REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

14/3/14

CASE NO:45827/2009

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

DATE SIGNATURE

In the matter between:

REFINE UNDERWRITING MANAGERS (PTY) LTD Applicant
(Plaintiff in the main action)

and

JACOBUS HENRICUS VAN ZYL First Respondent
(First Defendant in the main action)

MARIA ELIZABETH Van Zyl Second Respondent
(Second Defendant in the main action)

YELLOW STAR PROPERTIES 160 CC Third Respondent
(Third Defendant in the main action)

JUDGMENT

MURPHY J

1. The applicant issued summons against the three respondents in July 2009 in which it claims payment of R200 000 on a cause of action founded on a suretyship agreement. The applicant alleges that the respondents bound themselves personally as sureties and co-principal debtors together with Nocom Noord Wes BK t/a Madiba Motors ("Nocom") in respect of certain debts arising between Nocom and the applicant.

2. The present application is one made in terms of rule 28(4) in which the applicant seeks leave to amend its particulars of claim in various respects.

3. The suit between the parties is at an advanced stage. Discovery is completed and the matter has been set down for trial and postponed on three prior occasions. Most recently, the matter was set down for trial on 11 February 2014. However, because of the pending application for the amendment of the particulars of claim the matter was not ripe for trial and at the instance of the plaintiff the trial has been postponed to a future date.

4. Paragraphs 5-13 of the particulars of claim are the subject of this application. They read as follows:

"5. On or about 09 March 2006, the Plaintiff entered into a written fuel guarantee ("the guarantee") for and on behalf of Nocom Noord Wes BK t/a Madiba Motors, in favour of Total South Africa (Proprietary) Limited, in terms of which:

5.1 The Plaintiff would guarantee on behalf of Nocom Noord Wes BK t/a Madiba Motors fuel deliveries up to a maximum of R200 000.00.

6. In the event that the Plaintiff was called upon to make payment in terms of the guarantee, Nocom Noord Wes BK t/a Madiba Motors would repay the amount to the Plaintiff, failing which the Defendants, as sureties would make such payment.

7. A suspensive condition of the guarantee was that the Defendants enter into a suretyship agreement in terms of which they bound themselves personally as sureties and co-principal debtors together with Nocom Noord Wes Bk t/a Madiba Motors, the one paying the other to be absolved, in favour of the Plaintiff, in the event that Total South Africa (Proprietary) Limited exercising its rights in terms of the guarantee. Copies of the guarantee letter and the fuel guarantee are attached marked annexure **"A1"** and **"A2"** respectively.

8. On or about 13 January 2006 the Plaintiff and Defendants entered into a suretyship agreement. A copy of the signed suretyship agreement is attached marked annexure **"B"**.

9. In terms of the suretyship, the Defendants:

9.1 Waived all benefits of the legal exceptions of the division and excussion and acknowledged themselves to be fully acquainted with the meaning and effect thereof;

9.2 Acknowledged that their liability in terms of the suretyship agreement should not be affected by any concession or accommodation which may have been made to the Defendants by the Plaintiff or its successors in title.

10. Total South Africa (Proprietary) Limited exercised its rights and called in the guarantee for payment of the amount of R200 000.00. (Two Hundred Thousand Rand), which amount was duly paid by the Plaintiff on or about 28 February 2007.

11. Despite demand Nocom Noord Wes BK t/a Madiba Motors failed and/or refused to repay to the Plaintiff the amount of R200 000.00 (Two Hundred Thousand Rand), and in the premises, the Defendants are liable to the Plaintiff in the amount of R200 000.00.

12. Despite demand, the Defendants have failed to pay the amount of R200 000.00 or any part thereof.

13. Prior to commencing these proceedings, the Defendants were given notice in terms of section 129, read with Section 130 of the National Credit Act No 34 of 2005, which notice was sent per registered mail to the Defendants. Ten (10) business days have elapsed since the delivery of the aforesaid notice and the Defendants have failed to respond to the notice. Copies of the notice, together with proof of postage in annexed as annexure **"C1"**, **"C2"** and **"C3"**. The Defendants have further been in default for a period exceeding 20 (twenty) business days prior hereto."

5. On 13 November 2009 the applicant applied for and obtained summary judgment in the amount of R200 000 against the first and second

respondents (the first and second defendants in the action), the one paying the other to be absolved. The third respondent (the third defendant in the action) successfully resisted summary judgment on the ground that the applicant failed to comply with sections 129 and 130 of the National Credit Act 34 of 2005 ("the NCA").

6. The applicant delivered its notice of intention to amend in August 2013 setting out the amendments it wishes to effect to its particulars of claim, which it believes are necessary to clarify the contractual relationship of the parties. It seeks to amend the particulars in seven respects.

7. The first amendment sought by the applicant relates to paragraph 5 of the particulars of claim. The applicant wants to delete the paragraph in its entirety and to replace it with the following:

> "5. On or about 09 March 2006 and pursuant to the plaintiff concluding a Fuel Retail Guarantee Insurance Policy ("RGIP") with, alternatively on behalf of, Nocom Noord Wes BK t/a Madiba Motors ("Nocom"), in favour of Total South Africa (Proprietary) Limited ("Total SA"), in order to secure payment of the fuel supplies delivered to Nocom by Total SA, the plaintiff issued a written fuel guarantee letter ("the guarantee") containing the following salient terms:
>
> 5.1 the plaintiff bound the guarantor as credit insurer (being Absa Insurance Company) for the repayment of the amount or any part thereof due and payable by Nocom (the retailer) but unpaid to Total SA, provided that the total liability of the guarantor would be limited in all to the sum of R200 000.00 (Two Hundred Thousand Rands);

5.2 the guarantor agreed that any amount recoverable from the guarantor would be payable by the guarantor within 5 (five) business days on receipt of a written demand addressed to the guarantor. Such notice would be accompanied by a certificate signed by the company secretary, any legal advisor, the credit manager or group legal and credit manager of the company certifying the amount due and payable together with a detailed calculation thereof, ***which certificate shall be prima facie proof of the claim***.

A copy of the guarantee and the RGIP are annexed hereto marked **"A1"** and **"A2"** respectively."

8. The second proposed amendment seeks the deletion of paragraph 7 of the particulars of claim and its replacement with the following:

"It is a suspensive condition of the RGIP that the guarantee would only be issued upon receipt by the plaintiff, on behalf of the guarantor, or a surety signed by the members, directors, proprietors or trustees of the retailer, in respect of whom the guarantee is to be issued, and who undertake to reimburse the guarantor for any payment made under the guarantee."

9. The third proposed amendment seeks the insertion of the italicised words in paragraph 8 of the particulars of claim as set out below, so that in its amended form it would read:

"8. On or about 13 January 2006, *as required and in fulfillment of the terms of the guarantee*, the Plaintiff and Defendants entered into a suretyship agreement. A copy of the signed suretyship is attached marked Annexure B."

10. The fourth proposed amendment involves the insertion of two new paragraphs into and the re-numbering of paragraph 9 of the particulars of claim so that it will read as follows:

"9. In terms of the suretyship, the Defendants:

9.1 bound themselves as sureties for and co-principal debtors *in soliduim* with Nocom and its successor in title for the due and punctual fulfillment by the dealer of all its obligation arising out of and in terms of the RGIP in the event of the supplier (Total SA) exercising its rights in terms of the guarantee;

9.2 waived all benefits of the legal exceptions of the division and excussion and acknowledged themselves to be fully acquainted with the meaning and effect thereof;

9.3 acknowledged that their liability in terms of the suretyship agreement should not be affected by any concession or accommodation which may have been made to the Defendants by the Plaintiff or its successors in title; and

9.4 the operators, and/or the dealer undertook to pay all costs (including costs as between attorney and own client) incurred by the plaintiff in

taking steps against the operators or the dealer to enforce its rights under the suretyship."

11. The fifth proposed amendment aims to introduce an additional paragraph after paragraph 10 of the particulars with a consequent re-numbering of the existing paragraphs 11, 12 and 13 as paragraphs 12, 13, and 14. The proposed new paragraph 11 reads:

"11. The payment referred to above of R200 000,00 by the plaintiff, was as a result of the receipt of a certificate of indebtedness of Nocom dated 13 February 2007."

12. The sixth proposed amendment seeks to delete the existing paragraph 13 in its entirety and to replace it with a new paragraph 14 which reads:

"14. The provisions of the National Credit Act No. 34 of 2005 do not apply to the RGIP, and consequently do not apply to the suretyship as between the plaintiff and the defendants, alternatively the RGIP is exempt from the application of the National Credit Act because of the annual turnover of Nocom at the time of the conclusion of the RGIP exceeding the threshold stipulated in the National Credit Act."

15. The seventh proposed amendment wishes to replace prayer (c) of the relief sought with the following prayer:

"(c) Costs of this action on the attorney and own client scale."

16. The third respondent has delivered a notice of objection in terms of rule 28(2) and (3) setting out various grounds of objection.

17. The first objection is that the applicant failed to annex Annexures A1 and A2 referred to in the first amendment seeking to amend paragraph 5 of the particulars of claim. The objection is without merit. The documents evidencing the underlying agreement were referred to in the unamended paragraph 7 of the particulars of claim and were annexed to them. They are headed "Fuel Guarantee" and "Fuel Retail Guarantee Policy Document" respectively and are identified as such in the proposed amendment to paragraph 5. There is accordingly no substance to the objection that the third respondent will be embarrassed on this ground.

18. The second objection to the proposed amendment of paragraph 5 is more substantive. The third respondent contends that the terms of the alleged agreement in the new paragraph 5 are "new and different" from the original terms and cause of action as set out in the original paragraphs 5 to 9. The claim based on the new terms, it argues, may have prescribed and any claim or cause of action based on it will therefore be bad in law.

19. I am not persuaded that the amendments introduce a different right of action which may have prescribed. The terms of agreement relied upon

in the proposed amendments are essentially the same as those pleaded in the original particulars of claim as read with the guarantee and the policy. Paragraph 6 of the existing particulars of claim read with the proposed paragraph 5.1 and the existing paragraph 10 leave no doubt that the right of action under the primary agreement remains the same. A summons which fails to disclose a cause of action for want of an averment will interrupt the running of prescription provided that the right of action sought to be enforced in the summons subsequent to its amendment is recognizable as the same or substantially the same right of action as that disclosed in the original summons. If it is the same or substantially the same, as in this case, the running of prescription will have been interrupted and it will not matter that the effect of the amendment is to expand the claim - *Firstrand Bank v Nedbank (Swaziland) Limited* 2004 (6) 317 (SCA) at 320 I -321D. There is accordingly no merit in the second objection.

20. The third respondent has objected (the third objection) to the deletion of the original paragraph 13 and its substitution by the proposed paragraph 14. According to the third respondent, in the original paragraph the applicant effectively acknowledged and accepted that it had a legal duty to give Nocom and its sureties notice in terms of section 129 of the NCA and attached proof that it had done so. The substitution of the existing paragraph 13 with the new paragraph 14, the third respondent submitted, amounts to the withdrawal of a common cause fact or an admission and the applicant is not entitled to

do that unless it proffers an explanation under oath by way of affidavit, which it has not done. The effect of the amendment, it further submitted, would be to deprive the third respondent of a defence based on section 129 of the NCA and hence the amendment if allowed would be prejudicial.

21. The third objection is unfounded for two reasons. Firstly, the allegation in paragraph 13 of the existing particulars of claim is exactly that: an allegation. It is not a factual admission of any kind. The amendment does not aim to withdraw an admission of a common cause fact. In the circumstances the applicant is not obliged to tender any explanation under oath as to why "the fact" is being withdrawn. Secondly, the third respondent will not be prejudiced in its defence. It remains free to raise any defence under section 129 of the NCA which it may have and can do so after evidence has been adduced in relation to the annual turnover of Nocom.

22. In paragraphs 1.3 and 1.10 of the objection the third respondent raises a fourth objection, namely that the amended particulars will be excipiable. It contends that the allegations in the new paragraph 5.2 are vague and embarrassing or lacking of sufficient averments to sustain the alleged cause of action because:

i) the copy of the written demand to the guarantor referred to therein is not annexed.

ii) no proof of payment by the guarantor as alleged in the first sentence in paragraph 5.2 is annexed;

iii) a copy of the certificate signed by the company secretary/legal advisor/credit manager referred to in the second sentence in paragraph 5.2 is also not annexed; and

iv) a copy of the detailed calculation referred to in the said second sentence is also not annexed.

23. In so far as the complaint relates to the absence of documents, the basis of such objection falls away in view of such documents having already been discovered as items 10, 12 and 14 of the applicant's discovery. There is accordingly no prejudice in their not being attached to the particulars of claim at this late stage of the process.

24. The third respondent sought to expand upon the objection in argument by arguing that the guarantee agreement required the applicant to meet certain conditions or pre-conditions which had to be fulfilled or performed before it could make any claim as against Nocam and the sureties, (for instance that the guarantor had paid the amount recoverable from it within 5 days of a written demand addressed to the guarantor by Total SA, and that the demand would be accompanied by a certificate certifying the amount due and a detailed calculation of that

amount) and that the amended particulars do not make any factual allegations of compliance and hence were excipiable on that ground. This complaint too is unfounded. Firstly, this ground of objection was not raised in the notice of objection in terms of rule 28(3). Secondly, I doubt whether these allegations need to be pleaded as part of the *facta probanda*.

25. With regard to the amendment of the prayer for costs, there is no need for the applicant to set out any evidentiary basis for the amendment, as suggested by the first respondent. Whether attorney and client costs should be awarded will be determined by the evidence at trial and the discretion of the court. There can be no prejudice if the applicant gives notice of its intention to seek such an order at this stage.

26. As for the costs of this application, even though an amendment is an indulgence to the applicant, given the nature and timing of the application for amendment and the nature and extent of the opposition, justice requires that in this instance costs should follow success in the result.

27. I make the following orders:

    i) The applicant is granted leave to amend its particulars in the manner set out in its application in terms of Rule 28 (4).

ii) The third respondent is ordered to pay the costs of the application.

JR MURPHY
JUDGE OF THE HIGH COURT

Representation for the applicant:

Counsel:	Adv N Ali
Instructed by Attorneys:	Norton Rose Fulbright

Representation for 3rd respondent:

Counsel:	Adv DD Mosoma
Instructed by Attorneys:	Denga Inc.

Date Heard: 24 February 2014