IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 23668/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

DATE 30/8/2019 SIGNATURE

In the matter between:

NEDBANK LIMITED Plaintiff

and

MADODA MBATHA Defendant

JUDGMENT

MNGQIBISA-THUSI, J

[1] The plaintiff seeks the following relief against the defendant:

1.1 Payment of the amount of R765, 109.13;

1.2 Interest on the amount of R765, 109.13 payable at the rate of 11.00% per annum calculated from 24 September 2015 to date of payment and capitalised Monthly; and

1.3 Payment of costs on an attorney and client scale.

[2] The following facts are common cause. On 29 December 2006 at or near Johannesburg the plaintiff, Nedbank Ltd and Madoda Mbatha Investments (Pty) Ltd ("Madoda Investments"), entered into a number of agreements, including a term loan agreement. At the time the loan was obtained, the defendant, Mr Madoda Mbatha, was Madoda Investments' sole shareholder and director and acted on its behalf.

[3] On or about 2 August 2011 the plaintiff obtained judgement in its favour against Madoda Investments for payment of an amount of R526, 354.80 together with interest at the rate of 11.5% per annum from 2 November 2010 to date of payment, capitalised monthly, and costs. On failure by Madoda Investments to make payment in terms of the order, a warrant of execution was issued on 23 September 2011. However, the plaintiff was informed that Madoda Investments was deregistered due to failure to file its annual report.

[4] The plaintiff alleges that on 11 November 2006 the defendant, Mr Madoda Mbatha, had in writing bound himself as surety and co-principal debtor for the payment when due of all present and future debts of any kind of Madoda Investments. On the basis of this alleged suretyship and in the light of Madoda's Investments' de-registration, the plaintiff is seeking from the defendant, in his

capacity as surety and co-principal debtor, payment of monies Madoda Investments owes it.

[5] At the beginning of the trial it was agreed that the only issues to be determined were the following:

5.1 the existence of the suretyship agreement, and

5.2 the authenticity of the written suretyship agreement attached to the plaintiff's particulars of claim as annexure "D".

[6] Furthermore it was agreed, firstly, that should the court find that a valid suretyship agreement was concluded between the plaintiff and the defendant and that the signature of the defendant on the suretyship agreement was authentic, the defendant would not dispute the quantum of the plaintiff's claim and that the terms of the suretyship and its interpretation as contained in paragraphs 13 and 14 of the plaintiff's particulars of claim would not be in dispute. Secondly, it was agreed that the plaintiff bears the onus of proving, on a balance of probabilities, the existence of the suretyship agreement and its authenticity.

[7] Counsel for the plaintiff, Mr Raubenheim, submitted that the original suretyship agreement has been lost and that as a result a copy of the suretyship agreement would be assessed.

[8] The first witness called by the plaintiff is Mr Vaughn Justin Rigney ("Mr Rigney"), who is employed at the plaintiff's Shortfalls Recoveries' Department. Mr Rigney testified that amongst his duties at plaintiff, he is tasked with following up on accounts where a client has defaulted on payments. He testified that since

2015 when action was instituted against the defendant, he has taken steps to locate the original suretyship agreement signed by the defendant. According to Mr Rigney, he searched for the suretyship agreement on the defendant's digital application sites, using the defendant's identity number. The digital application sites reflected all of documents relating to the defendant and he had requested for copies of the digital documents relating to the defendant. Mr Rigney further testified that despite all his attempts to find the original agreement it could not be located. Mr Rigney explained that the process at the plaintiff is that after an agreement is entered into on paper, it is scanned and uploaded on to the plaintiff's system and is stored in vaults either in Johannesburg, Durban or Cape Town, for a period of approximately 5 to 7 years, and then it is sent to Metrofile. Mr Rigney further testified that once the original suretyship document could not be found he made a follow-up with the original bank official, a certain Ms Dhavhana, who had dealings with the defendant in relation Madoda Investments' transactions with the plaintiff. Ms Dhavhana did inform him that she remembers the defendant and does recall that the defendant did sign suretyship agreement with the plaintiff. Ms Dhavhana did inform him that she remembers the defendant and does recall that the defendant did sign suretyship agreement with the plaintiff. Ms Dhavhana did inform him that she remembers the defendant and does recall that the defendant did sign suretyship agreement with the plaintiff. According to Mr Rigney, Ms Dhavhana is no longer in the employ of the plaintiff and had indicated that she cannot assist plaintiff.

[9] In cross examination, Mr Rigney admitted that he was not personally involved in the printing of the suretyship pro forma in 2006 and that he has no

personal knowledge of the circumstances under which the suretyship was entered into. Furthermore Mr Rigney also admitted that he did not personally scan and upload the alleged original suretyship onto the system.

[10] Mr Rigney was also referred by Mr Rubenheimer to a facilities document discovered by the defendant.

[11] The defendant's version put to Mr Rigney was that the defendant would deny that he signed a suretyship in favour of the plaintiff and that had such suretyship been presented to him, he would not have signed it.

[12] The next witness called by the plaintiff is Mr Johannes Frederick Hattingh ("Mr Hattingh"), a handwriting expert whose credentials were not in dispute. Mr Hattingh's evidence is as follows. He was requested by the plaintiff to analyse the following documents:

12.1 a copy of the alleged suretyship dated 11 November 2006;

12.2 a copy of a loan agreement between the plaintiff and Madoda Investments dated 29 December 2006;

12.3 a copy of a resolution by Madoda Investments' directors dated 29 December 2006; and

12.4 a copy of a letter from the plaintiff to Madoda Investments referencing 'Loan Agreement' and dated 27 December 2006.

[13] Mr Hattingh testified that he initially was of the view that all documents presented to him were in dispute and it was only later that he was informed that the only document in dispute amongst those given to him to examine was the

copy of the suretyship agreement and that the others were only specimen signatures. He further testified that although he was given copies, the quality of the copies was good as the letter formations of the copies were discernible.

[14] Furthermore, Mr Hattingh explained that at school there is the same writing system and a person's handwriting adapts and over time develops individual characteristics until he reaches the age of 20 and thereafter the hand writing stays the same until old age unless it is deliberately changed. He further testified that no one signs identical in that natural variations do occur.

[15] Mr Hattingh further testified that he had no doubt that the signatures on all the copies given to him were made by the same person.

[16] In cross examination, Mr Hattingh testified that from the documents given to him he could not discern any fundamental differences in the signatures. He testified that in analysing handwriting you also look at variations which are not natural and the construction of the signatures which will give you a list of characteristics, which may be visual and in some instances not visual and you would need to use a microscope to discern them. Mr Hattingh testified that the copies given to him to examine were of a poor quality and admitted that in copying a document certain details may be added to such document, for instance, dirt or a scratch. He testified that when examining a handwriting, pen pressure is taken into account and that with regard to copies, it would be difficult to determine pen pressure as there are no indentations. However, he testified that there were other ways of determining pen pressure by looking at indentations. He reiterated that the signature on the disputed document and the

other documents provided were are the same. He disputed that the SWGDOC[1] methodology was the framework used in analysing handwriting and that in his opinion the SWGDOC were only guidelines you could use and that you could deviate from them.

[17] It is apposite at this stage to indicate that Ms Nonhlanhla Dhavhana, the banking specialist who dealt with the defendant with regard to the Mbatha Investments accounts whilst still in the employ of the plaintiff, was subpoenaed to come and testify on behalf of the plaintiff as she had previously refused to assist. A warrant was issued for Ms Dhavhana to be brought to court in order to testify. Ms Davhana testified as follows. During 2005-2006 she was in the employ of the plaintiff and remembers dealing with the defendant. She testified that she could not recall receiving a telephone call from a Mr Rigney but recalls one from a certain Mr Marius Coetzee. She testified that she would have told the person who called her that she could have dealt with the defendant. On being shown a copy of a facilities document, discovered by the defendant, Ms Davhana testified that she would not be in a position to recognise the signature of the authorised signatory for the plaintiff without seeing the original document. She further testified that her signature on the document looked different from her signature and that it could be copied or pasted. Further Ms Davhana testified that she does not remember signing the document as a long period has lapsed since the alleged signature was made. She admitted that during her employment by the plaintiff she was the one who dealt exclusively with the defendant. She further admitted that she always had to sign on behalf of the plaintiff when

[1]Is an international guide to methodology on analysing handwriting.

transacting with the plaintiff's clients. She consistently refused to confirm the signature on the document as it was a copy, insisting that the original be produced.

[18] On being asked to confirm whether the employee number on the document used to be hers, she initially admitted that it was but immediately stated that hypothetically it could be hers as anyone could have written her employee number. Furthermore, Ms Davhana admitted that she was required to sign any agreement in which she represented the plaintiff.

[19] The rest of Ms Davhana's evidence was a tirade against the plaintiff for allegedly messing up clients' securities.

[20] After the plaintiff closed its case, the defendant applied for absolution from the instance. The application was refused on the basis that taking into account the evidence by Mr Rigney, Mr Hattingh and Ms Davhana, the plaintiff had made out a *prima facie* case upon which a reasonable man might give judgment against the defendant.

[21] The defendant testified as follows. On 29 December 2006, the plaintiff and Madoda Investments concluded a loan agreement in order for Madoda Investments to obtain a bakery franchise. At the conclusion of the agreement, he represented Madoda Investments. In concluding the agreement he dealt with the plaintiff's specialist relationship manager for small businesses, Ms Nonhlanhla Davhana. The defendant explained that in his dealings with the plaintiff, once approval was given to an application made, he would be invited to the plaintiff's offices where Ms Davhana would take him through the necessary

documents in relation to the agreement reached and given an opportunity to ask questions. He would thereafter, as director, sign on behalf of Madoda Investments. He acknowledged that the initials and signature on the facilities' document appeared to be his but denied ever initialling or signing the document. He testified that he knew for the first time about the suretyship agreement some four years when it was shown to him by his lawyers, after the plaintiff instituted proceedings against him after it failed to recover monies loaned to Madoda investments as it was de-registered. The defendant admitted that the signed facilities document was discovered by him. However, the defendant denied that the suretyship agreement was shown or explained to him by Ms Davhana. He testified that if the suretyship agreement had been explained to him he would not have agreed to sign it. Further, the defendant testified that unless the original suretyship document he allegedly signed was produced, he suspected that the available copy was a forgery.

[22] During cross examination the defendant conceded that the initials and signatures appended to the suretyship document appear to be his but denied either initialling and/or signing the document.

[23] Ms Yvette Palm, a handwriting specialist, testified for the defendant. Her evidence was that she was unable to come to any conclusion with regard to the signatures she was requested to analyse. Ms Palm complained about the quality of the copies she was given and the fact that the signatures provided, did not have the signatory's initials which seemed to be paired with the disputed signature. Further to that, Ms Palm could not assist this court with regard to the authenticity of the signatures.

[24] It is common cause that the defendant had acted on behalf of Madoda Investments in its transactions with the plaintiff and that he was duly authorised to sign the necessary documents on its behalf. The defendant, save for the suretyship, does not dispute that he signed all the necessary documents relating to the loan agreement. According to the defendant, he would not have signed the suretyship even if it was shown to him and explained to him by Ms Davhana. However, the defendant could not comment when confronted with the fact that the agreement and the facilities documents provided, as one of the conditions of the loan agreement, that Madoda Investments had to provide security for the loan. In fact the facilities document, provides that approval of the loan would be subject security in the form of an unlimited suretyship being provided[2].

[25] I found Messrs Rigney and Hattingh to be honest and credible witnesses. Mr Rigney gave a plausible explanation with regard to why a copy of the agreement, and not the original was used. Ms Davhana was an unimpressive and evasive witness who instead of answering questions directly, hid behind the fact that the original documents were not produced. The defendant appeared to be an honest but an unimpressive witness. His denial of his signature on the copy of the suretyship was not convincing.

[26] From his evidence, it is clear that the plaintiff produced the best available evidence with regard to the loan agreement, inclusive of the suretyship. Mr Hatting's about the analysis he did of the facilities document compared with the specimens he was provided with, it is more probable that the disputed signature

[2] Clause 3 of the facilities letter.

is that of the defendant. The defendant did not provide any evidence to controvert the findings of Mr Hattingh. Taking into account Mr Hattingh's evidence, the evidence of both the defendant and Ms Davhana that Ms Davhana was the only bank official who dealt with the defendant with regard to the loan agreement and its ancillary attachments and the undisputed fact that the loan would not have been approved unless security was provided, I am of the view that the plaintiff has discharged its onus on a balance of probabilities that the disputed signature is that of the defendant. The defendant's denial of the signature upended to the suretyship was not convincing. I am satisfied that the plaintiff has proven, on a balance of probabilities, the defendant did sign the suretyship and that signature on the suretyship was not forged as alleged by the defendant but authentic.

[27] The general rule is that a successful litigant is entitled to his or her costs. There is no reason why the plaintiff should not be granted a cost order.

[28] In the result the following order is made:

1. That a valid suretyship was entered into between the plaintiff and the defendant.
2. That the signature on the copy on the suretyship is that of the defendant.
3. The defendant to pay the costs of suit.

N P MNGOMBISA-THUSI
Judge of the High Court

Appearances:

For plaintiff Adv R Raubenheimer (instructed by Vezi & De Beer Inc.) and for defendant Adv A Politis (instructed by Natalie Lubbe & Associates Inc.)