessary to deal exhaustively with the rest of the other grounds upon which the second defendant relies on in her attempt to resist summary judgment.

Oral Submission

[23] As I have already stated that during oral submission, the second defendant did not persist with the other grounds of defence on which she was resisting summary judgment. The only defence that was actively advanced was that the plaintiff's claim is essentially based on the *actio ad exhibendum* which the second defendant contended was not allowed under Rule 32.

The Applicable Law

[24] The law applicable to applications for summary judgment is clear. The plaintiff can now apply for summary judgment only after the delivery of the plea.[3]

[25] Prior to the amendment of the Rule 32, summary judgment proceedings could be instituted upon the notice of intention to defend being filed.

[26] The case of *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd and Another,*[4] explains the rationale behind the amendment to Rule 32 as follows:

> *"This judgement is instructive. It sets out the intention of the legislature to address the shortcomings of the position under the old rule bearing in mind that a plaintiff was required to bring a summary judgment application at a time when a possible defence to the claim has not yet been disclosed in a plea. The amended rule now requires an affidavit in support of summary judgment to be filed only once the defendant's defence to the action is apparent, by virtue of having been set out in a plea."*

[27] I align myself with the enunciations in the case of *South African Securitisation Programme (RF) Ltd & Others v Cellsure Monitoring and Response (Pty) Ltd & Others,*[5] where it is stated as follows:

> *"[33] I am mindful that a bona fide defence is assessed upon a consideration of the extent to which the nature and grounds of the defence and the material facts relied upon have been canvassed. Bona fides does not mean that the defendant has to satisfy the court that his version is believed to be true. All the defendant is required to do is to swear to a defence valid in law, in a manner which is not seriously unconvincing. Put differently, he should show that there is a reasonable possibility that the defence he advances may succeed on trial.*
>
> *[34] I am further mindful that at this stage of the proceedings, the court is not required to decide the disputed issues or determine whether or not there is a balance of probabilities in favour of another. The court merely considers*

---

3 Rule 32(1) of the Uniform Rules of Court.

4 [2020] ZAGPPHC 397 para 14, referencing *First Rand Bank Ltd v Shabangu and Others* 2020 (1) SA 155 (GJ) paras 16- 19.

5 [2022] ZAGPPHC 925 paras 33 to 34, a Decision of Kooverjie J in the Gauteng Division, Pretoria.

whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide."

[28] In so far as the plaintiff is concerned, the authorities are also quite clear about what is required of a plaintiff to succeed in obtaining summary judgment.

[29] Rule 32(2)(b) requires that a plaintiff should verify the cause of action and identify the facts upon which the plaintiff's claim is based and explain why the defence as pleaded does not raise any issue for trial.

[30] In respect of what the defendant is required to do to defeat an application for summary judgment, Rule 32(3)(b) provides that a defendant must satisfy the Court by affidavit or with the leave of the Court by oral evidence, that the defendant has a *bona fide* defence to the action. The subrule also states that such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon.[6]

Evaluation

[31] It must be emphasised that the plaintiff's cause of action against the second defendant arises from the two suretyship agreements which the second defendant does not dispute but avers that the agreements are not enforceable by virtue of the contention that the plaintiff is not a registered financial service provider.

[32] As I have already stated that contention was abandoned by the second defendant in her oral submissions. This defence was in any event untenable. Similarly untenable was the defence to the effect that summary judgment should not be granted because the plaintiff did not attach the certificates of balance which specify the amount that the plaintiff is claiming from the second defendant.

[33] In my view since summary judgment can now only be sought after a defendant has filed its plea, the court is enjoined to adjudicate the application by considering all the pleadings before it cumulatively. This means that the allegations in the

6 *Visser v Kotze* [2012] ZASCA 73 (25 May 2012) at para 11.

particulars of claim and the defendant ‘s defence as raised in the plea are taken into account.

[34] The fact that the certificates of balance are not attached to the founding affidavit supporting summary judgment is not fatal to the plaintiff ‘s claim since there is no prejudice to the second defendant. Attaching the very same certificates that are already annexed to the particulars of claim would have unnecessarily burdened the record.

[35] It is worth emphasising that the defence and in fact the only one that the second defendant vigorously pursued in oral submissions was that the plaintiff’s claim for the amounts owing both in respect of the first and second instalment agreements are claims for damages which are not allowed in terms of Rule 32. The other one that was also pursued (albeit not so much with vigour) is that the amount that the plaintiff is entitled to recover in terms of the suretyship agreements was not unlimited.

[36] These contentions lose sight of the fact that the amounts in question arose out of the first defendant’s default in making payment of the monthly instalments until the motor vehicles were paid off and also that these amounts are as a result of the fact that the proceeds arising from the sale of the two motor vehicles were not sufficient to extinguish the debt that the first defendant is owing to the plaintiff.

[37] Since it is not in dispute that the first defendant had defaulted and has not made payment of the amounts owing, the plaintiff is entitled to invoke its suretyship agreements with the second defendant. There is no restriction in both suretyship agreements about the nature of the debt that the first defendant should owe in order to trigger the second defendant’s liability as surety.

[38] In the circumstances, the second defendant’s attempt to avoid her liability to the plaintiff by alleging that the plaintiff’s claim amounts to a claim of damages does not constitute a *bona fide* defence in law against the plaintiff’s claim. Nor is the purported defence that the amount that the plaintiff is entitled to recover under the suretyship agreement is not unlimited.

[39] There is no limit in the suretyship agreements about the amount that the plaintiff is entitled to recover from the second defendant as surety. On the contrary, the suretyship is unambiguous that the second defendant is liable for all debts owed by the first defendant to the plaintiff.

[40] This conclusion is fortified by the fact that the amounts in question could not have been limited since the actual amount that would be owed by the first defendant could not have been known at the time when the suretyship agreements were concluded.

[41] The situation is different from standing as surety for a fixed amount in the form of a loan advanced to the principal debtor. In such a scenario the amount that could be owed by a surety could be limited to the loan.

[42] In the circumstances, the second defendant' contention that the amount that the plaintiff is entitled to recover in terms of the suretyship agreements was not unlimited has no merit and is susceptible to be rejected.

[43] In view of the fact that the second defendant has renounced the benefits of excussion and division, the plaintiff is entitled for payment of the amount owing and the second defendant cannot escape such contractual liability arising from the two suretyship agreements.

[44] It is trite that a suretyship is a contract in terms of which one person (the surety) bounds herself/himself as debtor to the creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal debtor if and to the extent that the principal debtor fails, without lawful excuse to render the performance herself/himself.[7]

[45] The only conceivable defence that the second defendant could have been able to advance albeit as a point *in limine*, is the excussion of the first defendant. This is not possible since the first defendant has been liquidated but more

---

[7] LAWSA para 281 read with the definition of Coney, *The Law of Suretyship*, 4th Edition at 26.

importantly and decisively, the second defendant had renounced the benefit of excursion and division.

[46] There is no valid and arguable defence for the second defendant to avoid her liability arising from the conclusion of the suretyship agreements. No authority is required for the trite proposition that a surety ‘s debt normally[8] becomes enforceable as soon as the principal debtor is in default. This is because of the nature of the suretyship agreement being an accessory in nature.

[47] The viability of commerce requires that Courts should continue to uphold the doctrine of *pacta sunt servanda* in our law of contract[9] in the absence of any conflict between the contractual terms embodied in the suretyship agreement and the constitutional values enshrined in our Constitution.

[48] There is no contention or evidence that the second defendant was induced in concluding the suretyship agreements. On the contrary, the undisputed evidence is that the second defendant concluded the two instalment sale agreements on behalf of the first defendant with the plaintiff as the sole director of the first defendant and then concluded the two corresponding suretyship agreements to secure the first defendant ‘s debts to the plaintiff. She did so freely and voluntarily.

[49] It is common cause that the first defendant was liquidated under the second defendant’s watch, its debts that are due to the plaintiff remain owing and the second defendant ‘s liability as surety is indisputable. Consequently, the second defendant, as surety for the first defendant ‘s debts, has no valid defence in law to resist the plaintiff’s claim for summary judgment.

[50] In the light of my conclusion that the second defendant had not disclosed a *bona fide* defence to foil the plaintiff’s application for summary judgment, I reiterate that, it is not necessary to deal exhaustively with all the other defences which are largely peripheral in nature and trumped-up to delay the plaintiff ‘s uncontested claim arising from the two suretyship agreements.

---

[8] The surety can of course demand that the principal debtor first be excused which defence is not available to the second defendant as I have alluded.

[9] Barkhuizen v Napier 2017 (5) SA 323 (CC) at para 70.

[51] For all these reasons, I am inclined to exercise my discretion in granting summary judgment given my conclusion that the second defendant has not managed to satisfy the Court by affidavit that she has a *bona fide* defence to the plaintiff's action as required by Rule 32(3)(b) of the Uniform Rules of Court.

[52] On the totality of the purported defences that the second defendant has raised, it is logically impossible to arrive at a conclusion that there is *bona fide* defence to the plaintiff 'action let alone whether there are grounds of the purported defences and material facts relied upon. There is absolutely nothing that could be regarded as a *bona fide* defence which is valid in law.

Costs

[53] I now turn to the issue of costs. As I have already alluded, the second defendant had advanced spurious defences in her affidavit opposing summary judgment. These include the defence that the plaintiff being a recognised bank which advanced the finance to purchase the two motor vehicles was not a registered financial service provider.

[54] It is of no surprise that this absurd argument was abandoned in oral submission and rightly so in my view. These ill-conceived arguments in resisting summary judgment application resulted in the unduly burdening of the papers. In my view the Court should indicate its ire for such conduct and censor such irresponsible manner of litigating.

[55] I am alive to the trite principle that the granting of costs falls within the Court's discretion which must be exercised judicially.

[56] I therefore make the following order which in my view is warranted given the criticism of the manner in which the second defendant conducted herself in concocting defences which were abandoned in her oral submission.

Order

[57] In the circumstances, I make the following order:

a. The application for summary judgment is granted.

b. The second defendant is ordered to make the following payment within 5 (five) calendar days from the date of the order.

(i) Payment of the amount of R406 170,56 at the rate of 15.5% from date of summons to date of payment.

(ii) Payment of the amount of R311 467,93 at the rate of 14.28% from the date of summons to the date of payment.

(iii) The second defendant is further ordered to pay the cost of the application on attorney and client scale including the costs incurred in drafting the particulars of claim and considering the plea.

_____

R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Delivered: This judgment was prepared and authored by the Acting 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 of the judgment is deemed to be **9 May 2024**.

COUNSEL FOR THE PLAINTIFF:	C Nkosi
INSTRUCTED BY:	Findlay & Niemeyer attorneys
COUNSEL FOR SECOND DEFENDANT:	JHF Re Roux
INSTRUCTED BY:	DBM attorneys
DATE OF THE HEARING:	23 August 2023
DATE OF JUDGMENT:	9 May 2024