REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

SIGNATURE ..... DATE 31/3/2021

CASE NO: 31244/2020

In the matter between:

NEDBANK LIMITED	Plaintiff
And	
VERNON VAN DER WESTHUIZEN N.O	First Defendant
JAN WILLEM FREDERIK BASSON N.O	Second Defendant
STELLA CECILLIA VAN DER WESTHUIZEN N.O	Third Defendant
CHRISTOFFEL JOHANNES SMITH N.O	Fourth Defendant
JAN WILLEM FREDERIK BASSON N.O	Fifth Defendant
HESTER ELSIE SUSANNA SMITH N.O	Sixth Defendant
VERNON VAN DER WESTHUIZEN	Seventh Defendant
CHRISTOFFEL JOHANNES SMITH	Eight Defendant

RAZORBILL ECO CONSTRCUT (PTY) LTD Ninth Defendant

RAZORBILL ECO BUILDING WAREHOUSE (PTY) LTD Tenth Defendant

RAZORBILL LIGHT WEIGHT STEEL PRODUCTS (PTY) LTD Eleventh Defendant

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JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an application for summary judgment against the fourth to eleventh defendants ("the defendants").

[2] The plaintiff seeks judgment against the defendants for the amount of R 4 610 804.27, the one paying the other to be absolved, as sureties and co-principal debtors with Razorbill Properties 127 (Pty) Ltd ("the principal debtor"). The plaintiff also seeks interest on the amount outstanding, as well as costs on an attorney-client scale.

[3] It is common cause that the plaintiff concluded a facilities agreement ("the agreement") with the principal debtor on 10 December 2019 and that monies were advanced to the principal debtor in terms of the agreement. It is further common cause that the principal debtor defaulted in its obligations under the agreement and that it was subsequently liquidated. The plaintiff contends that the fourth to eleventh respondents are liable by virtue of having concluded suretyship agreements in favour of the plaintiff on behalf of the principal debtor. In proving its quantum the plaintiff relies solely on certificates of balance.

[4] The defendants allege that they have a *bona fide* defence against the plaintiff's claim as well as a valid counterclaim. They deny liability on two grounds: Firstly, it is contended that no valid agreement was entered into. Secondly, because there was no valid agreement, the plaintiff cannot rely on the certificate of balance clause in the agreement. The claim is therefore, so it is argued, not a liquidated claim.

[5] The defendants concede that if the court finds that there was a valid agreement the second ground must fail. They however still contend that they have a valid counterclaim as the amount reflected in the certificate of balance is incorrect and the plaintiff should have attached the account history of the principal debtor. They contend that they are therefore entitled to demand a statement and debatement of the account.

THE FACILITY AGREEMENT

[6] In the plea, the defendants admitted that the principal debtor concluded the agreement with the plaintiff during or about December 2019.[1] The defendants further acknowledge that monies were advanced to the principal debtor, but deny the validity of the agreement. They allege that Mr Govender, who concluded the facility agreement on behalf of the plaintiff, was not duly authorized to conclude the agreement and bind the plaintiff. The agreement, so it is argued, is therefore void.

[7] The defendants aver that the deponent to the affidavit, filed in support of the summary judgment application, does not have personal knowledge of whether Mr Govender was duly authorised to bind the plaintiff, and that the application should, for that reason alone, fail.

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[1] Ad para 13.

[8] This defence has no merit. Firstly, the authority of an agent to conclude an agreement on behalf of a principal can be either express, tacitly, implied or ostensible.[2] As long as the contracting party does not attack its own agent's authority to contract on its behalf, it can be accepted that such authority exists, irrespective of whether it was express, implied, tacit or ostensible. A principal can also ratify the acts of an agent who was not in fact authorised at the time the agreement is concluded. At the very least it must be accepted that if the authority did not exist at the time it has been ratified. The absence of authority of a party's own agent where that party relies on the agent's authority is therefore not an issue that arises in law and is not a *bona fide* defence.

[9] Secondly, in *Nedcor Bank Ltd v Behardien*,[3] the court held that an affidavit by a legal adviser of a plaintiff bank, in which it is stated that the facts deposed to fall within the knowledge of the deponent and that the deponent can swear positively to these facts and confirms them, is sufficient. Similarly, in *Rees and Another v Investec Bank Ltd*[4], the Supreme Court of Appeal held that a bank employee had sufficient personal knowledge of the matter "*to swear positively to the facts verifying the cause of action and the amount claimed*" in a summary judgment application. Saldulker JA found that the deponent could rely for its knowledge on documents in the corporation's possession.

[10] Mr Quintis McIntyre, the deponent of the plaintiff's affidavit in this matter, is a Legal Recoveries Manager at Nedbank. He specifically states that he perused the records held by the plaintiff in respect of the principal debtor's indebtedness, as well as all

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[2] *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T).

[3] 2000 (1) SA 307 (C).

[4] 2014 (4) SA 220 (SCA) at [8] [12] and [14] –[16].

documents in the plaintiff's possession filed in this action (including the various surety agreements and the certificates of balance). He further states that from a perusal of the documents, electronic account records, and data available to him, he has acquainted himself fully with the facts and information relating to this matter and is able to swear positively to the facts contained in the affidavit. He then continues and expressly confirmed that Mr Govender was a Business Manager in the employ of the plaintiff at the time the agreement was concluded; that he was duly authorised to conclude the agreement with the principal debtor and that the plaintiff considers itself bound by the agreement.

[11] In *Standard Bank of South Africa Ltd v Kroonhoek Boerdery CC*[5], Tuchten J held that "*(T)he question is not whether the deponent can competently testify to all the documents with her employer bank, but whether she can competently testify to those relevant to the case in question…She had means to acquire personal knowledge of the contents of the documents attached to the statement of claim and she says, in effect, that she did so…*". The court further held that the principle in deciding whether or not to grant summary judgment, the court looks at the matter *"at the end of the day", on all the documents that are properly before it."*[6]

[12] Considering the affidavit as a whole, as well as all the documents that were available to the deponent to the affidavit, I am satisfied that that Mr McIntyre had sufficient personal knowledge to swear to the facts contained in the affidavit. At the

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[5] *Standard Bank of South Africa Ltd v Kroonhoek Boerdery CC* 2011 JDR 0980 (GNP) par [10] and [11]

[6] See *Maharaj supra* at 423H.

very least, it is clear from the affidavit that he satisfied himself that the plaintiff considered itself bound by the agreement and performed in accordance therewith.

THE CERTIFICATES OF BALANCE

[13] As indicated above, the defendants concede that if there is no merit in its first defence (the validity of the agreement) the plaintiff is entitled to rely on the certificate of balance and the claim is therefore a liquidated claim.

COUNTERCLAIM

[14] The plaintiff provided certificates of balance in respect of each surety agreement. These certificates are attached to the Particulars of Claim.

[15] The defendant's counterclaim is a claim for the statement and debatement of the account. They dispute the correctness of the amount reflected in the certificates of balance and aver that the plaintiff should have attached an account history to the Particulars of Claim. In their plea, it is averred that the plaintiff has failed to render a proper account to the principal debtor, alternatively, the accounts that the plaintiff have rendered are defective and inadequate.

[16] A certificate of balance constitutes *prima facie* proof of a debtor's indebtedness. In *Ex parte Minister of Justice: In re R v Jacobson and Levy,*[7] Stratford JA stated:

> *"Prima facie evidence, in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence."*

If the *prima facie* evidence or proof remains unrebutted at the close of a case, it becomes "sufficient proof" of the fact or facts (on the issues with which it is concerned)

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[7] 1931 AD 466 at 478

necessarily to be established by the party bearing the onus of proof. [8]

[17] In their plea the defendants baldly denied that the plaintiff complied with its obligations and that the amount is owing or payable. No facts were provided to substantiate the allegations. They, furthermore, baldly stated that the certificates of balance are incorrect and averred that the plaintiff failed to properly account to the principal debtor. Again, no facts were provided to explain the statements.

[18] The certificates of balance that constitutes *prima facie* proof of the amount outstanding cannot be rebutted by bald, vague, or sketchy denials by the defendants which leaves the court guessing as to the basis for the denials. The defendants have failed to set out any factual grounds on which it challenges the amounts set out in the certificates of balance or whether or not the applicant rendered an accurate account. In addition, the defendants have simply ignored the fact that they renounced the benefits of *non numeratae pecuniae, non cause debiti, errore calculi* and the revision of accounts. The renunciation of the *exception non causa debti* places the onus of proving the non-existence of a *causa* on the defendants.[9] The defendants have disclosed no facts on which a court may find that they are not bound by their contractual election to renounce these benefits. The defendants have accordingly, failed to disclose material facts which, if proven at trial, would constitute a valid counterclaim to the plaintiff's claim.

[19] The defendants have, therefore, failed to allege facts which disturbs the *prima facie* proof of the principal debtor's indebtedness and which would entitle the defendants to a statement and debatement of the account.

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[8] *Salmons v Jacoby* 1939 AD 588 at 593.
[9] *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C).

CONCLUSION

[20] In an application for summary judgment the defendants must set out fully the nature and grounds of their defence to enable a court to establish whether the defence or counterclaim is *bona fide* and good in law. It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing.[10]

[21] The defendants have failed to place any facts before the court. Their bald, vague and sketchy denials do not disclose any *bona fides.* In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[11], Navsa JA held as follows:

> *"[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.*
>
> *[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. ...."*

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[10] *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T)

[11] 2009 (5) SA 1 (SCA).

[33] 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, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G - 426E."

[22] I am satisfied that the opposition to the plaintiff's claim is just an attempt at depriving the plaintiff of a speed remedy where the defendants have no genuine defence or counterclaim to the plaintiff's claims. The plaintiff is accordingly entitled to the relief set out in the notice of motion.

COSTS

[23] Each of the Suretyships provide that in addition to the repayment of the principal debtor's debt each surety is liable to the plaintiff for interest, discount commission, commission, legal costs on the attorney and client scale. The plaintiff accordingly seeks costs on an attorney and client scale as against each of the sureties.

[24] In the result the following order is made:

1. Summary judgment is granted against the fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh defendants jointly and severally, the one paying the other to be absolved, for:

1.1 Payment of the amount of R 4 610 804.27, provided that the liability of the following defendants is limited to the extent of their suretyships as follows:

1.1.1 Fourth, fifth, and sixth defendants limited to R 2 500 000.00 plus interest and costs;

1.1.2. Ninth defendant limited to R 4 260 000.00 plus interest and costs;

1.1.3. Tenth defendant limited to R 4 260 000.00 plus interest and costs.

1.2 Default interest on the amount of R4 610 804.00 at the rate of 17,5% per annum from 23 July 2020 to date of final payment, both days inclusive.

1.3 Costs of suit on an attorney and client scale.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 March 2021.

APPEARANCES

Attorneys for the plaintiff:	Moodie & Roberston
Counsel for the plaintiff:	Advocate M. Nieuwoudt
Attorneys for the defendant:	Pagel Schulenburg Inc
Counsel for the defendant:	Advocate H. van der Vyver
Date of hearing:	4 February 2021
Date of judgment:	3 March 2021