

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO. 23040/2021**

REPORTABLE: YES / NO  
OF INTEREST TO OTHER JUDGES: YES / NO

In the matter between:

**BUSINESS PARTNERS (PTY) LIMITED**

Plaintiff/Applicant

(Registration Number: 1981/000918/06)

and

**GAVIN JONATHAN PENKIN**

Defendant/Respondent

(Identity Number: [....])

**JUDGMENT**

**NOCHUMSOHN AJ**

1. This is an opposed application for summary judgment.

2. The cause of action against the Defendant lies in a Suretyship annexed to the Summons as annexure “C” in terms of which the Defendant bound himself in favour of the Plaintiff as surety and co-principal debtor *in solidum*, for the indebtedness of K2017314092 (Proprietary) Limited (“the principal debtor”).

3. On 22 August 2017, the principal debtor entered into a loan agreement with the Plaintiff under which monies were advanced to the principal debtor at its special instance and request. The principal debtor breached the loan agreement by failing to effect payment of the monthly instalments provided for. Such breach triggered an acceleration clause provided for in the loan agreement. In terms thereof Plaintiff was entitled to claim the full balance of the loan still owing.

4. At 25 March 2021, the principal debtor owed Plaintiff R10 241 932.95 with interest at prime plus 1% per annum, in accordance with a Certificate of Balance attached to the Particulars of Claim, signed on behalf of the Plaintiff, as provided for in the loan agreement.

5. The citation of the parties, the terms of the loan agreement, the terms of the Suretyship, the details of the breach, the details of the balance outstanding, and the contents of the Certificate of Balance, are elegantly pleaded in the Particulars of Claim.

6. The cause of action is ascertainable, well drafted and in compliance with the rules of court.

7. On 3 August 2022, the Defendant filed a Plea dated 9 July 2021, in which the Defendant challenges the jurisdiction of this Honourable Court upon the ground that he no longer resides within the court’s area of jurisdiction.

8. The Defendant sets out further in such plea that:

8.1. The principal debtor was established to hold immovable assets, namely Erf 0082 Alrode, Alberton;

8.2. No money was paid to the principal debtor when Erf 0082 Alrode, Alberton was transferred;

8.3. When the Plaintiff applied for the liquidation of the principal debtor, Erf 0082 Alrode, Alberton reverted to the Plaintiff;

8.4. Improvements were made to the building which increased its value;

8.5. The Plaintiff is able to sell Erf 0082 Alrode, Alberton;

8.6. The Plaintiff and the principal debtor entered into an agreement with one Paga Designs (Pty) Ltd, without undertaking a proper due diligence.

9. The Affidavit resisting Summary Judgment deposed to by the Defendant on 11 November 2021, embraces the same points set out in the Plea, as recorded above.

10. The defence presented falls to be rejected in its entirety. Other than the suggestion that the principal debtor should have been credited with the value of the Alrode property or the proceeds of the sale thereof, there is no evidence presented as to such value. Neither is any evidence presented relating to the sale of such property, and, in particular any amounts as may have been received or which may have flowed pursuant to any such sale. Accordingly, the allegation raised, in its bald and bland state, does not serve to take the defence any further.

11. The liability of the Defendant with the principal debtor is joint and several, inasmuch as the Defendant bound himself in the Suretyship as a co-principal debtor, *in solidum*. As such, the Plaintiff is at liberty to excuss against the Principal Debtor or the Defendant, in its sole and absolute discretion. It is to be noted that the Defendant renounced the benefits of excussion and therefore remains liable for the indebtedness, due.

12. The provisions of the National Credit Act are not applicable to the loan agreement, which was concluded with the principal debtor for a principal debt in

excess of the threshold amount provided for in section 4(1)(a)(i) and (ii) of the Act. By implication, the Act will also not apply to the Surety (as stipulated in section 8(5) read with section 4(20)(c)) of the National Credit Act.

13. The Defendant's Special Plea relating to the absence of jurisdiction, by virtue of him having relocated to an area outside of the territorial jurisdiction of the Honourable Court is rejected. The reason for such rejection is attributable to both the loan agreement and Suretyship having been signed between the parties within the area of jurisdiction of this Honourable Court.

14. The Defendant has not set out a *bona fide* defence to the Plaintiff's claim.

15. In the circumstances, I make the following Order:

15.1. Summary judgment is granted against the Defendant, who is ordered to pay to the Plaintiff the sum of R10 241 932.95 together with interest thereon at the prime rate of interest quoted by Standard bank from time to time, plus 1%, per annum, calculated daily and compounded monthly in arrears, calculated from 26 March 2021 to date of payment, both days inclusive;

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

**NOCHUMSOHN, G**  
**ACTING JUDGE OF THE HIGH COURT**

|                                   |          |       |                |
|-----------------------------------|----------|-------|----------------|
| On behalf of Plaintiff/Applicant: | Advocate | K     | Markram-Jooste |
| (karlienmarkram@gmail.com)        |          |       |                |
| Instructed by:                    | Strydom  | Britz | Mohulatsi      |
| (annette@sbmattorneys.co.za)      |          |       |                |

On behalf of the Defendant/Respondent: Personally (gavin@penkin.co.za)

Instructed by:

Date of Hearing: 04 August 2022

Date of Judgment: 04 August 2022

This judgment was Authored by Nochumsohn AJ and is handed down electronically by circulation to the parties/their Legal representatives by email and uploading to the electronic file of this matter on caselines. The date of this Judgment is deemed to be 04 August 2022.