REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: **No**
(2)	OF INTEREST TO OTHER JUDGES: **No**

CASE NO: 28302/2014

10/10/2014

In the matter between:

NEDBANK LIMITED — **PLAINTIFF**

and

RIAAN COETZEE — **FIRST DEFENDANT**

WILLIAM JOHN VERSVELD — **SECOND DEFENDANT**

HENRIET MARTHINET VERSVELD — **THIRD DEFENDANT**

MARLICE VAN DER WALT — **FOURTH DEFENDANT**

RIAAN COETZEE N.O. — **FIFTH DEFENDANT**

J U D G M E N T

KUBUSHI, J

[1] The plaintiff's cause of action against the defendants, in respect of claim 1, is based on an agreement of suretyship in respect of which it is alleged that the defendants bound themselves to the plaintiff as sureties and co-principal debtors for the repayment to the plaintiff, on demand, of all amounts for which the principal debtor is indebted to the plaintiff.

[2] The plaintiff's cause of action in respect of claim 2, is against the second defendant only, and is based on a banking facility agreement granted to the second defendant.

[3] Claim 1 emanates from the following factual background: on 25 January 2012 the plaintiff and the Managed Living (Pty) Ltd (the principal debtor) entered into a written agreement in terms of which the plaintiff granted the principal debtor a banking facility and in terms of which the principal debtor inter alia received monetary advances to the value of R750 000.

[4] The aforesaid facility was granted on condition, amongst others, that limited suretyship is granted in favour of the plaintiff by: the first defendant in the amount of R262 500; the second defendant in the amount of R262 500; and, the fifth defendant in the amount of R487 500. As such on the same day that the written agreement was concluded and as required by the facility agreement, the first, second and fifth defendants bound themselves as sureties and co-principal debtors for the repayment on demand of all the amounts which the principal debtor may now or in future owe the plaintiff.

[5] On 25 May 2012 the principal debtor approached the plaintiff for another loan. On this occasion both the first and second defendants signed a further suretyship limited to R525 000 each. The third and fourth defendants also bound themselves as surety and co-principal debtors for the payment of all amounts which, according to the plaintiff, the principal debtor may now or at any time thereafter owe the plaintiff. In their case the surities were limited to the amount of R500 000 each.

[6] The principal debtor has defaulted on the facility agreement hence these proceedings. The second, third and fourth defendants have entered appearance to defend and the plaintiff has now approached this court on a summary judgment application against the second, third and fourth defendants. I shall for convenience refer to the second, third and fourth defendants collectively as the defendants.

[7] The defendants are opposing the application on a point *in limine* and on the merits. The point *in limine,* which I shall first deal with, is that the plaintiff cannot be granted summary judgment relief on the basis of a simple summons. According to the defendants, the plaintiff having issued a simple summons, had to file a declaration within 15 days of the notice of intention to defend, before filing the summary judgment application, which it failed to do. They contend that as the summons stands, it is defective and excipiable and does not comply with the rules of court. It does not specify who represented the plaintiff in the conclusion of the agreements and does not contain the averments that are necessary for the defendants to properly respond to the summary judgment application.

[8] It is correct that summary judgment may be sought in respect of a simple summons. Such procedure, however, places a defendant in the invidious position of not having a clear exposition of the claim he or she has to meet. It is, thus, possible for a defendant without a defence to more readily avoid summary judgment by being allowed to create uncertainty about the tenability of the plaintiff's vaguely formulated claim. See SJ Van Niekerk *et al: Summary Judgment* page 3 – 19 and the judgments referred therein.

[9] This is what the defendants seek to do in this instance. More particularly when viewed in the light of the defences raised, as will fully appear hereunder.

[10] On the merits of the application, and in respect of claim 1, the defendants contend that they have a *bona fide* defence and have not entered appearance solely to delay the case. In support thereof they raise a number of defences, namely, that:

a. the money in terms of the surety agreements signed by the defendants on 20 May 2012 was never advanced to the defendants and that the documents the plaintiff seeks to rely on in this respect cannot be of effect;

b. the surety of the third and fourth defendants was subject to a loan agreement under the express condition that a mortgage bond to the value of R1 000 000, be registered over a certain house in their names;

c. the defendants have a counterclaim against the plaintiff who brought them under the impression that the loan would be

granted and would allow them to purchase more stock that would enable them to work the company out of debt; and

d. the penalty clause is incorrectly calculated.

[11] In a summary judgment application, where the question of whether the defendant has a *bona fide* defence arises, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. The defendant is also not required to persuade the court of the correctness of the facts stated by him or her or where the facts are disputed, that there is a preponderance of probabilities in his or her favour. See *Nair V Chandler* 2007 (1) SA 44 (T) at 47B –C and *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A – E.

[12] All that a court requires, in deciding whether the defendant has set out a *bona fide* defence, is

a. whether the defendant has disclosed the nature and grounds of his or her defence; and

b. whether on the facts so disclosed the defendant appears to have, a defence which is *bona fide* and good in law. It is sufficient if the defendant swears to a defence, valid in law, which if advanced may succeed on trial.

See *Maharaj v Barclays National Bank Ltd supra* at 426B and *Marsh v Standard Bank Of Sa Ltd* 2000 (4) SA 947 (W) at 949E – F.

[13] My view is that on the papers before me, the defence raised by the defendants creates uncertainty about the tenability of the plaintiff's vaguely formulated claim. The defences are on their own, also arguable and require to be properly adjudicated upon at trial. Consequently, leave to defend the matter should be granted.

[14] In respect of claim 2, the second defendant has not raised a *bona fide* defence and/ or any defence at all. Summary judgment must be granted in respect of this claim.

[15] I therefore make the following order:

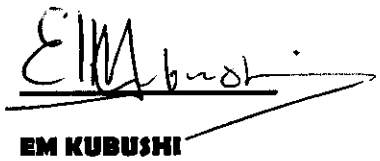
1 The summary judgment application is dismissed in respect of claim 1.

2 The second third and fourth defendants are granted leave to defend the matter.

3 Costs are costs in the main action.

4 The summary judgment application is granted with costs in respect of claim 2.

5 The second defendant is ordered to pay to the plaintiff an amount of R8 309. 01 together with interest thereon at the rate of 21% per annum, calculated daily from 1 March 2014 to date of payment, both days inclusive.



EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE:	06 OCTOBER 2014
DATE OF JUDGMENT:	10 OCTOBER 2014
FOR PLAINTIFF:	ADV S G MARITZ, instructed by ADAMS & ADAMS
FOR 2ND 3RD 4TH RESPONDENTS:	ADV J N STRYDOM, instructed by POTGIETER, PENZHORN & TAUTE INC