

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

CASE NO: 2021/25318

REPORTABLE: ~~YES~~ / NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED.

In the matter between:

ABSA BANK LIMITED

Applicant

and

MOOSA: AMINA

First Respondent

(ID No. [...])

MOOSA: SAYED MOHAMED

Second Respondent

(ID No. [...])

PEK INVESTMENTS CC

Third Respondent

(Reg no. 1989/039690/23)

JUDGMENT

MALINDI J:

Introduction

[1] The Applicant for summary judgment claims R7 327 035.45 in the first claim, and R2 043 024.58 in the second claim and costs as between attorney and client.

[2] Both claims are based on an alleged written agreement which the Applicant is unable to produce and annexe to the summons as required by the Uniform Rules of Court Rule 18(6). The claims arise out of the said agreement was entered into with the Principal Debtor, Pro Roll Corrugated Roofing CC, represented by the Second Defendant, in which it would operate a current account with the Applicant.

[3] The Applicant instead annexes a standard agreement usually entered into with its clients. The Respondents deny having entered into such an agreement and contend that the Applicant's summons, and therefore the application for summary judgment, is defective for non-compliance with Rule 18(6). The rule requires that when a claim is based on a contract, a copy thereof must be annexed to the summons.

[4] The claim against the three Defendants is based on the Deeds of Suretyship signed by the Respondents in terms of which they bound themselves in *solidum* as surety and co-principal debtors in favour of the Plaintiff.

[5] The second claim arises out of a written agreement. A copy thereof is annexed to the summons and is not disputed in this application.

[6] In both claims, the Respondents have agreed that the certificate issued by any manager of the Applicant would constitute *prima facie* proof of their indebtedness to the Applicant.

The Merits

[7] The Respondents delivered their Notice of Intention to oppose summary judgment on 24 August 2021 and the Second Respondent's opposing affidavit only on 4 October 2021 at 16h38. The application was set down on an unopposed basis for 5 October 2021. I allowed the answering affidavit and stood down the matter to Thursday, 7 October 2021.

[8] The Respondents resist summary judgment on the following grounds:

8.1. The plaintiff cannot prove the identity of the Principal debtor;

8.2. The plaintiff cannot produce a written agreement that it relies upon; and

8.3. A dispute of fact has arisen which cannot be resolved on the papers in that the respondents deny that an agreement was concluded with the third respondent and the applicant has to adduce secondary evidence in order to prove the agreement. Furthermore, that the applicant has alleged in its particulars of claim that the principal debtor is Pro ROLL Corrugated Roofing CC.

[9] The question is whether despite the absence of an agreement that was entered into between the parties, a summons may still contain a cause of action which can be relied upon in a summary judgment application. In *ABSA Bank Ltd v Jenzen, Kevin Glynn; ABSA Bank v Grobbelaar*¹, Sutherland J held that failure to annex a copy of an agreement relied upon does not erase a cause of action as a litigant who relies on the contract can adduce secondary evidence of its conclusion and terms.²

[10] Sutherland J stated that "the Plaintiff should extricate itself from the regrettable predicament on trial, not by way of summary judgment." However, he proceeded to say that the import or quality of the allegations made by a defendant to question the version of the plaintiff about the terms of the agreement alleged by the plaintiff must be of such quality as to not be "susceptible to rebuttal on the papers" or are not "demonstrated not to be *bona fide*." If it be so then the remedy of summary judgment remains available.

[11] In this case the Applicant has rebutted the denial that the Principal Debtor did not enter into an agreement identical to the standard agreement as pleaded by the Applicant in the summons, and therefore demonstrated that the defence is not *bona fide*. The Principal Debtor is the one that opened an account on 3 August 2017 with the Applicant and as represented by the Second Defendant. Furthermore, the Term Loan Agreement between the Applicant and Principal Debtor pertains to the current account being operated between them. Lastly, annexures "X1" - "X13" represent

¹ Case No. 2014/877 (GLD).

² At [5], [10] and [15].

transactions that took place on the account. The fact that there is no physical contract reflecting the identity of the Principal Debtor is a red herring. The defence of a dispute of fact also fails on this basis. It is not a genuine dispute of fact. These documents show the identity of the principal debtor and the applicant's inability to produce a written agreement is not a bar to proceeding on summary judgment.

[12] Binns-Ward J, post the amendment of Rule 32, in *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd*³ elaborated on what Sutherland J had said in *ABSA Bank Ltd v Jenzen, Kevin Glynn; ABSA Bank v Grobblelaar*⁴ prior to the amendments to Rule 32 that:

"14. ...The starting place must be to recognised that what is critical in legal proceedings is dictated by the relief sought. In summary judgment proceedings, to defeat the plaintiff's application a defendant must put up a basis. A plaintiff cannot get judgment without the merits of a defence being tested. ..."

[13] Binns-Ward J explains the requirements under the amended Rule 32 as requiring of the plaintiff to "engaged with the content of the plea in order to substantiate its averment that the defence is not *bona fide* and has been raised nearly for the purposes of delay. " However, as it was said in *Jenzen/Grobbelaar*, summary judgment is available where the pleaded defence can be rebutted and demonstrated not to be *bona fide*. I am of the view that these two judgments are in harmony with each other in setting out the duty and function of a court considering summary judgment where the merits of an action need not be traversed beyond determining whether the pleaded defence is genuinely advanced. The rebuttal of the defence as Sutherland J said must be clear on the papers. Binns-Ward J agrees in this regard.

[14] With the Respondents' defence clearly negated on paper and therefore disposing of any genuine dispute of fact and with the Respondents having bound

³ 2020 (6) SA 624 (WCC) at [22] and [23].

⁴ At [14]

themselves as surety and co-principal debtors in favour of the Applicant, they are left with no defence to summary judgment. The certificates issued by the Applicant constitute *prima facie* proof of their indebtedness to the Applicant. The Respondents' questioning how the overdraft facility of R1 500 000.00 escalated to R7 000 000.00 does not amount to a proper challenge to that certificate.

[15] In the circumstances, I find in favour of the Applicant in this application for summary judgment.

Costs

[16] I find no deplorable conduct on the part of the Respondents in the manner in which they conducted themselves in these proceedings. They will bear the costs emanating from the postponement of the hearing on 5 October 2021 for the belated delivery of their answering affidavit when they had entered their intention to oppose as early as 24 August 2021 and the cost of 7 October 2021 will follow the result.

Conclusion

[17] I therefore make the following order:

Summary judgment is granted against the First Defendant, the Second Defendant and the Third Defendant, jointly and severally, the one paying, the other to be absolved, for:

CLAIM A:

1. Payment of the amount of R7,327,035.45;
2. Interest on the aforesaid amount at the rate of 10.00% per annum linked and capitalised monthly from 02 May 2021 to date of final payment, both dates inclusive.

CLAIM B:

1. Payment of the amount of R2,043,024.58;
2. Interest on the aforesaid amount at the rate of 7.00% per annum linked and capitalised monthly from 02 May 2021 to date of final payment, both dates inclusive.
3. Costs on the party-and-party scale.

G MALINDI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the applicants: J.J Durandt
Instructed by: Jay Mothobi Incorporated

For the respondents: EG Malherbe
Instructed by: AM Theron Incorporated

Date of hearing: 5 October 2021
Date of judgment 4 January 2022