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
DATE: 05 April 2024
SIGNATURE: ……

CASE NUMBER: 001873/2023

In the matter between:

ABSA BANK LIMITED	**APPLICANT**
And	
MONALEBO HOLDINGS (PTY) LIMITED	**FIRST DEFENDANT**
MONABUDI GABRIEL SEBOTHOMA	**SECOND DEFENDANT**

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 05 April 2024*.

Summary: *Summary judgment application-Rule 32. Credit sale agreement-cancellation. Surety obligations and credit guarantor obligations. First Defendant liquidated and Second Defendant to satisfy the debt due not premised on the principal obligation but based on the surety agreement. Summary judgment granted in favour of the applicant and Second Defendant also ordered to pay the costs on an attorney and client scale.*

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This is an application for a summary judgment against the Second Defendant in terms of Rule 32 of the Uniform Rules of the Court for the payment of R658 000.59 plus 12% interest linked per annum, capitalized from 05 April 2023 to date of payment, both days included. The First Defendant was placed under provisional liquidation on 23 February 2023 subsequent to the institution of this action and the applicant sought relief against the Second Defendant based on the surety agreement signed on 21 May 2021.

[2] The application was opposed by the Second Defendant for the reasons to be highlighted hereunder.

[3] The applicant prayed for an order:

[3.1] Confirming the cancellation of the agreement;
[3.2] Payment of the sum of R658 000.59;
[3.3] Costs of suit and
[3.4] Further and or alternative relief.

[4] This brings us to the content of the facts from where and how the dispute emanated.

Background

[5] The parties entered into an instalment sale agreement (credit agreement) for the purchase of a 2016 Mercedes-Benz motor-vehicle on 28 May 2021 which was preceded by the signage of the suretyship agreement on 21 May 2021. The Second Defendant bound himself as a co-principal debtor for the obligations of the First Defendant regarding the said credit agreement. The First Defendant defaulted in honouring the credit agreement payments with an outstanding balance of R658 000. 59 and arrear amount of R186 931.92 as of 24 April 2023. The applicant issued summons on 16 January 2023 for the recovery of the outstanding amount with interest as indicated herein and appearing in the particulars of claim.

[6] The Second Defendant opposed the application arguing that the applicant sought relief for the return of the vehicle in the summons against both defendants, thus, claiming monetary relief against the Second Defendant only in the application for the summary judgment. Further, the Second Defendant submitted that Ms Pearl Matshaya, was not authorised to sign the affidavit on behalf of the applicant to the extent of not having personal knowledge of the facts in dispute. Also, the applicant was precluded by Rule 32(2)&(4) to disprove the facts raised by the Second Defendant. In addition, the credit agreement was signed as a 'credit guarantor' because 'suretyship is not just the vehicle for a surety to be jointly liable with the principal but also functions as a credit guarantee'. The applicant, having registered as a credit provider in terms of section 40 of the National Credit Act 34 of 2005 (NCA), the Second Defendant is entitled to protection afforded by various provisions as envisaged in the NCA which the applicant has failed to comply with. In this regard, a credit agreement, unlike surety, is not subject to the threshold limitation of the NCA. The Second Defendant raised a plethora of defenses in that the applicant was not entitled to cancel the credit agreement, the latter was not signed, certificate of balance by a manager cannot be a *prima facie* proof of the amount owing due to the uncertainty of the proceeds of the sale and liquidation. The Second Defendant prayed for the dismissal of the applicant's claim in that the latter's plea amounts to collusion or unfair practices as envisaged in section 40 of the CPA. Also, for the agreement to be declared void or set aside as per sections 52(3)(b)(iii) and 52(4)(a)(i)(bb) and or 52(4)(bb) of the CPA. In essence, the Second Defendant boldly denied that the applicant is entitled to be granted the relief sought.

Analysis of evidence

[7] It is common cause between the parties that a credit agreement was entered into, and after the institution of this action, the First Defendant was placed on liquidation. The primary issue which was misdirected by the Second Defendant was the status of a 'surety' and 'credit guarantee' in 'credit agreements'. The Second Defendant boldly stated that he signed the agreement as a 'credit guarantor' and not as a 'surety'.

[8] I do not intend to make superfluous analysis and distinction between these concepts, thus, for purposes of clarity on the substance of this case, it is imperative that I provide a brief overview of the interrelationship between them. For the argument in the present matter, a 'surety agreement' is an accessory obligation after the principal debtor defaulted in paying the primary obligation, (Molahlehi J in ***PG Group (Pty) Ltd v Amoretti*** **(7151/2021 [2023] ZAGPHJHC 6,** ***para 19****)*. This means that the surety obligation is dependent on the failure of the principal debtor to undertake the envisaged principal responsibilities. It is the *failure itself* to satisfy the debt due that the principal creditor may have the right of recourse to claim the outstanding amount from the 'surety'. Makgoka JA in ***Liberty Group Limited v Illman*** **(1334/2018) [2020] ZASCA 38** endorsed the legal status of surety and held '*the surety's obligation is merely to guarantee performance by the principal debtor. Given a suretyship's accessorial nature, the liability of a surety is tied to that of the principal debtor. If the claim against the principal debtor became prescribed or ceased to exist, the claim against the surety likewise became prescribed or otherwise ceased to exist*', ***para 10***. Of further importance is the voluntary nature of the obligation regarding the signage of the suretyship agreement wherein the surety consents to be bound by the obligations as envisaged in the principal debt should the principal debtor fail to honour the said obligations. This is the framework for credit agreements in that parties must voluntarily enter legal and binding obligations without a shadow of doubt regarding the nature of their responsibilities. I need not go any further about the suretyship status as the Supreme Court of Appeal (SCA) in ***Van Zyl v Auto Commodities (Pty) Ltd*** **(279/2020) [2021] ZASCA 67** put a final '*nail in the coffin*' on the definition of what constitutes a 'surety agreement' and held:

> *a contract of suretyship is distinct from the contract or contracts between the principal debtor and the creditor that give rise to the principal indebtedness, but it*

is accessory to that contractual relationship and the principal debtor's obligations under it. Subject to any specific limitation, such as a suretyship in a limited amount, the surety's obligations are coterminous with those of the principal debtor. Where the surety signs as co-principal debtor, as Mr van Zyl did, the addition of those words shows that the surety is assuming the same obligations as the principal debtor. In other words, the obligation of the surety is the same as that of the principal debtor. It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal debtor', (para 11, all footnotes omitted).

[9] On the other hand, a credit guarantor or guarantee is foundational to a credit agreement as envisaged in section 8(5) of the NCA which reads as follows:

an agreement, irrespective of its forms but not including an agreement contemplated in subsection 2, constitutes a credit if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation in terms of a credit facility or a credit transaction to which this Act applies.

[10] It is in line with this definition that I do not intend to qualify the Second Defendant's argument about the applicant's non-compliance with the various provisions of the NCA to an extent of alleging that he did not waive the rights as provided in the said provisions. The Second Defendant sought to distract this court from the interpretation and meaning of a creditor guarantee which he viewed it exclusively of the primary responsibility of satisfying a 'debt due'. These concepts, through the lens of a purposive approach on their interpretation are interrelated and not distinct from each other as they are foundational to the satisfaction of the debt due. The slight distinction is that on a suretyship agreement, the surety is a co-principal debtor which would be enforceable as soon as the principal debtor fail to honour the debt due. On the other hand, a credit guarantor is not a primary party to the agreement but serves as what I would refer to as a '*safety valve*' for the principal creditor wherein the latter may institute a claim for the amount due. In essence, they capture the same principle of the existing need to pay the debt due on demand which entails an underlying interrelationship that exists between the surety and the guarantor in a credit agreement.

[11] Binns-Ward J in ***Standard Bank of SA Ltd v Adam Essa*** **(18994/2009) [2012] ZAWCHC 265** similarly expressed that the '*definition of 'credit guarantee' in s 8(5) of the Act may be wide enough to encompass a contract of guarantee related to the performance by another of person of his or her obligations under a contract qualifying as a credit facility or a credit transaction, as well a contract of suretyship intended to provide a form of the performance of its obligations by a principal debtor under a credit agreement in terms of section 8(3) or 4 of the NCA*, (*para 14, all footnotes omitted*). In giving substance to Binns-Ward J extension of the definition of a credit guarantee, I am persuaded by Mshila J in ***Home Afrika Limited v Ecobank Kenya Limited*** **[2023] KEHC 1802 (KLR)** citing with approval ***Peter Munga v African Seed Investment Fund LLC*** **[2017] eKLR** that *'a creditor has a free hand, when to act and on which security, without any direction by the debtor, sureties or the court, unless parties have expressly agreed to the contrary and the security documents themselves stipulate the agreement', (**para 18**).* It is my considered view, in the context of the present matter, the Second Defendant, whether he is surety or credit guarantor, the foundational principle is to pay the amount due and not for him to dictate to the applicant how to identify the person whom he sought to recover the amount due. Particularly, there is no disagreement regarding the common cause of the dispute, the existence of a credit agreement, wherein the First Defendant defaulted from fulfilling the terms as agreed. The undisputed subject matter of the original credit agreement which was based on the Second Defendant's liability regarding the original principal debt was owed at the time of instituting this action, (***Shabangu v Land and Agricultural Development Bank of South Africa*** **2020 (1) BCLR 110 (CC)** *paras 23-25*).

[12) The Second Defendant also took aim at what he alleged as the misapplication of Rule 32 of the Uniform Rules of the Court in this matter regarding the liquidated amount in summary judgments. This Rule, with effect from 01 July 2019, was amended to read as follows:

> *(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only:*
>
> *(a) on a liquid document.*
>
> *(b) for a liquidated amount in money.*
>
> *(c) for delivery of specified movable property; or*

(d) for ejectment, together with any claim for interest and costs.

[13] The import of Rule 32 was contextualised by Navsa JA in ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*** **(161/08) [2009] ZASCA 23** and held:

> *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. […] first, 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. […] …[and] that recalcitrant debtors pay what is due to a creditor. Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, … […], (paras 32-33, all footnotes omitted).*

[14] The essence of a summary judgment, particularly with the exercise of the judicial discretion on its enforcement, Binns-Ward J in ***Tumileng Trading CC v National Security and Fire (Pty) Ltd and Others*** **(3670/2019) [2020] ZAWHC 28** held that '[the] amendment [of Rule 32] has not changed the test that is prescribed in [its] subsection 3 for a *bona fide* defence which serves as a catalyst for the validity of the defence against the application', (***para 13***). In turn, the applicant must show that the defendant is *mala fide* as pleaded [as is the case] in this case, (***para 22***). In the present matter, having read Rule 32 'holistically' and not the subsections independently of each other, it is my express opinion that the Second Defendant's defence that the claim is not in a liquidated amount is without substance. The rule entails the link and interdependence of a claim for a movable property and liquidated amount. The movable property claimed (2016 Mercedes Benz) is foundational to the liquidated amount which is correctly reflected in

the particulars of claim and certified in the Certificate of Balance. The Second Defendant misplaced the *goal post* regarding the centrality of Rule 32 on the enforcement of summary judgment applications.

[15] The Second Defendant is hypocritical in taking responsibility towards fulfilling the original debt by refuting that he is 'surety' instead as 'credit guarantor' which also means that on its broader interpretation, he is still the carrier of the duty to satisfy the outstanding amount. The Second Defendant did not dispute the signage of the suretyship agreement and argued 'uncertainty regarding the nature of the principal debt not capable of being determined by reference to the said agreement and is subject to the proceeds of sale and liquidation'. I find it discomforting that the Second Defendant without evidence of duress in the signage of the surety agreement as correctly captured in the Surety greement (paragraph 2 of the SJ4 document) bound himself for the debts and future liabilities including any associated interest and costs against the First Defendant. The defenses lack merit in that the underlying obligation which is not disputed is the agreements (credit and surety) that serve as a framework towards his duty to satisfy the debt due. This court is not to rely on technical concerns about the identity of the debtors at the expense of the broader view regarding the fulfilment of the secondary obligations towards the satisfaction of the debt due.

[16] That brings me to the Second Defendant's dismissal of the legitimacy of the affidavit signed by Ms Matshaya which is also disingenuous by unfairly, through the '*tom's peeping eye*' sought to discredit the quality and qualification of the applicant's employees in executing their duties. Ms Matshaya is the *Legal Recoveries Manager of Business Banking and Wealth Recoveries Department* of the applicant, as reflected in the affidavit, (***para 1***). The Second Defendant gave the impression that the applicant's legal archives are dependent on a particular individual at the time the case is made. I need not legitimise the Second Defendant's argument regarding this aspect because the applicant, as a juristic person its record-keeping is not attached to an individual and or anyone within the portfolio. I am persuaded by the applicants Counsel with the reference to ***Shackleton Credit Management v Microzone Trading*** **(2010) 5 SA 112 (KZP)** judgment wherein the court held '*first hand knowledge which goes to make up the applicant's cause of action is not required and where the applicant is a corporate entity the deponent may well legitimately rely on records on company's possession for*

personal knowledge of at least certain of the relevant facts and the ability to answer positively to the facts', (*para 13*). The Second Defendant is '*clutching a dry bone by the straws*' to evade the satisfaction of the debt because, as read from the affidavit, it is evident that Ms Matshaya understands the substance of the facts and case presented before this court. A wild allegation about Ms Matshaya not having personal knowledge of the dispute, I repeat, is the '*chase of a wild goose*' with no substance. This is also an attack on the intellectual integrity of the applicant in the determination of the ripeness of the matters that need to be lodged before this court.

[17] It is my considered view that the defenses raised by the Second Defendant against the application for a summary judgment are bad in law and without merit and the application must succeed as envisaged in the particulars of claim. Of further consideration, the legitimacy and or validity of the credit agreement was not in dispute as attached in the particulars of claim and the Second Defendant having engaged in a frivolous litigation should bear the costs of this application.

[18] Accordingly, it is ordered as follows:

[18.1] a summary judgment is granted in favour of the applicant for the payment of the sum of R658 000.59; together with interest of 12% per annum from the date upon which amount became due (05 April 2023) until final payment.

[18.2] Cancellation of the agreement.

[18.3] The costs are granted against the Second Defendant to pay the applicant on an attorney and client scale.

NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date Heard: 02 November 2023

Date Delivered: 05 April 2024

***Appearances*:**

Plaintiff:	Advocate Jacklin Kiarie Cnr Dely and Pinaster Avenue Pretoria
Respondents:	Advocate CW Havemann 307 West Street Pretoria North