


## REPUBLIC OF SOUTH AFRICA


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

2/6/2016

CASE NO: 80438/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	2/06/2016
	DATE
	
	SIGNATURE

STANDARD BANK OF SA LIMITED

Applicant/Plaintiff

and

JONATHAN DRENNAN REDMOND

Respondent/Defendant

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 JUDGMENT
 

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KHUMALO J

[1] This is an application for Summary Judgment. The Applicant instituted an action against the Respondent claiming payment of monies owed to it by a company called J & S Cylinders (Pty) Ltd, ("Cylinders") the principal debtor, on behalf of whom the Respondent signed a suretyship agreement binding himself as co-principal debtor *in solidum* with Cylinders for any debts that arises from Cylinders' use of a Business Cheque Account Cylinders held with the Applicant. A copy of the suretyship agreement was annexed to the summons.

[2] Preceding the institution of the action was the liquidation of Cylinders, the principal debtor, on 10 April 2015. At the time the amount by which Cylinders was indebted to the Applicant arising from such use of the Business Cheque Account ("the account") was certified by a certificate of balance by a manager from the Applicant to have been an amount of R274, 686.63 together with interest thereon at the rate of 22.65% per annum from 25 July 2015 to date of payment. A copy of the certificate is also annexed to the summons.

[3] Reliant upon the liquidation of Cylinders and the terms of the suretyship agreement, the Applicant has in its summons sought to enforce the suretyship agreement pleading therein that in terms of the suretyship agreement the Respondent agreed:

[3.1] to bind himself as surety and co-principal debtor *in solidum* with Cylinders for its indebtedness towards the Plaintiff, **howsoever arising**, including present and future debts of any kind (which would include monies lent and advanced or overdrawn on the account);

[3.2] that in the event of the liquidation of Cylinders, the failure of the Applicant to prove its claim against Cylinders in liquidation to the full extent thereof, or at all, shall not detract from the right of the Plaintiff to recover from the Defendant the full amount for which the Respondent is bound under the suretyship.

[3.3] that a certificate signed by any manager or branch administrator of the Plaintiff, whose appointment need not be proved, as to the amount owing to the Plaintiff by Cylinders and or Respondent at any time, the fact that such amount is due and payable, the rate of interest payable thereon and the date from which such interest is reckoned shall be binding on the Respondent and shall be *prima facie* proof of the facts stated therein.

[3.4] The amount recoverable by the Applicant in terms of the Deed of suretyship shall be **unlimited**, including interest on an unpaid interest and legal costs of recovery on the attorney and client scale, including collection commission.

[3.5] The Respondent renounced the benefits of excussion and division and all other benefits and legal exceptions that could or might be raised or pleaded by the Respondent in answer to any claim.

[4] The Applicant alleges that all amounts due and owing on the Business Cheque Account became immediately due and payable as stated in the suretyship agreement.

[5] The Respondent has raised the following point *in limine*, against the Application that:

[4.1] the verifying affidavit in support of a summary judgment application is defective as it does not appear to have been signed before a commissioner of oaths. The deponent signed same on 4 December 2015 at Johannesburg, whilst the commissioner of oaths signed it at Pretoria.

#### BONA FIDE DEFENCE

[6] Furthermore, the Respondent contends that the particulars of claim are excipiable, in that the Applicant failed to attach the principal overdraft agreement (the Business Cheque Account agreement) or to plead the terms of such an agreement and as such the cause of action is incomplete.

[7] He also denies that he entered into a suretyship agreement with the Applicant, alleging not to have no knowledge of the suretyship agreement in that the contents thereof were never at any stage explained to him or informed that he was in fact signing a suretyship agreement.

- [8] The point *in limine* was decided in favour of the Applicant. The reasons only following in this judgment. According to the certificate on the verifying affidavit, the commissioner of oaths certified that the deponent has acknowledged that he knows and understands the contents of the affidavit which has been signed and sworn to in his presence at Johannesburg on this 4<sup>th</sup> day of November 2015. The commissioner then appended his stamp of office that had his full names, business address in Pretoria and the office held by him, (designation) his appointment being held *ex officio*.
- [9] The attestation to affidavits is governed by the Regulations Governing the Administration of an Oath or Affirmation (RGAOA) promulgated by the President in terms of s 10 of the Justices of Peace and Commissioners of Oaths Act 16 of 1963.
- [10] Regulation 4 thereof reads:
- (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.
  - (2) The commissioner of oaths shall-
    - (a) sign the declaration and print his full name and business address below his signature; and
    - (b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*.
- [11] With regard to Regulation 1 -4, the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with the regulations has been proved or not; See *S v Kahn* 1963 (4) SA 897 (A) at 900C.
- [12] The provisions are straightforward, the business address in that context is said to signify the address at which a person carries on business hence furnishing a postal address is not full compliance. It has got nothing to do with the manner, place and date of taking the declaration which is provided for in the commissioner's certificate. The contention by the Respondent that the business address denotes where the commissioner of oaths appended his signature is therefore not a valid argument (see Erasmus Superior Court Practice 2<sup>nd</sup> Ed, Van Loggerenberg at D3-1. The commissioner has certified that the affidavit was sworn to in his presence on the date at the specific place mentioned.
- [14] The Respondent also referred to an unreported case in this Division by Ranchod J that addressed non- compliance with the regulations, the case of *Ingersoll Rand Company SA (Pty) Ltd v Frandcorp CC*, Case no: 40111/2015 delivered on 23 October 2015. A party disputed that the deponent to an affidavit signed in the presence of the commissioner. The facts of the matter were different in that the date on the certificate that which the commissioner declared to be the date of deponent's signature of the affidavit differed from the date on the stamp that was affixed on the certificate to indicate the date on which the commissioner signed and completed his particulars. The certificate stated that deponent signed the affidavit on 5 July 2015 whilst the stamp

affixed on signature by the commissioner had 6 July 2015. The handwriting that completed the certificate seemed different to that of the commissioner of oaths that had a different date. The court held that in the absence of a verifying affidavit from the deponent or commissioner the inference should be that the deponent did not sign in the presence of the commissioner. A correct decision however oblivious to the fact that summary judgment proceedings do not allow any further affidavit other than an affidavit verifying the cause of action and that the Defendant has no defence.

[15] All the same, compliance with the provisions of Regulation 3 (1) that requires that the deponent sign the declaration in the presence of the commissioner of oaths has been held not to be peremptory; see *Cape sheet Metal Works (Pty) Ltd v JJ Calitz Building (Pty) Ltd* 1981 (1) SA 697 (O) at 699B. However *in casu* that has not been the case, the commissioner *ex officio* indicated the affidavit to have been signed before him in Johannesburg.

[16] In addition, unless a commissioner hold his appointment for a specific area not *ex officio*, his attestation outside the area for which he holds office in that instance will not be in compliance with the regulations. The commissioner of oaths that holds his appointment *ex officio* can sign affidavit anywhere in the Republic.

[17] The Respondent's point *in limine* in that regard was therefore dismissed.

#### EXCEPTION

[18] Furthermore, the Respondent contends that the particulars of claim are *excipiable*, in that the Applicant failed to attach the principal overdraft agreement (the Business Cheque Account agreement) or to plead the terms thereof, therefore its cause of action incomplete.

[19] In respect of the Applicant's failure to annex the Business Cheque Account that gave rise to the debt or to plead the terms of such an agreement, the Respondent refers to s 18 (6) of the High Court Rules that provides as follows:

*"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."*

[20] A party who uses a contract as a link to the event that gives rise to the liability of the alleged debtor he is suing "relies on that contract" as is stated in subsection 6. See *South African Railways and Harbours v Deal Enterprises Pty Ltd* 1975 (3) SA 944 (W) at 953A. In that instance he would be required then to annex a true copy thereof or of the part relied upon. In instances where such a contract has been lost or destroyed it has been held that failure to do so will not be regarded as fatal to the Plaintiff's claim in certain instances and could be condoned (see *Moosa and OTHERS NNO v Hassam and others NNO* 2010 (2z) SA 410 (KZP) .

[21] The Applicant's particulars of claim sets out that as a result of the principal debtors' liquidation it has become entitled to recover the money that is owed to it under the

Business Cheque Account as *per* provisions of the suretyship agreement. Applicant's right to claim against the Respondent is therefore based upon the provisions of a suretyship agreement that was concluded between itself and the Respondent that provided for the stated eventuality, the liquidation of the principal debtor. In other words Applicant's cause of action is based on the terms of the suretyship and liquidation. A copy thereof has been annexed to the summons. It is therefore the document that links the Respondent to the Applicant for the indebtedness of Cylinders, the principal debtor. The suretyship agreement constitutes the names of the creditor, the principal debtor with whom the surety binds himself, the surety and the terms of Respondent's liability and its extent that is determined by the certificate as referred to in the suretyship, pleaded by the Applicant. It is therefore the vital link in the cause of action. The Respondent's liability to the Applicant therefore stems from this suretyship, without it there would be no link of the Respondent to Applicant.

- [22] The ground for the Applicant to hold the Respondent liable is because of the suretyship that he signed binding himself as a co-principal debtor to the Applicant for any indebtedness howsoever arising between the Applicant and Cylinders. Therein lies the cause of action of the Applicant. The indebtedness of the principal debtor and its extent is also vital in elucidating the cause of action of the principal debtor. The certificate of balance confirms such indebtedness and its extent, which certificate is also annexed to the summons.
- [23] The Applicant has therefore adequately pleaded its cause of action having adequately indicated the nature, extent and grounds of its action. It did mention that the amount that is due and payable was the amount used by the principal debtor from the Business Cheque Account at the time of its liquidation that is reflected in the certificate of balance, the latter being the event upon which the Applicant is reliant as part of his cause of action (making the amount immediately payable) against the Respondent as surety. The essential terms of the contract of suretyship are the identity of the creditor, the identity of the debtor, the identity of the surety and the nature and amount of the principal debt. The agreement states that the certificate of balance will *prima facie* be sufficient proof
- [24] Cylinders' use of the Business Cheque Account is mentioned by the Applicant in its particulars and pleaded as the transaction from which Cylinders not the Respondent's indebtedness arose, however it is the liquidation of Cylinders that triggered the enforcement of the suretyship agreement. For that reason the Applicant's cause of action is based on the liquidation as is provided for by the terms of the suretyship agreement. The Business Cheque Account is therefore not a vital link to the chain of cause of action and reference thereto in the pleadings is adequate, pleading of its terms would amount to over-pleading.
- [25] Ambiguity on its own is not sufficient. There must be evidence that the opposing party will be seriously prejudiced if the relevant portions in the particulars are allowed to stand. The case that Respondent is faced with is clear from the certificate of balance read with the relevant clauses in the suretyship agreement and as pleaded in the particulars of claim. The ambiguity and vagueness pleaded by the Respondent fails to go to the root of the action as indicated in the matter of Jowell v Bronwell-Jones 1998 (1) SA 836 (W) at 899 -903.

- [26] The terms of the Business Cheque Account are therefore not necessary to be pleaded against the surety. Failure therefore to do so or annex a copy is not fatal to the Applicant's Application.

#### SIGNING THE SURETYSHIP AGREEMENT

- [27] The Respondent denies that he entered into a suretyship agreement with the Applicant, alleging to have no knowledge of the suretyship agreement in that the contents thereof were never at any stage explained to him or informed that he was in fact signing a suretyship agreement.
- [28] The suretyship agreement is a separate document, *ex facie* with a very clear and unambiguous heading that reads "Suretyship in favour of Standard Bank of South Africa". The document could not be mistaken for any other thing except for what it reads to be in terms of its heading and contents. The Respondent does not explain why notwithstanding such reference and contents on the document as a suretyship he would not have been aware that he is signing a suretyship or he would have needed to be told that it is a suretyship agreement. He does not explain the circumstances that made him not to be aware that he is signing a suretyship agreement.
- [29] Further, the Respondent initialed each and every page of the document that he alleges was not aware of, and on the last page of the document there is a space for execution of the suretyship provided, for signature by the sureties who at the time seem to have been more than one. The paragraph begins with a sentence that reads "the suretyship is signed by each surety as follows." The Respondent affixed his full signature under that clause as Surety No 1 and furnished his address where it says 'Street address of surety'. Such details illustrates that it is improbable that the Respondent would not have been aware that he is signing as surety.
- [30] The mystery remains that if he was not aware that he was signing the suretyship agreement then he has to explain the document he signed on 15 January 2001 consenting to the release of the other surety from the operation or obligation of the suretyship.
- [31] Since this is a summary judgment application, the defence is raised in an affidavit opposing summary judgement whereupon the respondent has got to show its *bona fide*. It must fully disclose the nature and grounds of his defence and the material facts upon which it is founded. The Respondent had an opportunity to place evidence on oath before the court substantiating their defence and demonstrating their bona fides in this regard. The court cannot speculate that the Respondent might reveal a good explanation why it happened when the matter goes to trial. No facts are disclosed in that regard. The defence lacks substance and cannot be said to be devoid of any *mala fides*. Respondent is not challenging the relief sought against him on the basis that he never intended entering into a suretyship agreement.
- [32] The Respondent has failed to disclose a defence that is *bona fide* or good in law in his opposing affidavit, which if it is proved at the trial, will constitute a defence to the Applicant's claim. He only raised technical defences that are indicative of an attempt to frustrate and delay the Applicant. The exercise of my discretion is

not to acquiesce to the request for a refusal of summary judgment in favour of the Respondent, as the facts deposed to in the affidavit do not suggest a reasonable possibility that the Respondent may have a defence against the claim of the Applicant.

[33] The purpose of a summary judgment, as submitted on behalf of Applicant with reference to the matter of *Meek v Kruger* 1958 (3) SA 154 (T) at 159H -160A is to assist an Applicant where Respondent who cannot set up a bona fide defence or raise an issue to be tried, enters appearance simply to delay judgment. Which is the case in this matter.


[34] I therefore make the following order:

[34.1] Judgement is granted as follows

[34.1.1] Payment of the sum of R274,686.63;

[34.1.2] Interest on the amount of R274,686.63 calculated at the rate of 22.65% per annum from 25 July 2015 to date of full and final payment;

[34.1.3] payment of the costs of suit.



**N V KHUMALO J**

**JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

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