REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2022/053688

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

01/02/24
Date

Signature

In the matter between:

SB GUARANTEE COMPANY (RF) PROPRIETARY LIMITED
(Registration Number: 2006/021576/07) **Applicant**

and

DOUBLE DELIGHT INVESTMENTS 1 CC **First Respondent**

NAZER CASSIM **Second Respondent**

JUDGMENT

STRYDOM, AJ

INTRODUCTION:

1. This is an application for summary judgment based on the failure of the respondents to perform in terms of a home loan agreement and surety thereto.

2. The second Respondent describes the contractual matrix involved as follows: On or about 7 October 2019, the First Respondent and the Standard Bank of South Africa Limited

("SBSA") entered into a home loan agreement (" loan agreement"). The Applicant concluded a written guarantee (the Common Terms Agreement) in favour of SBSA, in terms of which, inter alia, the Applicant guaranteed the due and punctual payment of all sums now and subsequently due by a debtor (who has borrowed money from SBSA pursuant to a home loan agreement) to SBSA ("Guarantee"). The First Respondent was required by the Applicant, in turn (of the Guarantee) to conclude a written indemnity agreement in terms of which, inter alia, the First Respondent (as borrower) indemnified and held the Applicant harmless from and against all loss, costs, expenses and liabilities which the Applicant may suffer in connection with SBSA and the Guarantee (" Indemnity Agreement"). In the event that the loan agreement became effective and was breached, SBSA would have had the option to claim from both the First Respondent and the Applicant (as guarantor) jointly and severally. The Second Respondent concluded an agreement of surety in favour of the Applicant concerning the obligations of the First Respondent in terms of the Indemnity Agreement (" Surety Agreement").

3. It is common cause that the first respondent is in default of the repayments of the home loan. The applicant seeks judgment in the amount of R1 246 102.05 against the first Respondent (being the whole outstanding amount per the homeloan agreement), alternatively R1 170 000-00 against the second Respondent (being the maximum to be granted pursuant to the suretyship agreement) as well as an order declaring the property executable.

4. Consequent to the default of the first respondent, the Applicant served summons on the 12th of January 2023. Following the service of a notice of bar, the Respondents delivered their plea on the 29th of March 2023.

5. Pursuant to the plea, the applicant filed an application for summary judgment which was set down on the unopposed roll of the 8th of June 2023. On that day, however, the Respondents served a notice of intention to amend its plea. The matter was accordingly removed from the roll.

6. The Applicant served a notice of objection to the amendment in terms of Rule 28 (3) on 23 June 2023. The amendment was never affected and on the 28th of September 2023 the Applicant served the Respondents with a notice of set down for the summary judgment application on the unopposed motion roll for the 27th of October 2023.

7. The Respondent’s filed their affidavit resisting summary judgment on the morning of the 27th of October 2023 and sought condonation for the late filing.

8. As the consideration of the strength of the defence raised would, in any event, be a factor in considering whether the late filing should be condoned[1] and even if not condoned, necessary to determine whether the plea discloses a *prima facie* defence, I requested counsel for both parties to prepare short written heads of argument to address the validity of the defence raised.

Condonation

9. The second respondent explains the reason for the delay in filing the affidavit resisting summary as follows:

"The reason that I have filed late is that I instructed my attorneys of record to amend the First and Second Defendants plea to clarify my defence. It was my opinion that by amending the plea, we would be able to make our defence clearer…. Unfortunately, after my attorneys of record filed the notice of intention to amend, the Plaintiff objected to the amendment. I was of the opinion that the summary judgment application would not proceed until such time as there was certainty about the Defendants truly pleaded case and after the amendment had been dealt with. I have now deposed to this affidavit because the Plaintiff has indicated that they do not have the same view and intend on advancing the summary judgment despite there being a pending amendment to clarify my defence."

10. This affidavit was deposed to on the 27th of October 2023 (being the same day as the hearing of the summary judgment application. It is wholly insufficient in that it fails to explain what steps have been taken to effect the amendment after the objection in June 2023. Furthermore despite having been served with the set down for the present application in September, the deponent fails to address why it took him a whole month to depose to the affidavit. Save for his own subjective views, there is in fact no explanation specifically related to the question of delay.

11. Rule 27(3) of the Uniform rules provides that a 'court may, on good cause shown, condone any non-compliance with these rules'. In *United Plant Hire (Pty) Ltd v Hills* & others Holmes JA stated:

'It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides.' *The various factors that are to be considered 'are not individually decisive but are interrelated and must be weighed one against the other' with the effect, for instance, that 'a slight delay and a good explanation may help to compensate for prospects of success which are not strong'*

[1] See for instance *Darries v Sheriff, Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) at 40H-41E.

12. In *Darries v Sheriff, Magistrate's Court, Wynberg & another* the Court held that:

'I will content myself with referring, for present purposes, only to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted……

And further on:

" But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'[2]
[Underlining my own]

13. I have also noted that, as per *Smith NO v Brummer NO*[3], where there has been a reckless or intentional disregard of the rules of court, or the Court is convinced that the applicant does not seriously intend to proceed, the Court will refuse to grant the application.

14. In *casu,* the non-observance has been flagrant and the reason for the delay in compliance wholly insufficient enough to render a reference to possibility of success irrelevant. However, by virtue of the fact that I have to, even on an unopposed basis, have regard to the prospects of success of the defence raised in the pleadings for purposes of summary judgment, I note that for purposes of condonation the pleaded defence has no merit (as set out below.) In the affidavit resisting summary judgment, the Respondent raises issue with the amount due being proven on the strength of a certificate of balance, when the indemnity agreement does not provide for such a certificate being proof. I note that this is not pleaded, even in the intended amended pleadings. Apart from being a technical point that does not disclose a defence to the fact that the Respondent is indebted to the Applicant, it therefore also does not convince this Court that the Respondent seriously intends to proceed with this argument.

15. The argument that the Applicant failed to attach the liquid document upon which it relies to the summary judgment application (the certificate of balance), similarly is a technical

[2] *Darries v Sheriff, Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) at 40H-41E.
[3] *Smith NO v Brummer NO* 1954 (3) SA 352 (0) at 358A

objection – especially in circumstances where there is no dispute that the document exists and that the Respondents are aware of it (attached to the particulars of claim) and the Respondents in fact refer to it is their defence as part of the affidavit resisting judgment.

16. As a result, the application for condonation is refused. I pause to note that, even if condonation had not been refused, the outcome of this judgment would have remained unchanged.

The prima facie defence raised

17. In the written submissions on behalf of the Respondents, it is contended that: "…*one of the loan agreement's suspensive conditions was not met and that the loan agreement (and all the agreements concluded based on the presupposed existence of the loan agreement) is consequently void*."

18. The argument advanced is as follows:

"The Applicant has no claim against the Respondents as the Guarantee only obliges it to pay SBSA in relation to home loan agreements. In the matter at hand, the Applicant is not obliged to pay SBSA as there is no home loan agreement considering that:

15.1.the suspensive condition in clause 9.7.2 of the loan agreement that a resolution be passed and provided by the First Respondent was not met; and

15.2.the special condition that a certified copy of the resolution of the authorising the acquisition of ownership of the immoveable property and the registration of a bond over it be provided to SBSA was not met."

19. Both clauses form part of the home loan agreement entered into between SBSA and the first Respondent. Clause 9.7.2 operates as a suspensive condition in favour of SBSA, as is evident from the wording of clause 10, which indicates that in the event the resolution is not provided within 6 months, SBSA reserves their rights to withdraw from or/or terminate the home loan agreement, on written notice to the first Respondent. The provision of the certified copy of the resolution follows from the resolution to be taken in terms of clause 9.7.2 and therefor similarly operates within the discretion and in favour of SBSA.

20. Absent an allegation that such a written notice has been received by the first Respondent in terms of which the agreement is withdrawn from or terminated, the "suspensive conditions" referred to by the Respondents is of no assistance to them.

21. To hold otherwise would on a practical level, in the words of the applicant, be "farcical" when one considers that the second respondent is the sole member of the first respondent. He does not deny receiving the loan amount, using it to acquire the property or that the first

respondent is in default. Instead his defence is based on the technicality that he failed to authorise himself in writing to conclude the loan agreement.

22. The applicant correctly refers to the following explanation of the concept of 'alter ego' as per *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* [2003] 1 All SA 164 (C):

"A company is said to have been the 'alter ego if its controlling shareholders where it does not, in truth, carry on its own business or affairs but acts merely in the furtherance of the business or affairs of its shareholders, in other words, its controllers do not treat it as a separate entity, at least not in the full sense. Although the form is that of a separate entity carrying on business to promote its stated objects, in truth the company is a mere instrumentality or business conduit for promoting, not its own business or affairs, but those of its controlling shareholders. For all practical purposes the two concerns are in truth one. In these cases there is usually no intention to defraud although there is always abuse of the company's separate existence (an attempt to obtain the advantages of the separate personality of the company without in fact treating it as a separate entity".

23. The defence raised is therefore not one that prima facie would be successful if proven at trial. As such summary judgment is also granted in favour of the Applicant.

24. I note that, despite the property being owned by the first respondent (a juristic person) the Applicant has indicated that this Court should set a reserve price. I have had regard to the submissions made by the applicant in it's "affidavit in support to declare property specially executable"[4] and will set a reserve price of R850 657-87

ORDER

25. In the result, the following order is made:

1.The application for condonation for late delivery of the affidavit resisting summary judgment is dismissed.

2. The Court grants summary judgment in favour of the Applicant against the First Respondent, jointly and severally with the Second Defendant, the one paying the other to be absolved, for:

2.1. Payment of the sum of R1 246 102.05, of which the maximum amount that may be recovered from the second Respondent shall be R1 170 000.00;

2.2 Interest on the abovementioned amount at the rate of 10,240% per annum from 7 November 2022 to date of payment, both dates inclusive;

3. That the immovable property described as:

[4] Case Lines 003-27

A unit consisting of-

(a) Section No. 48 as shown and more fully described on Sectional Plan No. SS416/2001, in the scheme known as TURTLE CREEK in respect of the land and building or buildings situated at KOSMOS EXTENSION 5 TOWNSHIP, LOCAL AUTHORITY: MADIBENG LOCAL MUNICIPALITY of which section the floor area, according to the said sectional plan, is 142 (ONE HUNDRED AND FORTY TWO) square meters in extent; and

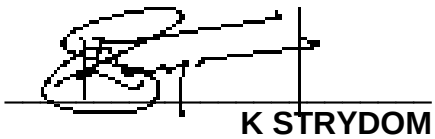
(b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan HELD BY DEED OF TRANSFER NUMBER ST75242/2019 ("the Property")

be declared executable for the aforesaid amounts.

4. The issuing of a writ of execution in terms of Rule 46 as read with 46A for the attachment of the property is hereby authorised;

5. The reserve price for the property as described at a sale in auction shall be R850 657-87

6. The first and second Respondents are ordered to pay the applicant's costs of suit on attorney and client-scale



K STRYDOM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

Applicant's written submissions receive: 31 October 2023

Respondent's written submissions received: 1 November 2023

Judgement delivered: 01 February 2024

Appearances:

For the Plaintiff: Adv Xolisa Hilita

For the Defendant: Adv Butler J