**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.

6 April 2022 .....

DATE SIGNATURE

Case no. **2021/23327**

In the matter between:

**FIRSTRAND BANK LIMITED** APPLICANT

And

**VINCENT MULALO MAGODA** RESPONDENT

Coram: Dlamini J

Date of hearing: 19 January 2022 – in a 'virtual Hearing' during a videoconference on Microsoft Teams digital platform.

Date of Judgment: 06 April 2022

*This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and shall be uploaded onto the caselines system.*

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**JUDGMENT**

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**DLAMINI J**

[1] This is an application for a money judgement against the Respondent in his capacity as surety and co-principal debtor of ISO-Q Consulting. The cause of action is a written suretyship agreement in terms of which the Respondent (Magoda) bound himself, jointly and severally as surety and co-principal debtor of ISO-Q debts in favour of the Applicant arising out of the loan agreement (the Agreement)

[2] The common cause facts are that the Applicant and the Respondent concluded a loan agreement on 19 January 2006 wherein the Applicant approved a loan facility in favour of the Respondent in the sum of R12 217 990. In terms of the Agreement the loan was repayable to the Applicant in sum of R 157 763 in twenty monthly instalments.

[3] Further the Applicants holds a deed of suretyship executed by the Respondent limited to the sum of the loan advanced to the Principal Debtor.

[4] The Applicant avers that the Principal Debtor has breached the Agreement in two respect, that

4.1. It failed from time to time to pay the monthly instalments under the agreement.

4.2. It failed to make payment of the municipal charges in respect of the mortgaged property.

[5] The Applicant avers that as at 26 August 2020, the Principal Debtor was in arrears in the sum of R615 457.35. It issued a letter of demand calling upon the Principal Debtor to settle the arrears within a period of three months. In the same letter Applicant also called upon the principal debtor to furnish copies of the latest municipal accounts in respect of the mortgaged properties.

[6] That despite the indulgences no payments were made. The Applicant submits that as a result of these breaches and the failure by the Principal Debtor to pay the City of Johannesburg (COJ)the municipal charges it launched the present application.

[7] Finally the Applicant submits that as at 6 May 2021 the Principal Debtor and the Respondent are indebted to it jointly and severally in the aggregate sum of R7.3 million.

[8] The Respondent contents that ISO-Q has remedied its breach in respect of the outstanding monthly instalment payment. That all current monthly instalments have been paid and no monthly instalment payment is outstanding. As a result, contends the Respondent, that the acceleration of the full amount is against public policy.

[9] Furthermore that the Principal Debtor is dealing with and is in the process of finalising the municipal accounts and its disputes with the COJ.

[10] At the heart of the dispute is weather the Applicant is entitled to enforce the acceleration clause.

[11] Assisting us in resolving this question are the following clauses in the Agreement that provide as follows;

14.3. *"Upon the occurrence of an Event of Default or Potential Event of Default, FNB shall in addition to and without prejudice to any of other rights which it may have in terms of the Agreement or in law*

*including without limitation, its rights to claim damages, have a right, upon notice to immediately":*

*14.3.1.* *"accelerate or place on demand payment of the Loan Outstanding which shall immediately become due and payable".*

[12] The Applicant contends that as result of the breach of the Agreement by the Principal Debtor it has elected to invoke the acceleration clause.

[13] On the other hand the Respondent submits that the acceleration clause should not be enforced as it is *contra bonos* mores and is against public policy. Reliance for this submission was sought in **Combined Developers and Aurun Holdings and Two Others 2013 JDR 2017 (WCC)** where Davis J referenced the case of **Junglal v Shoprite Checkers (Pty) Ltd 2004 (5) SA 248 (SCA)** where it was held that *"no party can give effect to the provision of a contract in manner the court deems to be unconciable illegal or immoral and that any attempt will find its enforcement being refused".* Finally, **Davis J** concluded that *the application could not be granted because, inter alia, the nature of the acceleration clause and the manner in which the Applicant intended it to be strictly construed resulted in the clause being contrary to public policy.*

[14] The Respondent contends further that even if this court accepts the allegation that the Applicant is entitled to accelerate the full loan agreement and that the acceleration is enforceable, the Respondent submit that the accelerated amount is not a liquidated amount. That the full loan amount is not easily ascertainable as it is not clear how the Principal Debtor will be liable in terms of legal fees, service and other fees over the remainder of the loan period. Further that the rate of interest charged to the Principal Debtor over the period is not easily ascertainable, that the legal fees are also in dispute and are not capable of being ascertained by the court. Finally, that there is a dispute regarding the accelerated amount as opposed to the amounts that the Principal Debtor has paid since 1 November 2020 to date.

[15] I agree with the Applicant's submission that that the facts of this case are sharply different with those in **Combined Developers** above. There the court refused and rightly so to implement the obvious unwarranted acceleration clause. The facts briefly summarised, are that the creditor had sent an email notifying the debtor that the instalments had not been paid, with no amount specified. The debtor paid the amount. Nevertheless, the creditor proceeded to recover the interest of R86.57. The court refused to implement the acceleration clause.

[16] I am satisfied that in this case the Applicant has in terms of the Agreement sent a formal notice to the Principal Debtor notifying of its default and requesting it to settle the arrears in a specified sum and period. That the Applicant indulged the Principal Debtor to settle the arrears within 3 months, which the Principal Debtor failed to settle within the agreed time.

[17] At the time of the hearing of this matter the certificate of balance (which notable is not disputed by the Respondent) shows that the principal debt stood at R6 365 148.00. There is no doubt that this is quite a significant amount and in my view the Applicant is not acting unreasonable to have this collected. Further the Applicant allowed the Principal Debtor to settle the outstanding amount within a specified period without success. As result it is my finding that under all the prevailing circumstances the acceleration is just and is lawful. The Applicant is entitled to the order of the money judgment.

[18] It is common cause that the Principal Debtor is indebted to the COJ for the various municipal charges that the city has levied against its various properties. The Respondent submission that it has been over charged by the COJ and has engaged the city to have these amounts corrected is insufficient. In fact, the Respondent's further submission that it intends to bring action against the COJ has no corroboration and is just hearsay. As at the hearing of this matter the Respondent has not attached a copy of that application, or summons or anything in that regard to support its averments. This hearsay falls to be dismissed.

[19] For the sake of completeness, the Applicant has issued an application against the Principal Debtor on the same facts under case number 23548/21 seeking a final order of liquidation against it. Based on the reasons same reasons that I have found in this matter, I granted an order placing the Principal Debtor under provisional winding -up. This was to enable the interested parties to show cause on the return day, why the Respondent should not be placed under a final wounding up order.

[20] In the result, I find that the agreement of suretyship between Applicant and the Respondent Mr Magoda and its acceleration is lawful. In terms of the suretyship Magoda agreed to bind himself jointly and severally as surety for and co-principal debtor *in solidum* with ISO-Q, for the due and punctual payment by ISO-Q to the Applicant in the sum of R5 971.860.22 plus interest and cost thereon.

The following order is granted in tthis matter as follows ;

(a) Judgement is granted against the Respondent, in favour of the Applicant, in the amount of R5 971 860.22, together with interest thereon at 6.95% subject to change calculated from 20 January 2022 to date of payment both days inclusive;

(b) The Respondent is ordered to pay the cost of this application.

**DLAMINI J**

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 19 January 2022

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| handed down on: | 06 April 2022 |

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