REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OP SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 64188/2014

DATE: 8 DECEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

ABSA BANK LIMITED **PLAINTIFF/APPLICANT**

and

MICHELE ROULSTON **FIRST DEFENDANT/RESPONDENT**

(ID NO. […])

PHILLIP JAMES DAVID STEPHENS OMCKE

ROULSTON (ID NO. […]) **SECOND DEFENDANT/RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] On or about 17 November 2005, pursuant to an application by the representative of Artisan Flooring CC (the principal debtor), for opening and conducting of an overdraft cheque account, the applicant and the principal debtor concluded a partially written, partially oral agreement In terms of the said agreement, the

applicant lent and advanced monies to the principal debtor. The outstanding amount thus lent and advanced to the principal debtor as at 17 October 2013 amounted to R93 746.31 subject to a further payment of interest thereon at the rate of 16.50% *per annum,* capitalised monthly from 18 October 2013 to date of payment.

[2] The principal debtor failed to comply with the obligations of the said agreement and on 10 January 2014, the applicant obtained judgment against the principal debtor for the amount of R93 746.31 plus interest thereon at the rate of 1650% *per annum,* capitalised monthly from 18 October 2013 to date of payment, both days included.

[3] The first respondent has in terms of a written suretyship agreement bound herself as surety and co-principal debtor together with the principal debtor in favour of the applicant for the repayment of the amount of any sum or sums of money, which the principal debtor may from time to time be owing to the applicant from whatever cause arising.

[4] The second respondent, ex-husband of the first respondent, and who was when the suretyship was concluded married in community of property with the first respondent, gave the necessary consent to bind the joint estate of their then marriage in terms of the provisions of the Matrimonial Property Act, 88 of 1984.

[5] In terms of the said suretyship agreement the first and second respondents mortgaged the following property in favour of the plaintiff, namely:

THE REMAINING EXTENT OF ERF 77 MOUNTAIN VIEW (PTA) TOWNSHIP, REGISTRATION DIVISION J.R., PROVINCE OF GAUTENG

(HELD BV DEED OF TRANSFER T52904/2002)

[6] The judgment against the principal debtor has remained unsatisfied and as a result the applicant instituted a claim against the respondents. The first respondent entered an appearance to defend the claim, hence the application for summary judgment.

[7] In her affidavit in opposing the summary judgment application, the first respondent has raised a point *in limine* and is also attacking the applicant's claim on the merits.

[8] In regard to the point *in limine,* the first respondent has raised a dilatory remedy in that she has been declared over indebted and all her debts, including the applicant's debt, were restructured. Accordingly a debt restructuring order has been granted specifically in regard to the agreement in question.

[9] In the main ground raised regarding the point *in limine,* the applicant痴 assertion is that the first

respondent cannot rely on the dilatory remedy because the National Credit Act ("the NCA・) does not apply in the circumstances of this case.

[10] It is common cause that the principal debtor is a juristic person, Artisan Flooring CC and that the respondents bound themselves as sureties in regard to the principal debtor's overdraft facility.

[11] Section 4 of the NCA states the applicability of the Act as follows:

> "(1) Subject to sections 5 and *6*, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except -
>
> *(a)* a credit agreement in terms of which the consumer is -
>
> (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);
>
> (ii)
>
> *(b)* a large agreement as described in section (4) in terms of which the consumer is a juristic person whose assets value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1);..

[12] The effect of the afore stated section is that: the NCA does not apply where the consumer is a juristic person whose asset value or annual turnover, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister; or where the consumer is a juristic person which enters into a large agreement, irrespective of the value of its asset value or annual turnover.

[13] The applicant states in its particulars of claim that the provisions of the NCA do not apply to the transaction claimed for due to, *inter alia,* the principle agreement not falling within the definition of a credit agreement as set out in the NCA, alternatively, the principal agreement with the principal debtor is excluded in terms of s 4 of the NCA in so far as the principal debtor is a juristic person whose asset value or annual turnover at the time when the agreement was made, equalled or exceeded the threshold value determined by the Minister in terms of s 7 (1) of the NCA.

[14] It is my view that, in order to rely on this ground, the applicant must allege and prove that the asset value or annual turnover of the principal debtor, at the time the agreement was made, equalled or exceeded

the threshold value determined by the Minister. It is not known what the asset value or annual turnover of the principal debtor or the threshold value in terms of s 7 of the NCA, was, at the time the agreement was made. The allegations are therefore bare and unsubstantiated. Even though the first respondent did not dispute the applicant's allegations, the applicant must still prove on a balance of probabilities that at the time the agreement was made the principal debtor's equalled or exceeded the threshold value determined by the Minister. I can as a result not conclude that the current agreement is excluded from the operation of the NCA.

[15] The second ground raised by the applicant is that the allegation by the first respondent that a debt restructuring order has been granted to this specific agreement is factually incorrect and not supported by evidence.

[16] In its particulars of claim, the applicant states that a debt rearrangement order was granted in favour of the first respondent but that order does not include the debt to which this claim relates. In response to this allegation, the first respondent states in her affidavit that the applicant is aware that the first respondent is over indebted and in this regard refers to a debt restructuring order granted on 10 February 2014.

[17] The debt restructuring order (debt re-arrangement order) in question is attached to the applicants summons as annexure "J" and lists several credit providers who consented to the debt re-arrangement and one that was ordered by the court. ABSA *Bank* is also listed as one of the credit providers who consented to the debt re-arrangement. The applicant's contention is that the debt listed under ABSA bank is not the same debt as in this instance.

[18] The debt claimed in the applicant's particulars of claim is referred to in paragraph 3 as 'overdraft - account number; [...]'. A similar account number is reflected in the certificate of balance attached to the summons as annexure "A" and the s 129 of the NCA letter attached to the summons as annexure "G3". As already stated the amount claimed in respect of this account number is R93 746.31. To the contrary, the reference number allocated to ABSA Bank in the debt re-arrangement order is [...] and the balance due is R13 395.43. As such I have to agree with the applicant that this cannot be the same account. The first respondent's submission that all her debts were restructured does not assist her because a debt restructuring can only be granted in respect of a particular debt hence the list appearing on the debt re-arrangement order.

[19] On the merits, the first respondent relies on various defences why the summary judgment application should not be granted. For convenience I shall deal oniy with the first defence raised by the first defendant due to the conclusion that I come to in respect thereof.

[20] It is said that a duty rests upon a defendant when formulating his or her defence in opposing the application for summary judgment, to present a *bona fide* defence to the plaintiffs claim. Such *bona fide*

defence must be set out in such a nature and with such clarity to enable a court to be in a position to establish if the facts alleged, if proved at trial, would present a good defence.[1]

[21] When deciding whether a *bona fide* defence has been raised, the court will consider the following:[2]

> 1. whether the defendant disclosed fully the nature and grounds of the defence and the material facts relied upon therefore.
>
> 2. whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

[22] It is common cause that the applicant did not attach a copy of the purported written part of the agreement to the summons because it is lost. The applicant alleged same in paragraph 3.2 of the particulars of claim. Having done so, the applicant proceeded to set out, in paragraph 4, what it referred to as the salient, alternatively tacit, alternatively implied terms of the agreement and alleged further alternatively that the terms set out forms part of the agreement between the parties due to longstanding banking practice.

[23] The first respondent in resisting these allegations by the applicant, denies the terms of the agreement as alleged by the applicant and contents that due to the failure by the applicant to attach the written part of the agreement to the summons, the applicant's particulars of claim lack the necessary allegations to sustain a cause of action. According to her, since the action is based on a suretyship to a partially written, partially oral agreement between the applicant and the principal debtor, the terms of the written part of the agreement cannot be proven without the written agreement which necessitates the presentation of oral evidence in court.

[24] In argument against the first respondent's defence, the applicant contends that the first respondent's defence cannot succeed, firstly because she ought to have stated on what basis she denies the terms of the agreement; and secondly because she failed to present her version of the terms of the agreement.

[25] The terms of the agreement as stated in the summons are bare allegations which must be proved first in order for the applicant to succeed in its claim. The first respondent is resisting the application on the basis of an exception. It is trite that summary judgment application cannot be granted if the summons is exceptiable.

[26] It is correct that a written agreement may be proven in the absence of the document on which it is written. It is also trite that the contents of a document may be proved by secondary evidence if such document has been lost - proof in this way is by means of the best evidence rule. It means that extrinsic evidence must be led to prove the contents of that document.

[28] I am not inclined to grant summary judgment. Consequently I make the following order:

1. The application for summary judgment is dismissed.

2. The first respondent is granted leave to defend.

3. Costs are costs in the main action.

EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCE:

HEARD ON THE: 24 NOVEMBER 2014

DATE OP JUDGMENT: 08 DECEMBER 2014

FOR PLAINTIFF/APPLICANT: ADV R J GROENEWALD, instructed by VAN ZVL LE ROUX INC

FOR *2nd* DEFENDANT/REIPONDENT: ADV S CLIFF, instructed by MOLDENHAUER ATTORNEVS

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1 *Breytenbach v Fiat SA (Edms) Bpk 1976* (2) SA 266 (T)

2 Uniform Rule 32 (3) *(b)* read with the judgment in *Maharaj v Barclays National Bank Limited\976* (1) SA 418 (A) at 426