IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11066/2021P

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **PLAINTIFF**

and

ZENZO KHULUMANGIFILE ZUNGU **DEFENDANT**

REASONS FOR JUDGMENT

HENRIQUES J

[1] On 11 May 2022, I granted summary judgment as prayed for in the application against the respondent for payment of the sums of R311 179,85 and R166 190,83 together with interest and costs of suit on the attorney and client scale.

[2] The defendant, although not present in motion court, was represented by Ms S. Ndaba of Ndaba & Associates who confirmed having been instructed to make a settlement proposal to the plaintiff's attorneys of record that morning, which was rejected. She confirmed that she advised the defendant that in the event of the settlement offer not being accepted, judgment would be entered against the defendant

and the ramifications of this were explained to him. Having satisfied myself that the defendant was legally represented at the time and further, that the ramifications of a default judgment had been canvased with him, judgment was entered as prayed for.

The cause of action

[3] The plaintiff instituted action against the defendant in respect of a written guarantee signed by the defendant in favour of the debts and liabilities of ZKZ Security CC of which he was the sole member.

[4] In the particulars of claim, the plaintiff pleads that on 18 September 2014, the plaintiff and ZKZ Security CC also concluded a written fleet management system agreement in terms of which the plaintiff provided ZKZ Security CC with a credit card facility, repairs, fuel purchases and related on-road costs. On 5 July 2019, the defendant concluded a written guarantee in favour of the plaintiff limited to an amount of R1 million and unconditionally guaranteed and undertook to pay the due, punctual and full payment of all the debts which ZKZ Security CC owed or may owe in the future to the plaintiff.

[5] The plaintiff further pleads that on or about 30 December 2019, it and ZKZ Security CC, duly represented by the defendant, concluded a written overdraft agreement. In terms of such agreement the plaintiff lent and advanced an amount of R550 000 to ZKZ Security CC which would attract interest in terms of the loan agreement.

[6] It is common cause that ZKZ Security CC breached the agreements aforementioned and committed an act of default as it was placed into provisional liquidation by order of this court on 6 October 2021. Pursuant to the defendant's guarantee for the debts of ZKZ Security CC, the defendant is indebted to the plaintiff for the amounts as claimed.

[7] The defendant who opposed the action, filed a plea raising two defences. The first is a point *in limine* in terms of which he alleges that the plaintiff was obliged to comply with the pre-emptory provisions of s 129 of the National Credit Act 34 of 2005 (the NCA) prior to instituting the legal proceedings against the defendant. The second

defence is that the plaintiff agreed to facilitate a debit order against the bank account of Ncwane Investments (Pty) Ltd of which the defendant is the sole director and shareholder. The defendant alleges that the plaintiff unilaterally terminated the debit order resulting in ZKZ Security CC's account falling into arrears.

[8] In respect of the first point *in limine*, the defendant avers that the NCA is not applicable to the agreements between the plaintiff and ZKZ Security CC but applies to the claims against him as he is a natural person. In my view, the plaintiff is correct that there was no need for it to comply with the provisions of the NCA as the defendant is sued as a guarantor for ZKZ Security CC obligations in terms of a credit transaction to which it is common cause the NCA does not apply.

[9] In *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T), the court held that '[a] surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship [and that] signing as surety and co-principal debtor does not render a surety liable in any capacity other than [that of] a surety who has renounced the benefits of excussion and division'.

[10] The court also found that *in casu* the second respondent was sued as a guarantor to the obligations of the first respondent in terms of a credit transaction to which the Act did not apply. It therefore followed that he could not claim that he was entitled to have received a s 129 notice in terms of the NCA (because the NCA did not apply to the principal obligation).

[11] In *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ), the court held the following:

'[9] The defendants contend, however, that the National Credit Act does apply to sureties who are natural persons. This approach is incorrect as s 4(2)(*c*) of the National Credit Act provides expressly that the Act "applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted". It is accordingly evident that the National Credit Act does not apply to a suretyship if the principal debt does not arise from a credit agreement which falls within the scope of the Act.

[10] This conclusion is also confirmed by the provisions of s 8(5) of the National Credit Act, to the effect that a credit guarantee constitutes a credit agreement for purposes of the Act only if in terms of the credit guarantee a person undertakes or promises to satisfy an obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies. Since the National Credit Act does not apply to the credit transaction which gave rise to the principle debt, the suretyships in the present matter do not constitute credit agreements for purposes of the Act…The plaintiff was accordingly not obliged to give notice to the defendants, as required by s 129 of the Act in respect of credit agreements which are subject to the National Credit Act.'

[12] In respect of the second defence, the plaintiff admits that ZKZ Security CC was reducing its indebtedness by way of a monthly debit order from Ncwane Investments (Pty) Ltd, a related entity. However, the debit order lapsed automatically as it was returned unpaid on two occasions.

[13] I agree that these defences raised do not constitute a defence to the plaintiff's claim and is also indicative of the breach of the agreements by ZKZ Security CC and the defendant's liability. In addition, having regard to paragraph 3 of the defendant's plea, he admits the arrears of ZKZ Security CC and consequently there is no defence to the plaintiff's claims against him.

[14] The provisions of Rule 32 apply in circumstances where a plaintiff can prove that a defendant has no bona fide defence to its claims and that a notice of intention to defend and plea has been delivered solely for the purposes of delay.[1] Given the nature of the defences advanced by the defendant, I am of the view that he has no

[1] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), the court stated:

'[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment.'

bona fide defence to the action and claims of the plaintiff and it is for those reasons that summary judgment was granted as prayed for in the notice of application.

Costs

[15] In addition, given that the plaintiff has been successful, there is no reason to depart from the usual order in relation to costs and both agreements make provision for costs of suit on an attorney and client scale and there is no reason to depart from same.

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HENRIQUES J

CASE INFORMATION

APPEARANCES

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Date of orders	:	11 May 2022
Date of reasons	:	21 June 2022