



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <i>Yes</i>
<i>27/1/16</i>	
DATE	<i>C. Rabie</i>
	SIGNATURE

*27/01/2016*  
**Case no. 72492/2015**

In the matter between:

**MFC, A DIVISION OF NEDBANK LTD**

**Applicant**

and

**ARB SMITH**

**First Respondent**

**IJ SMITH**

**Second Respondent**

**MJ PAILE**

**Third Respondent**

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**JUDGMENT**

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**RABIE, J**

1. In this application the applicant applied for summary judgement against the first, second and third respondents for payment of the amount of R 135 656, 55 together with interest and costs. The respondents were sued in their capacities

as co-principal debtors and sureties of and on behalf of Siyabonga Civil Works & Steel Pty Ltd (hereinafter "the principal debtor").

2. The background to the matter is briefly the following: During September 2008 the principal debtor and Imperial Bank Ltd entered into a written lease agreement in terms of which certain movable goods were leased. It was in respect of this agreement which the respondents bound themselves as co-principal debtors and sureties.
3. During October 2010 the applicant and Imperial Bank entered into a written agreement in terms of which the applicant, in terms of section 54 of the Banks Act, purchased the business of Imperial Bank as an indivisible whole and as a going concern. According to the agreement the "business" sold was the business which Imperial Bank conducted, comprising the assets of the business which included the immovable property, the trademarks and all claims against trade debtors in respect of the business. All the assets and liabilities of Imperial Bank were also transferred to the applicant. According to the agreement the "assets" meant all the assets of Imperial Bank on the implementation date of the sale excluding claims against SARS. The required statutory approval for the transfer of the assets and liabilities of Imperial Bank to the applicant was duly granted by the Registrar of Banks as well as the Minister of Finance.
4. According to the applicant's particulars of claim the aforesaid constituted a cession to it of all Imperial Bank's rights in terms of the aforesaid agreements with the respondents.

5. The applicant pleaded that the principal debtor breached the lease agreement by failing to pay the agreed monthly rentals entitling the applicant to cancel the aforesaid agreement and to claim whatever is due to it.
6. The principal debtor was finally liquidated during or about May 2015. The applicant decided that it was not economically viable to recover the leased goods and abandoned same in favour of the principal debtor in liquidation. Subsequently, and in the present action, the applicant claimed payment of the amount payable in terms of the lease agreement.
7. The respondents opposed the action and the applicant instituted the present application for summary judgement.
8. The respondents did not deny the deeds of suretyship nor the amount claimed and also did not dispute the authenticity or lawfulness of the agreement between Imperial Bank and the applicant but relied on so-called technical defences alone. I shall briefly refer to these defences.
9. Firstly, it was submitted that the officials of the applicant who deposed to the affidavit supporting the application for summary judgement laid no basis to confirm that they considered the "Imperial Bank documentation". Furthermore that no supporting affidavit of anybody previously in the employ of Imperial Bank, was annexed. Consequently, so it was submitted, the deponents to the supporting affidavit did not have personal knowledge of the matter as stated by them.
10. There is no merit in this submission. Firstly, the business of Imperial Bank was taken over as a going concern and all its assets, which would have included all documentation and computer information, were delivered to the applicant.

Consequently, when the deponent's stated that they perused and familiarised themselves and have personal knowledge of the principal debtor's account and all related agreements and documents including the credit application, supporting documentation, accounts and transaction history as well as the suretyships, there is no reason to suggest that they were not referring to the documents and information relating to the relationship between the applicant and the respondents which they have in their possession. In fact, no person previously in the employ of Imperial Bank would be in a better position than the deponents regarding the state of affairs relating to the respondents.

11. Secondly, it was submitted by the respondents that, having regard to the agreement between the applicant and Imperial Bank, there was no cession of the specific claim between Imperial Bank and the respondents. It was submitted that the "business" and the "assets" which were transferred, do not include the aforesaid suretyship agreements.
12. This submission cannot be sustained. Firstly, the respondents were trade debtors in respect of the business transferred to the applicant and as such were specifically mentioned in the definition of "business" in the aforesaid agreement between the banks. It was not necessary, as was submitted on behalf of the respondents, to mention each and every type of agreement, such as lease agreements, credit agreements, suretyship agreements, and the like, in the aforesaid agreement. The wording of the agreement is comprehensive and clearly included the aforesaid agreement with the principal debtor and the suretyship agreements with the respondents. Secondly, a claim by Imperial Bank against a debtor or a surety clearly constituted an asset of Imperial Bank and as

such formed part of the assets transferred to the applicant in terms of the aforesaid agreement.

13. Thirdly, it was submitted that the copy of the agreement between the applicant and the principal debtor which was attached to the particulars of claim, was not legible and that only the first page of the suretyship agreement pertaining to the third respondent was attached to the particulars of claim. Consequently, so it was submitted, the particulars of claim is excipiable and/or constitutes an irregular process. In an attached letter of the applicant's attorney these allegations were denied. Furthermore the annexures filed in the court file are sufficiently legible and the full version of the particular session was attached to the particulars of claim. In any event, the applicant's attorney immediately forwarded a legible copy of the agreement and all the pages of the aforesaid suretyship agreement to the respondents. During argument the submissions in this regard were withdrawn and no more needs to be said about them.
14. Lastly, it was submitted on behalf of the respondents that it was not open to the applicant to simply abandon the assets which formed part of the lease agreement without stating why it was not economically viable to recover such assets. It was further submitted that the abandonment of the assets was to the prejudice of the sureties.
15. There is no merit in this submission either. The applicant was entitled to claim the amount claimed in the present action, from the principal debtor in terms of the lease agreement. As such it was entitled to claim the same amount from the respondents who were co-principal debtors and sureties. They were liable to the applicant as much as the principal debtor had been liable to the applicant. In any

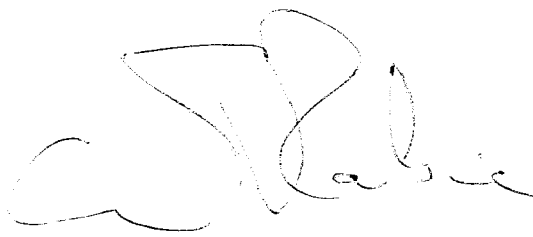
event, the respondents did not suggest in their answering affidavit that they had suffered any prejudice as a result of the applicant claiming the balance due to it in terms of the lease agreement instead of attaching the goods which were the subject of the lease agreement.

16. Having regard to the aforesaid I find that there is no triable issue between the parties and consequently no reason why summary judgement should not be granted in favour of the applicant.

17. In the result the following order is made:

1. The respondents are ordered jointly and severally to pay to the applicant the amount of R135 656,55 together with interest thereon at the rate of 2% above the prevailing prime lending rate from time to time from date of service of the summons to date of payment.

2. The respondents are ordered jointly and severally to pay the costs of the action and the application for summary judgment on the scale as between attorney and client.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', is written above a horizontal line.

**C.P. RABIE**

**JUDGE OF THE HIGH COURT**