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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No

DATE SIGNATURE

Case No.: 41105/2019

In the matter between:

THE STANDARD BANK OF SA LIMITED **Applicant**

and

FENESTRATION TECHNOLOGIES (PTY) LIMITED
(REGISTRATION NO: 2003/013371/07) **First Respondent**

OWEN SEAN PRICE
(ID NO: […]) **Second Respondent**

LINDA ELIZABETH PRICE
(PASSPORT NO: […])
DATE OF BIRTH: […]) **Third Respondent**

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email.

Gilbert AJ

1. The applicant instituted proceedings against the first respondent (the principal debtor) based on five banking facilities and against the second and third respondents as sureties. Full sets of affidavits were filed by all the parties together with heads of argument and practice notes and the matter was duly enrolled for hearing on the opposed roll.

2. The day before the matter was to be heard the attorneys of record for the respondents withdrew. When the matter was called for hearing on the opposed roll on the morning of 4 August 2020, there was an appearance for the applicant but not for the respondents.

3. The applicant's notice of motion is divided into two parts. Part A, consisting of five claims, seeks judgment and related relief in respect of five banking facilities, more particularly in respect of a business current account upon which overdraft facilities were advanced, a fleet management card facility, a corporate credit card and two instalment sale agreements for equipment. Part B seeks relief in relation to execution against the sureties' immovable properties. What is before me is Part A of the relief.

4. Each of the applicant's claims are pleaded in a similar manner in the founding affidavit:

4.1. the conclusion of the relevant agreement is pleaded;

4.2. the terms of the relevant agreement are pleaded;

4.3. performance by the applicant in terms of the agreement is pleaded;

4.4. the breach of the agreement by the principal debtor is pleaded;

4.5. demand for payment of the arrears is pleaded;

4.6. cancellation of the agreement is pleaded;

4.7. lastly, the full outstanding amount under each agreement is pleaded.

5. The applicant averred in its founding affidavit by way of breach in respect of the overdraft facility (Claim A) as follows:

> "*47. The First Respondent has breached the terms of the agreement by failing to make timeous payment of the amounts due in terms thereof. As at the 6 June 2019 the outstanding amount was R7,016,001.21 (SEVEN MILLION, SIXTEEN THOUSAND, ONE RAND AND TWENTY ONE CENTS)*."

6. There was similar pleading of the breach in respect of the fleet management card facility (Claim B) and the corporate credit card facility (Claim C).

7. No averments are made in the founding affidavit as to the breach in respect of these facility agreements for Claims A, B and C, other than payment was not timeously in terms of the relevant agreement. No averments are made as to which amounts were not paid timeously and why those amounts were overdue. No link is pleaded between the averred breach by non-timely payment with a specific term of the many pleaded terms of the particular agreement.

8. I raised with the applicant's counsel that the breach as pleaded in respect of the overdraft facility (Claim A) did not specify what amounts had not been timeously paid in terms of the overdraft facility and which resulted in a breach of that agreement. No specific terms of payment in respect of the overdraft facility were pleaded and then relied upon by the applicant as underlying its averment of breach. Recourse to the applicant's demand of 19 June 2019, which is the earliest demand found in the papers, does not assist as in that demand, "FA4" to the founding affidavit, the assertion is made by the applicant that the principal debtor is already in arrears in an amount of R7,016,001.21, which equates to the then full balance outstanding. That demand does not shed any light on why that amount was in arrears as at 19 June 2019.

9. The applicant's counsel submitted that as the overdraft facility was repayable on demand, that the applicant was entitled to call for payment of the outstanding amount in terms thereof. But this is not what is relied upon by the applicant in its founding affidavit. As appears above, the applicant specifically pleads reliance upon the failure to make timeous payment as constituting the breach of the agreement. It follows that for the amount of R7,016,001.21 to have already been in arrears on 19 June 2019, as reflected in the demand "FA4", that something must have happened before that date which resulted in that amount being in arrears. In the absence of any indication on the papers that the applicant had prior to 19 June 2019 called-up the overdraft facility upon reasonable demand, the factual basis for the assertion by the applicant in paragraph 47 of its founding affidavit remained elusive.

10. The applicant's counsel submitted that this deficiency can be addressed by the applicant instead relying upon clause 10.1 of the Standard Terms and Conditions for the overdraft facility and more particularly clause 10.1.1:

> "*10.1 Default in terms of this Overdraft Agreement will occur if:*
>
> *10.1.1 you breach this Overdraft Agreement, or any agreement between us, and you fail to remedy the breach within the time period specified in our written notice to you.*"
>
> (my emphasis)

11. I was also referred to clause 10.2, which provides, in the relevant portion thereof:

> "*10.2 Overdraft facilities are repayable on demand and if you default in your obligations under this overdraft facility we may …*
>
> *…*
>
> *10.2.3 terminate the facility by giving you written notice requesting the repayment of all amounts owing to us:*
>
> *10.2.3.1 immediately; or*
>
> *10.2.3.2 on the date stated in the notice.*"

12. Counsel's argument then progressed that as the principal debtor had defaulted in respect of the other four facility agreements (as described in claims B, C, D and E), those defaults constituted a cross-default in respect of the overdraft facility and so justified the applicant in calling up the overdraft facility in terms of clause 10.1.1 read with clause 10.2.2..

13. This is not the case pleaded in the founding affidavit on the overdraft facilities. The case pleaded in the founding affidavit is based squarely upon the principal debtor breaching the overdraft agreement by failing to make timeous payment <u>in terms of that overdraft agreement</u>. There is no pleaded reliance in the founding affidavit on a cross-default.

14. The applicant in paragraphs 22.3, 23 and 24 of its replying affidavit does rely upon the breach of the other facility agreements as a basis for calling up the overdraft.

15. Accordingly, I am to decide whether it is permissible for the applicant to rely upon what is set out in its replying affidavit to address the deficiencies in its founding affidavit, at least in relation to the overdraft facility (Claim A) and also claims B and C that suffer from the same deficiency.

16. But before dealing with this issue, it is necessary to consider whether the applicant can rely upon a failure by the principal debtor to have made payment in terms of the other banking facilities as an event of default in respect of the overdraft facility.

17. Although the terms of the overdraft facility expressly provides that the applicant can do so, the defence advanced by the respondents is that the reason why the principal debtor was unable to pay the arrear amounts in terms of the other banking facilities was because of the premature termination by the applicant of the overdraft facility. The respondents contend that the applicant cannot rely upon a failure to pay the other facilities where it caused the principal debtor not to pay the amounts outstanding on those facilities by its own unlawful conduct in prematurely terminating the overdraft facility, and so depriving it of access of funds to pay the amounts on the other facilities.

18. The applicant's counsel submitted that this assertion by the respondents in their answering affidavit is factually unsustainable, and false, in that the other facilities were already in arrears before there was any termination of the overdraft facility. As a matter of logic, for the respondents' opposition to succeed on this basis it is necessary for the overdraft facilities to have been terminated before the amounts in terms of the other facilities became overdue. If the amounts under the other facility agreements were already in arrears, a subsequent termination of the overdraft facilities cannot be advanced by the respondent as excusing those accounts being in arrears.

19. Counsel progressed his argument that if regard is had to the demands of 19 June 2019, the other facilities were already in arrears as at that date. The applicant's demands of 19 June 2019 forewarned that if the arrears were not settled that *inter alia* the applicant may cancel the agreements. But those demands to not cancel (or even suspend) the overdraft facility.

20. The applicant also avers in paragraph 75 of the founding affidavit the breach of the two instalment sale agreements by the failure to make timeous payment of specified arrear amounts in respect of each agreement. The amounts reflected in this paragraph accord with those set out in the demand of 19 June 2019 relating to the two instalment agreements. These two instalment sale agreements were already in arrears as at 19 June 2019.

21. Based upon the material that appears from the affidavits, the principal debtor was already in arrears as at 19 June 2019 on the remaining facilities. And as the overdraft facility was only terminated on 24 July 2019, that termination could not have caused the other facilities to be in arrears.

22. This also demonstrates the falsity of the respondents' factual averment in paragraph 24 of their answering affidavit that *"[w]hen the Applicant demanded that the First Respondent should settle the amounts outstanding in respect of the further accounts held by the First Respondent with the Applicant, the Applicant was in breach of the tacit Overdraft Agreement… in that it unlawfully terminated the First Respondent's overdraft facility".* The overdraft facility was only terminated on 24 July 2019. Demand has already been made in 19 June 2019. And so when demand was made, the overdraft facility not yet been terminated.

23. I am persuaded that the papers read as a whole establish that there had been breaches of the other facility agreements that were not caused by a termination of the overdraft facility and the respondents' factual contention to the contrary is to be rejected.

24. Accordingly the cross-default relied upon by the applicant in its replying affidavit to trigger the calling-up of the overdraft in terms of clause 10.1.1 has been factually established and is legally sustainable.

25. The issue that then remains is whether I in my discretion should permit the applicant to address the identified deficiencies in its founding affidavit, particularly in relation to its entitlement to call up the overdraft facilities, by reference to what is contained in the replying affidavit and by making use of such other material as can be extracted from the various annexes to their affidavits.

26. It is trite that the court has a discretion in this regard. The submissions made on behalf of the applicant as to why this discretion should be exercised in its favour were that:

    26.1. the relevant facts are before the Court and enable the Court to make a determination, notwithstanding what the applicant's counsel described as the clumsy pleading by the applicant of its case in its founding affidavit;

    26.2. it is clear on the facts that the other facilities were in arrears. This is especially so in respect of the two instalment sale agreements where express reference is made in the founding affidavit to the arrear amounts outstanding on those two agreements. As this appears in the founding affidavit, this then would constitute factual material contained in the founding affidavit to support the applicant's reliance upon cross-default in terms of clause 10.2.1 and that recourse need not be had to the replying affidavit or the annexes to find the facts to sustain a cross-default;

26.3. there is no suggestion of any cognisable defence to a case of cross-default. To the contrary, as appears above, the reason advanced by the respondents why the remaining accounts were in arrears is to be rejected as factually incorrect. There is no indication from the papers that if the applicant had expressly asserted reliance upon clause 10.2.1 in its founding affidavit, rather than in its replying affidavit, that some other defence might have materialised in the answering affidavit.

27. The starting point is that an applicant is required to make out its case in its founding affidavit, as it is the founding affidavit that sets out the case which the respondents are required to meet.[1]

28. An applicant is required in motion proceedings to supply both the pleadings and the evidence in its founding affidavit.[2]

29. In *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D), Miller J stated:[3]

> *"…In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet. If the founding affidavit is allowed to be supplemented by adding further facts in a replying affidavit, the consequence would often (but not necessarily always) be that a fourth and possibly also a fifth set of affidavits would be required – a situation the development of which the Court would not lightly be disposed to facilitate or encourage…*

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[1] *Titty's Bar and Bottle Store (Pty) Limited v ABC Garage (Pty) Limited* 1974 (4) SA 362 (T) at 369A/B.
[2] *Transnet Limited v Rubenstein* 2006 (1) SA 591 (SCA) at para 28; *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at para 43.
[3] From 704G to 705C and 706I to 707B (with emphasis added).

> *In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom…*
>
> *It is one thing to say that an applicant might or ought, by careful consideration of a piece of information conveyed by the respondent before commencement of proceedings to have made certain deductions therefrom which would or might have led him to investigate and discover further facts relative to his claims; it is, however, an entirely different thing to say that the applicant knew all the relevant facts when he commenced proceedings but for some unexplained reason omitted to state or rely on them in his founding affidavit – it is when that may properly be said of an applicant, that the rule against the introduction will otherwise than in very exceptional cases be strictly applied against him."*[4]

30. As appears from the analysis above, the deficiency in the founding affidavit is the applicant relies upon an inadequately pleaded breach or basis of cancellation for calling-up the overdraft facility. The basis relied upon in the replying affidavit is different, being cross-default under clause 10.1.2. The factual material to sustain the cross-default is found in the founding affidavit, particularly in relation to the arrear amounts on the two instalment sale agreements. It is not so much a question of new facts being set out or relied upon in the replying affidavit but of a species of breach that was not asserted in the founding affidavit.

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4 Cited with approval in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at para [26].

31. Although the applicant only in reply relies upon cross-default, the respondents did not, despite opposition, seek to strike out reliance upon the cross-default.

32. The respondents did have an opportunity to address the factual assertions supporting the cross-default, including the arrear amounts on the two instalment sale agreements and did so by contending, incorrectly on the facts, that the failure to pay those amounts was because of the termination of the overdraft facility.

33. For the court to approach the matter on the basis that only the founding papers must be considered to see whether the applicant discloses a cause of action, and reference must not be had to the further affidavits, may be misplaced, at least where there is no real conflict of fact on the papers.[5] I make no definitive finding in this respect but only express hesitation. As set out above, the respondents' version as to why the arrear amounts on the two instalment sale agreements were not paid can be rejected, and so there is no real conflict of fact on the papers. This then facilitates the court in its discretion to have regard to what is set out in the replying affidavit, and indeed in all the affidavits, for purposes of ascertaining whether a sufficient cause of action has been made by the applicant.

34. What also weighs heavily upon me is that there is no denial that monies were lent and advanced by the applicant to the principal debtor under the

[5] See *Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA) at 779E-780C (as subsequently applied in *Contract Employment Contractors (Pty) Limited v Motor Industry Bargaining Council and others* 2013 (3) SA 308 (C), qualifying *Hart v Pinetown Drive-in-Cinema* 1972 (1) SA 464 (D).

various facilities, and that they had not been repaid. Should the court not exercise its discretion in favour of the applicant, the applicant would have to initiate proceedings afresh, but this time perhaps taking more care in the drafting of its founding affidavit. In my view to penalise the applicant for an absence of exactitude in its founding affidavit in circumstances where the respondents have not intimated any substantive defence cannot be in the interests of any of the parties. Interest will have continued to accrue on the outstanding amounts, and this too cannot be in the interests of the respondents. Further legal proceedings together with the costs and delay attendant thereupon should in these circumstances be avoided.

35. The “clumsiness”, as the applicant’s counsel described the applicant’s pleading of its case, is regrettable. (I interject that there is no indication that the applicant’s counsel was responsible for settling the applicant’s papers). It appears that the founding affidavit was a product of “cut-and-paste” from precedent, with a replication of that material across the five claims making up the founding affidavit, with little attention to adapting that material to the task at hand. The same can be said of series of demands and cancellation letters annexed to the founding affidavit, which conflate material relevant to the principal debtor with that relevant to the sureties.

36. This clumsiness in pleading resulted in an unnecessary burden for the court, and is to be avoided. Nonetheless with the industriousness of applicant’s counsel coupled with the court’s exercise of its discretion, as

described above, a sufficient case has been made out on the papers to enable judgment to be granted in favour of the applicant in respect of Part A of the notice of motion.

37. An order is granted as follows:

1. Claim A: Business Current Account – 023298316

1.1. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay and cause the Applicant to be paid the sum of R7,016,001.21;

1.2. Interest on the sum of R7,016,001.21 at the rate of 13,330% per annum calculated daily and compounded monthly in arrears from 25 May 2019 to date of payment in full;

1.3. Costs on an attorney and client scale;

2. Claim B: Fleet Management Card Facility – 17537517

2.1. The respondents are ordered jointly and severally, the one paying the other to be absolved, to pay and cause the applicant to be paid the sum of R138,735.84;

2.2. Interest on the sum of R138,735.84 at the rate of 12,25% per annum calculated daily and compounded monthly in arrears from 6 June 2019 to date of payment in full;

2.3. Costs on an attorney and client scale;

3. Claim C: Corporate Credit Card – 4215769730028365

3.1. The respondents are ordered jointly and severally, the one paying the other to be absolved, to pay and cause the Applicant to be paid the sum of R30,103.70;

3.2. Interest on the sum of R30,103.70 at the rate of 23,35% per annum calculated daily and compounded monthly in arrears from 10 May 2019 to date of payment in full;

3.3. Costs on an attorney and client scale;

4. Claim D: Instalment Sale Agreement – 40205916 0004

4.1. Confirmation of cancellation of the agreement entered into between the applicant and the first respondent attached to the Applicant's founding affidavit as annexure 'FA20';

4.2. The sheriff of, or his lawful deputy are authorised, directed and empowered to attach, seize and hand over to the Applicant the assets being:

4.2.1. Description: SBZ140 CNC MACHINE 9.7MTR and DOUBLE MITRE SAW 7.5MTR;

4.2.2. Serial Number: 40799 and 1040099180.

4.3. Damages are postponed *sine die*;

4.4. In the event of there being a shortfall after each asset has been repossessed and sold and there being a balance outstanding by the respondents to the applicant, the applicant is granted leave to approach the Court on the same papers, duly supplemented, for payment of the difference between the balance outstanding and the amount for which the asset has been sold and/or the value of the asset;

4.5. Costs of suit on the scale as between attorney and client;

5. Claim E: Instalment Sale Agreement – 40205916 0005

5.1. Confirmation of cancellation of the agreement entered into between the applicant and the first respondent attached to the Applicant's founding affidavit as annexure 'FA21';

5.2. The sheriff, or his lawful deputy is authorised, directed and empowered to attach, seize and hand over to the applicant the assets being:

5.2.1. Description: 1 NEW VERTICAL CNC MACHINING CENTRE ALU RANGER 4221 ONE R;

5.2.2. Serial Number: 17.642.001.

5.3. Damages are postponed *sine die*;

5.4. In the event of there being a shortfall after each asset has been repossessed and sold and there being a balance outstanding by the respondents to the applicant, the applicant is granted leave to approach the Court on the same papers, duly supplemented, for payment of the difference between the balance outstanding and the amount for which the asset has been sold and/or the value of the asset;

5.5. costs of suit on the scale as between attorney and client;

6. Part B of the notice of motion is be postponed *sine die*.

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Gilbert AJ

Date of hearing:	4 August 2020
Date of judgment:	7 August 2020
For the Applicant:	J C Viljoen
Instructed by:	Stupel & Berman Inc.
For the Respondents:	No appearance (Heads of argument prepared by B C Stoop SC, on instructions of Molenaar & Griffiths (North) Inc).