IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 14072/2019

DATE: 2019/06/21

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE? NO.
(2) OF INTEREST TO OTHER JUDGES? YES
(3) REVISED? NO
DATE: 21/06/19
SIGNATURE

In the matter between

HLABAHLOSILE TRADING Applicant

and

WETPIPE (PTY) LTD TRADING and 4 OTHERS Respondent

***EX TEMPORE* JUDGMENT**

MAKHUBELE (J): I will proceed to hand down the *ex tempore* judgment. This is an opposed summary judgment application that I heard in the unopposed roll of Tuesday 18 June and undertook to hand down judgment at the end of the week's roll, today, 21 June 2019. I did not think that it would be necessary to reserve the judgment because all, but one of the defences raised were abandoned. The remaining issue is very crisp. The application for summary judgment arises from the summons issued by the applicant (plaintiff in the action) against the 5 defendants whom I will refer to as the respondents. It is a simple

summons that contains all the material facts relating to the cause of action. There is no objection in this regard. The cause of action arises from a settlement agreement, it is called 'acknowledgement of debt'. In the particulars of claim attached to the simple summons it is referred to as a 'settlement agreement'.

There is nothing contentious with regard to usage of the word 'settlement agreement' because even in the acknowledgement of debt itself, these words 'acknowledgment of debt' and 'settlement agreement' are used interchangeably. The settlement agreement or the acknowledgement of debt was signed on 23 November 2018 by the fourth and fifth respondents in their capacities as joint trustees of the Schutte Family Trust and as sureties in terms of the deed of surety. Furthermore, the fourth respondent also signed in his capacity as director of the first respondent as a second debtor.

There is also a suretyship signed on the same day 23 November 2018, signed by both the fourth and fifth respondents as joint trustees and in their personal capacities. The fourth respondent also signed on behalf of another entity referred to as Wetpipe (Pty) Limited Trading as Minions Day care.

This agreement of settlement was for to acknowledge the indebtedness to the applicant in the total amount of R2 37344-40. The allegation is that the respondents have failed to pay this amount on or before 28 February 2019 which was the due date. The particulars of claim also indicate the suretyship agreement and the basis on which all of the respondents are liable for this amount.

The respondents gave due notice to defend the action whereafter the applicant filed the current application for summary judgment.

An opposing affidavit in this respect was filed. The defences raised are of a technical nature as they have been correctly referred to by the applicant's counsel. They all relate to issues or objections to the validity of the acknowledgement of debt and deed of suretyship. The first one being that the acknowledgement of debt is void for vagueness. The second one is that the suretyship signed is invalid because there is a prohibition clause in the trust deed regarding the basis on which the trustees are allowed to bind the trust. This relates to whether or not the debt is for the benefit of the trust beneficiaries. I will get back to this issue because this was the only remaining defence that was argued. The third one is titled 'incorrect *causa* in the suretyship agreement'. The complaint here is that the applicant attached an acknowledgement of debt in the simple summons whereas the particulars of claim refer to a deed of settlement. The fourth defence was that the simple summons is excipiable because it refers to a settlement agreement which was not attached.

The fifth and the last defence was that the certificate of balance was not annexed to the simple summons.

Ms Tromp appeared on behalf of the respondents and on behalf of the applicant is Mr Marais. They both handed up heads of argument. I am indebted to both of them although Ms Tromp basically abandoned all but one of the defences that were raised. This was after Mr Marais had argued the defences that had been raised, and if I may say competently

so. The only issue remaining defence is whether or not the acknowledgement of debt or the settlement agreement is invalid because of the prohibition clause in the deed of trust. When I adjourned these proceedings, I realised that the defences that have been raised are rather common when trusts are faced with actions to recover money. Well, there is an acknowledgement of debt and a suretyship agreement. Despite the fact that the law is settled, one still finds these kind of defences being raised. I particularly remembered a few matters that I will refer to. Some of which the circumstances are similar to the matter before me.

The relevant paragraph in the opposing affidavit with regard to the remaining defence is titled 'invalidity of the suretyship signed on behalf of the Schutte Family Trust.' It reads as follows:

> *"[7.1] At the time when the documents were presented to the fifth defendant and myself for signature, it was expressly pointed out to the representatives of the plaintiffs that the trust cannot bind itself as a surety. I made this statement as a result of the fact that I was aware of the provisions of the trust deed that stipulates that a suretyship may only be signed on behalf of the trust if it benefits the trust or its beneficiaries.*
>
> *[7.2] notwithstanding the aforesaid communication to the plaintiff's representatives, the plaintiff demanded that the documents be signed. I should*

also add in this regard that the documents were signed under extreme pressure from the plaintiff and in haste.

[7.3] I annexed a copy of the trust deed of the Schutte Family Trust hereto marked annexure "CJ2." The honourable court is specifically referred to the provisions of clause 11.2.14 that provides as follows.

> *11.2 The trustees shall at all times be vested with such powers to deal with the trust assets which they in their exclusive discretion deem necessary to best control the trust fund for the benefit of the beneficiaries. The main emphasis in the administration of the trust property is upon investment and not speculation and speculative transactions. Without restricting the general powers of the trust, the trustees shall have powers to:*
>
> .....
>
> *11.2.14.Guarantee as surety or co-principal debtor for the due performance by any natural or legal person for composition or free of charge, notwithstanding that a trustee might have a*

personal direct or indirect interest in such person, and to bind an asset of the trust as collateral security for this purpose provided however that such guarantee or suretyship should benefit the trust or its beneficiaries."

[7.4] I can state unequivocally that the suretyship signed on behalf of the trust did not benefit the trust or its Beneficiaries.

[7.5] The beneficiaries of the trust are the children of the fifth defendant and myself, namely Stepfan Schutte and Thean Schutte.

This is all regarding the remaining defence.

It is clear from the paragraphs that I have quoted above that there are actually two issues, the first one being the prohibition clause 11.2.4 and the second one being the alleged pressure or duress under which the suretyship agreement was signed. What is also clear from these paragraphs is that the beneficiaries are the children of the joint trustees. In fact when one looks at the Trust Deed itself, it shows two kinds of beneficiaries. The first is income beneficiaries, who are the children as indicated. What is not indicated in the opposing affidavit is that the trustees are also beneficiaries as it appears from the definition clause of the Trust Deed. Paragraph 1.2(a) indicates the income beneficiaries as amongst others, their children, Stepfan and Thean Schutte.

Amongst others, the capital beneficiaries are indicated in

paragraph 1.2(b) (viii) as *"the testate or interstate heirs of Christian Johannes Schutte and Thean Schutte, if none of the beneficiaries referred to under (i) to (VI) are no longer alive at the vesting date"*

As such the fourth and fifth respondents are beneficiaries of the trust because the capital from this trust will in future accrue to their respective estates. Therefore, the beneficiaries of this trust are in the first place the founder of the trust, the children and the joint trustees.

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In the heads of argument, Ms Tromp relied on or referred to the judgment of *Standard Bank of South Africa versus Koekemoer and others* 2004 (6) SA 498 (SCA). Unfortunately, she did not indicate which paragraph in this judgment she relies on. I have looked at this judgment. It does not support the respondent's contentions. Quite to the contrary, as it appears from the following paragraphs. This judgment, per Mpati DP, was delivered on 27 May 2004, the head note (summary) reads as follows

> *"Trust deed empowering trustees to enter into*
> 20 *loan agreements and to encumber trust property in the process – lending bank under no obligation to protect beneficiaries in circumstances of case".*

Paragraphs [12] and [13] read as follows:

[12] Part of the bank's business is to lend money to clients and what would have been of interest to it is whether the trustees had the authority to borrow money and to encumber trust property in the process. If satisfied on that score, the bank was under no obligation to protect the beneficiaries. There was accordingly no obligation on it to study the Trust Deed any further to ascertain whether the trustees did or did not have the power to on-lend the money to the third respondent. The fact that the Trust Deed was in its possession indeed provided the bank with the means to acquire the knowledge, or, if that was not apparent ex facie the Trust Deed alone, to appreciate what questions should be asked to acquire the knowledge, but that in itself does not justify a finding that it had actual or constructive knowledge of the prohibition. In my view, to render the agreements unenforceable at least actual knowledge by the bank of the prohibition would have to be established. A court is not normally concerned with the respective motives which actuate parties in entering into a contract, except in so far as they were made part and parcel of the contract either expressly or by clear implication. African Realty Trust Limited v Holmes ***1922 AD 389*** *at 403. The question whether, if actual knowledge was established,*

the respondents, in their quest to have the loan agreements declared unenforceable, would have to go further and show that the bank also appreciated the implications upon the validity or enforceability of the on-lending, does not arise for consideration here.

[13] It may be mentioned, in conclusion, that in the absence of proof at least of actual knowledge on the part of the bank of the prohibition clause in the Trust Deed, or the existence of a positive duty in law to investigate whether the on-lending would be ultra vires the Trust Deed or constitute a breach of trust prejudicial to the beneficiaries, considerations of public policy do not arise. The appeal should accordingly succeed.

In their affidavit resisting summary judgment, the respondents before me rely on duress, not the prohibition clause in the Deed of Trust.

The principles in the Standard Bank case were applied in subsequent cases such as *Investec Bank BPK en Anders v Scholtz NO.* The neutral citation is [2011] ZAAFSHC 208 (15 December 2011.This is the judgment of Van der

Merwe R. It was a summary judgment application against a trust that was trying to escape liability by raising the similar defences. Paragraph 38 of this judgment reads as follows.

[38] Die teenkant, naamlik dat dit vir 'n persoon wat voornemens is om met hierdie trusts sake te doen, slegs nodig is om die spesifieke magtigings van die trustee in klousules 11.2 (en 9.2) na te gaan, is in ooreenstemming met wat gesê is in ***STANDARD BANK OF SOUTH AFRICA LTD v KOEKEMOER AND OTHERS 2004 (6) SA 498*** *(HHA) op 503 F, naamlik:*

> *"Part of the bank's business is to lend money to clients, and what would have been of interest to it is whether the trustees had the authority to borrow money and to encumber trust property in the process. If satisfied on that score, the bank was under no obligation to protect the beneficiaries."*

It is clear from a reading of these cases that the issue is the authority of the trustees, which is not what the respondents before me have raised in their affidavit resisting summary judgment.

I agree with the submissions made by Counsel for the applicant

that nowhere in the papers before me did the respondents raise a defence about the authority of the trustees to sign the acknowledgment of debt and also bind the a prohibition regarding trust as surety for these debt. Authority of the trustees in this regard is not denied.

These issues were raised and discussed in the matter of First Rand Bank *Limited versus Bezuidenhoudt nomino officio and another* (per Makhubele AJ, as she then was). The neutral citation (80818/15) [2017] ZAZGPPHC 332 (30 June 2017). In this matter at least the contentions related to authority of the one trustee who it was alleged had not been authorised by the other to bind the trust because there was a prohibition clause such as in the current case. It may not be relevant to the issues here because here there is not even an issue about authority, but I am mentioning it because the question here is whether the issue raised would constitute a defence in law. In the judgment that I have just referred to, reference was made to a Supreme Court of Appeal decision that deals specifically with the issue of authority of a trustee where the other trustees are denying that they would have been authorised, which is not even the case here. It is the matter of *Moraitis Investments (Pty) Limited versus Montic Dairy (Pty) Limited* (799/2016) [2017] ZASCA 18 May 2017.

What would have been a triable issue in the matter before me as I have already mentioned is authority of the trustees, if it had been raised. The following was stated in paragraph 33 of the Moraitis

judgment:

[33] The issue can be summed up in a single stark question. In executing the settlement agreement Mr Moraitis said expressly that he was authorised to represent 'his' trust. In his affidavit he said that he was not so authorised. Why should we believe that he was lying when he signed the settlement agreement, but telling the truth in his affidavit? Counsel was unable to provide an answer to that question. That brings us back to the point at which this analysis commenced, namely that the onus rested on the Moritis Trust to prove that Mr Moraitis lacked the authority to conclude the settlement agreement on its behalf and to agree to its being made an order of court. In the absence of any attempt to explain the workings of the trust or how issues of authorisation had been dealt with in the past, or any of the matters highlighted by Mr Kebert, that onus was not discharged

In the Moraitis case the challenge was about the authority of one trustee to conclude a settlement agreement on behalf of the trust and without authority of the other trustees. The SCA indicated that the real question was whether there was a genuine dispute about lack of authority which if so would be resolved by referral to evidence. The court took into account the nature of the trust. This was a family business. The business association between the parties were taken into account and the court came to a conclusion that there was no genuine dispute of lack of authority. The defence of lack of authority was therefore dismissed. In the matter before me there is no issue of authority having been raised, and if it had been there is the answer. This defence, even

if it was raised, it would not have passed the test of a 'bona fide' defence.

I will move to the second issue arising from the remaining defence. Whether the trustees were forced to sign the agreement of settlement and the sureties. The deponent to the respondent's affidavit has just made one flirting statement that the representatives of the bank demanded that the documents should be signed. That is all there is.

Duress must be pleaded. Without trying to indicate what kind of documents or what kind of information should have at least been brought before this court, when one looks at the acknowledgement of debt, it was signed in November 2018. If it was signed under pressure or under duress or having been forced by the representatives of the plaintiff, there is no evidence subsequent to the signing to show that there has been any issues raised, and as such this defence could not have been raised with good intentions.

I will refer again to a matter where issues such as this were raised in a summary judgment application. That is the matter of *Nedbank Limited versus Van der Berg and Another*. The neutral citation is (61063/2013) [2014] ZAGPPHC 432 (14 March 2014), per Makhubele AJ, as she then was.

The defences were raised under a heading *'infringement of constitutional rights'*. The issues raised are similar to what is been

raised here, namely, that the lending institutions have this power or advantage when negotiating or signing agreements with their clients. Then issues such as duress or strong or weak bargaining powers were raised. The defence was raised as follows:

> Infringement of constitutional rights
>
> [26] The defendants' complaint is that:
>
> [26.1] they were in an unequal bargaining position because "*the deed of surety contained all standard terms and conditions in favour of the plaintiff. The defendants were simply not in a position to negotiate the terms of the deed of surety and had to consent thereto without reference to an attorney. I was forced to sign the document as presented, on behalf of the defendants, failing of which the plaintiff would not have made the funds available to the principal debtor.*" **[19]**
>
> [26.2] "The banks have a powerbase and negotiate from this position. This is standard, bank practice, and neither the principal debtor nor the defendants was in a position to negotiate with any other financial institution." **[20]**
>
> [26.3] in paragraph 14.5, the first defendant stated that "I *had no intention to be bound as co-principal debtor*". (Footnotes were omitted)

The respondents in this matter were very vocal about these issues of having been forced to or pressure been put on them to sign. They even referred to the bill of rights and argued that there must be an investigation to determine whether a contract under those circumstances is enforceable. They also referred to the legislation called "Promotion of Equality and Prevention of Unfair Discrimination Act No.4 of 2000, which was enacted in terms of section 9(4) of the Bill of Rights. In dealing with these issues

about duress, paragraph 38 of the judgment reads as follows.

> *[38] In the matter of* ***Andre Visser and Another v Ereka Kotze[26]****, a defence of duress was raised in the affidavit opposing summary judgment. The court, per Van Heerden JA[27] assessed the facts placed by the deponent to assess the defence of duress. It came to a conclusion that the facts placed before the court did not meet the elements necessary to set aside a contract on the ground of duress.*

Paragraph 41 reads as follows

> *[41] I may add that having taken all facts in the documents properly placed before me and not just the opposing affidavit, it is clear that the defendants were involved in some multimillion rand property developments in up market areas. They do not appear to be any simple Jane and Harry who obtained a loan to start a café in a small sleepy town. They welcomed the benefit and were looking forward to reap profits when the bank (rightly so in terms of the deed of sureties) pulled the rug underneath them.*
>
> *They should have placed real facts before the court to enable it to assess the defence of duress and unequal bargaining power. They do not state what preferable terms they would have agreed to and the basis thereof.*
>
> *[43] In the matter of* ***Napier v Barkhuizen*** *[28] the Constitutional Court per Cameron JA was not able to decide whether the consumer was in a weak bargaining power as against an insurer because there was no sufficient evidence to make such a finding. "Whether the plaintiff in effect was forced to contract with the insurer on terms that infringed his constitutional rights to dignity and equality in a way that requires this court to develop the common law of contract so as to invalidate the term. But without any inkling regarding the issues set out above, the broader constitutional challenge cannot even get off the ground."[29]*

[44] Consequently, the defendants have failed to disclose a bona fide defence based on allegations of infringement of their constitutional right to equality.

That is so far as case law is concerned.

In his heads of arguments counsel for the applicant (plaintiff) directed my attention to clause 13 of the suretyship agreement. This relates to an issue that I have already addressed, the issue of authority. But for completeness sake I need to highlight it. It reads as follows

> *"In as much as any signatory hereto is a company or companies, then each company does hereby warrant and represent to the creditor that it is duly empowered by its memorandum of association to enter into this suretyship. And that it has a material interest in securing the indebtedness covered by this suretyship which is entered into for its direct or indirect benefit.*
>
> *The person signing the suretyship on behalf of any company shall be deemed by virtue of such signatures to be party to the foregoing warranties and representations in his/her their personal capacity or capacities joinedly and severally with the said company. And shall further be deemed to warrant and represent to*

the creditor that such person/persons is or are duly authorised to execute the suretyship on behalf of such company. The foregoing provisions shall apply mutatis mutandis where the signatory is/are a close corporation."

I have already indicated that there are no issues about authority arising in the matter before me, but counsel for the respondents in response, wanted to argue, attempted to argue or she did argue, although she did not really make a firm argument that this clause refers to a company whereas here we are dealing with a trust not a company. This distinction that she sought to make actually defies logic because when you look at who the respondents are, the 1st respondent is a company.

There is also another company which is not cited as a respondent but which is a trading company of the 1st respondent. It is indicated as trading as Minions Day care. And to the extent that the trust has been represented by the same signatory who signed on behalf of the company that is the 1st respondent. This clause applies to all of them. And a submission was made by counsel for the applicant that in terms of the law a trust is a company.

Having dealt to the specific issues arising from the one defence that was argued, the question is whether the defence would constitute a bona fide defence in terms of rule 32. The principals have been highlighted in the heads of argument and they are trite, as such, I do not intent to repeat them. On the question of the contents of an affidavit opposing summary judgment whether the affidavit before me would pass the required standard, I wish to refer to the matter of **Di Savino v Nedbank**

Namibia Ltd [12], the appeal court, per Ngcobo AJA considered the principles of summary judgment, in particular the issue of whether the failure of the affidavit to measure up to the requirements of the Rule would result in the granting of summary judgment.

Principles governing summary judgment

23. One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The defendant would normally do this by deposing to facts, which, if true, would establish such a defence. Under Rule 32(3) (b) the affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upontherefor". Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

24. The enquiry that the court must conduct is foreshadowed in Rule 32(3)(b) and it is this: first, has the defendant "fully" disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. [13] *If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.*

25. While the defendant is not required to deal "exhaustively with the facts and the evidence relied upon to substantiate them", the defendant must at least disclose the defence to be raised and the material facts upon which it is based "with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence." [14] *Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule.* [15]

26. Where the defence is based on the interpretation of an agreement, the court does not attempt to determine whether or not the interpretation contended for by the defendant is correct. What the court enquires into is whether the defendant has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the defendant may succeed at trial, and, if successful, will establish a defence that is good in law.[16] Similarly, where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law.

27. But the failure of the affidavit to measure up to these requirements does not in itself result in the granting of summary judgment. The defect may, nevertheless be cured by reference to other documents relating to the proceedings that are properly before the court.[17] In Sand and Co. Ltd v Kolliasthe court held that the principle that is involved in deciding whether or not to grant summary judgment is to look at the matter "at the end of the day" on all the documents that are properly before the court.[18]

The defences raised in the matter before me are simply statements of what the trust deed provides. What is required is material facts on which such a conclusion would be justified. It is actually a conclusion. There are no supporting facts. The respondents have not submitted any facts or made any statements why this particular surety would not be, is not for the benefit of the beneficiaries. It is just a quotation, if I may put it that way from the trust deed. What is required is facts that would support that principle or statement in the trust deed. It is not here.

However, in this particular matter and for purposes of deciding whether there would be a triable issue or facts have been placed before, it is clear from the documents before me the beneficiaries

are clearly identified. And it was or it is, the duty of the deponent or the respondents to put facts that would have indicated that this particular debt was not incurred for the benefit of the beneficiaries. This is what has been stated in the cases that I have referred to when I started this judgment, starting with the Standard Bank and also the Invest Bank matter.

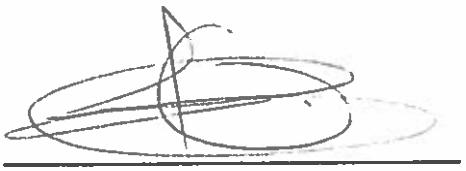
What would have assisted would have been for the respondents to indicate facts and not just bald allegation which are just extracts from the deed of trust or trust deed. The conclusion that I am reaching is that the respondents have failed to disclose a defence that is good in law and importantly made in good faith. I am raising the good faith because when you look at the manner in which the opposing affidavit has been drafted, and the fact that all (but one) defences were abandoned in court as the matter was being argued. This indicates that there was really no intention to raise any defence. It is only after counsel for the applicant had argued and taken the court through various clauses in the acknowledgment of debt and suretyship agreement that when she stood up, counsel for the respondents abandoned all defences. If I count, 10 defences were raised, and all abandoned but one.

This is a clear indication that all defences were raised spuriously, and simply to delay finalisation of the matter, I mean the main action when the respondents knew that they have no defence but had to scrutinise the acknowledgment of debt (settlement agreement) and the suretyship to find something to hold on to.

Accordingly having said all that I have said, the applicant is entitled to summary judgment.

In the result I make an order in terms of the draft that has been provided to me which is incorporated into this judgment, I am marking it X, it reads as follows:

> *"After having read the documents filed and after hearing Counsel for the applicant and respondents, summary judgment is granted against the respondents jointly and severally in solidum, the one paying the other to be absolved in favour of the applicant as follows:*
>
> 1. *Payment of the amount of R 2 37344-40.*
> 2. *Interests on the amount of R 2 037344-40 at the rate Of 10, 25% from the 30th November 2018 to date of Payment of the full amount.*
> 3. *Costs on a party and party scale.*



TAN MAKHUBELE J

Judge of the High Court, Gauteng Division.