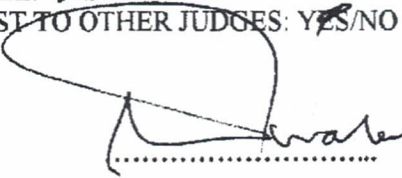


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 17482/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
	
19/06/20	
Date	ML TWALA

In the matter between:

FIRSTRAND BANK LIMITED
t/a FIRST NATIONAL BANK

PLAINTIFF

Versus

FUSHCECO CONSOLIDATED (PTY) LTD
(REGISTRATION NO: 2013/050262/07)

FIRST DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 19th of June 2020.

TWALA J

- [1] Before this Court is an application wherein the plaintiff seeks an order for summary judgment against the defendants in the following terms:
- 1.1 Payment of the sum of R303 246.56;
 - 1.2 Interest on said sum of R303 246.56 at the rate of 16.50% (prime plus 6.50%) linked, per annum calculated and capitalised monthly from 1 January 2020 to date of payment, both days inclusive;
 - 1.3 Costs in the amount of R200 (ex-vat) together with the sheriff fees.
- [2] The first defendant did not file any opposition to the claim of the plaintiff. The second defendant filed three special pleas in opposition to the plaintiff's action, however, it did not challenge the merits of the plaintiff's claim. In other words, the second defendant did not dispute the claim of the plaintiff.
- [3] The genesis of this case arises from an overdraft facility concluded between the parties in Katlehong on the 15th of December 2016 whereby the plaintiff lend to the first defendant an amount of R230 898 as an overdraft facility.

Furthermore, on the 15th of December 2016 the second defendant concluded a deed of suretyship in favour of the plaintiff binding itself as surety jointly and severally in solidum with the first defendant, for the payment on demand of any sum or sums of money which the first defendant owes or may thereafter owe to the plaintiff from whatever cause arising and the due fulfilment of all obligations of the first defendant to the plaintiff. It is further not in dispute that the first defendant has failed to make regular and sufficient deposits and credits in order to repay the facility account as agreed upon between the parties – hence the facility account is now in debit exceeding the agreed limit amount.

- [4] It was submitted by Mr Nel, counsel for the second defendant, that the plaintiff has in numerous correspondence consented to granting the second defendant leave to defend the action. Furthermore, that the second defendant stands by its papers in that the person who deposed to the affidavit in support of the summary judgment application does not have personal knowledge of the matter since it is applying for judgment in a different amount to the one claimed in the summons. It is contended further that the affidavit mentions a “she” as the deponent who appeared before the Commissioner of Oaths whereas it is a Mr Louw who deposed to the affidavit. That the papers of the plaintiff are excipiable since the plaintiff did not make out a case that it is a registered credit provider in terms of the National Credit Act. The plaintiff, so the argument goes, did not explain to the second defendant that he was signing or concluding a suretyship agreement and he did not know that he was binding himself as surety as documents were just given to him to sign.

- [5] In *Khunou & Others v Fihrrer & Son* 1982 (3) SA (WLD) the Court stated the following:

“The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.”

- [6] In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla & Another* (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014) the court stated the following:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

- [7] I agree with Advocate Denichaud, counsel for the plaintiff that the second defendant has raised only technical defences and has not answered the case of the plaintiff. There is no merit in the argument that the certificate by the commissioner describes the deponent as a female whereas he testified that he is a male. The deponent has testified in his affidavit and confirmed his testimony before the commissioner of oath. The regulation prescribes that an affidavit must be commissioned by a commissioner of oath and this has been done. Furthermore, the plaintiff submitted a further affidavit explaining the issues raised by the second defendant regarding the stamp of the commissioner not being legible. The deponent further explained his position in the plaintiff and how the information came to his knowledge in the course of his employment. It should be understood that people or employees move around and change their employ as it suits them.
- [8] It is my respectful view therefore, that it is absurd to expect that the employee who represented the plaintiff in the conclusion of an agreement with the first defendant should be the one who can testify positively about the contract. Any employee of the plaintiff who occupies the position or is tasked with dealing with such contracts is competent to testify on that contract. Further, there is no merit in the difference of figures between the summons and the certificate of balance which reflects the amount owing including the interest, fees and charges accumulated from the date of default to date of judgment. It is therefore my considered view that there was sufficient compliance with the regulation as far as the affidavit deposed to in support of the application for summary judgment. I therefore cannot find any prejudice to be suffered by the defendants in this case.
- [9] Further, it has long been settled that where there is non-compliance with the rules or regulations, the Court has discretion to condone the non-compliance.

However, the discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. The court is entitled to overlook in proper cases any irregularity which does not work to substantial prejudice to the other party.

- [10] I am unable to disagree with Advocate Denichaud that the second defendant describe himself as an adult businessman and should therefore have known that he is expected to read any document that he is signing. Moreover, the deed of suretyship has a heading in bold written 'Suretyship' and clear capital letters that this document contains "Important Legal Information" in its first paragraph. On the signature page, just below the second defendant's signature it is written "the surety's domicilium address". I therefore hold the view that a reasonable businessman in the position of the second defendant would not expect the plaintiff to read the document to him but rather would read the document himself to ascertain what he was signing. I therefore cannot but find that the second defendant knew what he was signing was a security for the first defendant to obtain the overdraft facility and that he held himself bound for the due and proper fulfilment of the obligations of the first defendant in favour of the plaintiff.
- [11] Mr Nel, counsel for the second defendant, made a veiled attempt for the postponement of the matter since the person or attorney who was dealing with it is now acting as a magistrate and was not in a position to finalise a proper affidavit dealing with the merits in this case. I refused this attempt since there was no substantive application before the Court and it was just a ploy to delay the plaintiff in obtaining the relief it sought.
- [12] It is trite that for a defendant to succeed in resisting an application for summary judgment, it must show that it has a bona fide defence to the action of the

plaintiff. Although the defendant does not have to establish such a defence as it would normally in a plea, but it must place certain facts before the Court which show that such defence may succeed in the trial that might ensue.

- [13] In the case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), the Court stated the following:

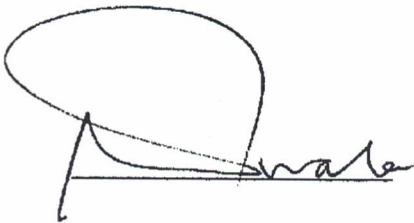
“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to 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 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by the 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. Corbett JA also warned against requiring of the defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”

- [14] In the present case, the second defendant has filed an affidavit resisting summary judgment which affidavit contained only the technical defences as enunciated above. In my view, it is not that the second defendant did not understand what the plaintiff's claim is about, but deliberately avoided to

establish a bono fide defence and to set out the nature and grounds of its defence and the facts upon which it is based with sufficient clarity to satisfy the Court that the defendant has a *bona fide* defence which is good in law. The second defendant testified in its answering affidavit that it finds no reason to make issue with the merits of the plaintiff's claim since it is of the view that its points in limine are good in law. The ineluctable conclusion is that the second defendant does not have a defence to the claim of the plaintiff and therefore the plaintiff is entitled to the relief sought.

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

1. The defendants are to pay the plaintiff a sum of R303 246.56 jointly and severally, the one paying the other to be absolved;
2. The defendants are to pay interest on the sum of R303 246.56 at the rate of 14.25% (prime currently being 7.75% plus 6.5%) linked, per annum, compounded and calculated monthly from the 1st May 2020 to date of payment, both dates inclusive;
3. Costs of suit on the scale as between attorney and client, including the costs of reserved on the 8th of August 2019.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 15th June 2020

Date of Judgment: 19th June 2020

For the Plaintiff: Adv. C Denichaud

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For the Defendants: Adv. M Nel

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