



**IN THE HIGH COURT OF SOUTH AFRICA**

**WESTERN CAPE DIVISION, CAPE TOWN**

Case No. 2567 / 2021

In the matter between:

**WESBANK, a division of FIRSTRAND BANK LTD**

Plaintiff

and

**BESTER KELLERMAN HOLDINGS (PTY) LTD**

First Defendant

**WILLEM BESTER**

Second Defendant

**JACO VISSER KELLERMAN**

Third defendant

**Coram: Wille, J**

**Heard: 5<sup>th</sup> of September 2022**

**Delivered: 9<sup>th</sup> of September 2022**

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**JUDGMENT**

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**WILLE, J:*****Introduction***

[1] The plaintiff seeks summary judgment against the third defendant for the payment of R1 540 015,00 plus interest and costs. The pleaded case is that the above amount is due and payable by the third defendant (jointly and severally with the first and second defendant), in terms of a written finance agreement.<sup>1</sup> The plaintiff entered into the agreement with the first defendant<sup>2</sup> and, the second and third defendants bound themselves in accordance with the provisions of two discrete suretyship agreements.

[2] The principal debtor operated a motor vehicle dealership and the agreement provided the principal debtor with a line of credit to allow it to make purchases of vehicles for resale, subject to the terms and conditions of the agreement, read with provisions of the plaintiff's facility letter.<sup>3</sup> I mention the facility letter because the third defendant seems to underpin one of his core defences on certain terms recorded in the facility letter in order to contend for breach of the agreement at the instance of the plaintiff.

[3] What makes this matter somewhat more problematic for the third defendant is that a judgment was previously granted against the principal debtor and the second defendant in terms of the agreement and the co-surety obligations for payment of the capital amount, interest and costs as claimed in the plaintiff's particulars of claim. Despite this, the third defendant entered an appearance to defend the action, filed a plea and opposed the applicant's summary judgment application.

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<sup>1</sup> The Floor-Plan Agreement (the 'agreement').

<sup>2</sup> The principal debtor.

<sup>3</sup> It is recorded in this letter that if there is a conflict between it and the agreement, the agreement shall prevail.

### ***The plaintiff's case***

[4] The plaintiff's position is that neither the plea nor the affidavit opposing summary judgment set out any facts that if proven at trial, would provide the third defendant with a valid defence against the plaintiff's claim and accordingly the plaintiff seeks summary judgment as prayed.

[5] The plaintiff's case is; (a) that the first defendant breached the terms of the agreement; (b) that as a result the plaintiff became entitled to payment of the full amount outstanding in terms of the agreement and, (c) that due to the terms of the agreement (read with the suretyship agreement signed by the third defendant) the plaintiff is entitled to judgment against the third defendant jointly and severally (with the other defendants), for the outstanding amount as claimed.

### ***The case for the third defendant***

[6] It is common cause between the plaintiff and the third defendant that the agreement was entered into and that the third defendant signed (and is bound by) the suretyship relied upon by the plaintiff. Despite this, the third defendant denies that he is liable to the plaintiff. He does so on the basis that the first defendant has a valid defence against the plaintiff's claim and that he as a surety can accordingly not be held liable in terms of the suretyship.

[7] The position advanced is that the first defendant purchased certain vehicles in line with the agreement and the second defendant thereafter unlawfully sold eight of these vehicles to third parties and unlawfully appropriated the proceeds of those sales for his own benefit. The third defendant advances that in these circumstances the plaintiff was obliged to mitigate its damages and that as a consequence the third defendant is not liable to the plaintiff for the amount claimed under and in terms of his surety obligation.

### ***Consideration***

[8] It is trite that in order for a defendant in summary judgment proceedings to avoid summary judgment, the defendant has to set out facts which, if proven at trial, would provide the defendant with a valid defence in law. These defences fall to be set out with sufficient particularity to allow the court to be satisfied with the *bona fides* thereof and should not be set out in a manner that is needlessly bald, vague or sketchy.<sup>4</sup> The plaintiff advances that the third defendant has failed to comply with the abovementioned requirements and that summary judgment should accordingly be granted, as prayed.

[9] In the third defendant's plea, he does not engage with the issue of whether or not the plaintiff was paid for the vehicles (which on the third defendant's own version) came into the possession of the first defendant in terms of the agreement. Put in another way, there is no dispute that the first defendant failed to settle the amounts in respect of the vehicles in accordance with the agreement.

[10] As a matter of logic, the obligation to ensure payment of the amounts due in terms of the agreement was initially that of the first defendant as the principal debtor. The third defendant guaranteed this payment obligation by way of his surety for these amounts due to the plaintiff. The shield raised that the second defendant stole from the principal debtor by selling the vehicles (obtained in terms of the agreement), for his own benefit does not on the facts of this matter, amount to a valid defence in law against the claim by the plaintiff.

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<sup>4</sup> *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228.

[11] In an attempt to overcome this legal hurdle the third defendant pleads that there were additional express, implied or tacit terms to the agreement, to the effect; (a) that the plaintiff had an obligation to conduct monthly stock audits; (b) that the plaintiff would only extend credit in respect of vehicles in which the plaintiff registered itself as a titleholder and, (c) that should the plaintiff be advised or it comes to the plaintiff's knowledge that goods were used in an unlawful manner, the plaintiff would immediately take the necessary steps to mitigate any loss to be suffered (including cancelling the agreement and re-taking possession of the relevant vehicles that were used unlawfully).

[12] By way of elaboration, the third defendant pleads that the plaintiff breached these new alleged terms because; (a) the plaintiff did not register itself as title holder in respect of the vehicles in question; (b) the plaintiff despite being informed of these unlawful actions failed to cancel the agreement and re-take possession of the vehicles (so as to mitigate its potential damages) and, (c) the plaintiff failed to conduct monthly stock audits.

[13] The plaintiff says that in these circumstances, the third defendant has failed to set out a triable defence and has failed to put up a *bona fide* defence in his affidavit opposing summary judgment because of the following, namely (a) that the question of whether the first defendant is liable for the amount claimed has already been determined and this liability now cannot be disputed by the third defendant; (b) that it would not in any event as a matter of law provide the third defendant with a valid defence if he could show that the alleged terms contended for by him, were incorporated in the agreement and breached by the plaintiff; (c) that the third defendant has failed to put up the facts that it would need to prove in order to establish the terms he relies upon at a trial and, (d) accordingly the third defendant has failed to set out a *bona fide* defence as required in terms of the appropriate court rules.

[14] The shield advanced by the third defendant is that the plaintiff breached the agreement between it and the first defendant and that the third defendant would accordingly have a defence against plaintiff's claim. Problematic to this defence is that the first defendant cannot dispute its liability to the plaintiff as judgment has already been granted against the principal debtor in favour of the plaintiff. A court has rendered a judgment that the first defendant is liable for the amount claimed when it granted judgment and the third defendant accordingly is now liable for the amount of the judgment debt in terms of his surety obligation.

[15] Adopting a liberal and favourable approach to the determination of this matter and accepting for a moment that it is open for the third defendant to dispute his liability on the basis that the first defendant has a defence against the plaintiff's claim (despite the judgment), it is difficult for me to discern how the pleaded case by the third defendant (even if it were to be established at trial), would constitute a defence to the plaintiff's claim. Put in another way, the third defendant's defence (as currently formulated), would not have the effect that the third defendant would somehow be discharged from the obligation to repay the monies due to the plaintiff in terms of the agreement.

[16] This is manifestly so because as a general proposition, a breach by a creditor will not necessarily have the effect that a debtor is excused from performing in terms of the contract unless; (a) the wrongful conduct of the creditor made the performance by the debtor impossible; (b) where the creditor's intention can be ascribed to a deliberate intention to prevent the performance by the debtor or; (c) it amounts to a breach of an express or implied term of the agreement to the effect that such breach would provide an excuse.<sup>5</sup> It cannot be

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<sup>5</sup> *Acadamy of Learning (Pty) Ltd v Hanckock & Others* 2001 (1) SA 952 at par 33.

seriously contended that the purported breach of the terms relied on by the third defendant falls into either category (a) or (b) as referenced above.

[17] The position in connection with (c) is euthanized by the fact that there are no express terms in the agreement to the effect that the alleged failures to register vehicles in the plaintiff's name, conduct monthly audits or take steps to recover assets stolen by the representative of the first defendant, would create an entitlement to refrain from making payment of the monies due in terms of the agreement.

[18] On the contrary, the agreement provides that stock audits would be conducted at the sole discretion of the plaintiff's management and the agreement provides that the first defendant may not use the goods for use by members or directors of the first defendant. The agreement also indicates that the first defendant may not dispose of the goods until it becomes the owner thereof in terms of the agreement. The implied terms contended for are accordingly euthanized by the express terms of the written agreement. The third defendant's pleaded case is for certain tacit, implied or express terms. However, these are difficult to understand as the terms of the agreement between the plaintiff and the first defendant are admitted by the third defendant. Simply put, there are no tacit, implied or express terms incorporated in the agreement in line with those alleged by the third defendant.

[19] The agreement itself provides that it is the sole record of the agreement and no evidence would be permissible at a trial to establish any express terms not recorded therein. This is in line with the established rules of evidence. In addition, there could be no question of finding that such terms (as contended for), are tacitly or impliedly incorporated into the agreement as this will be in conflict with the express terms of the agreement.

[20] Moreover, the parties expressly agreed that it would be the duty of the first defendant to provide the plaintiff with the registration documents indicating the plaintiff's ownership of the vehicles purchased in terms of the agreement. In addition, the first defendant was obligated to keep the original registration documents in safe custody on behalf of the plaintiff in terms of the agreement.

[21] Accordingly, it is difficult to understand under what circumstances the tacit or implied terms as contended for by the third defendant, could as a matter of law, be capable of being imported into the agreement to the effect that (should it come to the knowledge of the plaintiff that the goods were used in an unlawful manner), the plaintiff had an obligation to immediately take steps to mitigate its loss in connection therewith.

[22] Further, I have to consider the issue of whether or not the defence put up by the third defendant is indeed a *bona fide* defence. On this score, I do not have to cast my net very far. The legal position when dealing with the now amended summary judgment court rules and their impact on applications for summary judgment is now settled. I take, *inter alia*, the following passages from the judgment in *Tumileng*:<sup>6</sup>

*'...Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application'*<sup>7</sup>

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<sup>6</sup> *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 JDR 0747 (WCC).

<sup>7</sup> *Tumileng* at paragraph 13.



*‘...As has always been the position, the opposing affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon therefor. The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the defendant has a bona fide defence to the action...’*

*‘...There is thus no substantive change in the nature of the 'burden', if that is what it is, placed on a defendant in terms of the procedure. However, the broader form of supporting affidavit that is contemplated in terms of the amended rule 32(2)(b), will in some cases require more of a defendant in respect of the content of its opposing affidavit than was the case in the pre-amendment regime, for the defendant will be expected to engage with the plaintiff's averments concerning the pleaded defence.. ’<sup>8</sup>*

[23] As far as the *bona fides* issue is concerned, the following is apposite, namely;

*‘...The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit; viz. upon a consideration of the extent to which 'the nature and grounds of the defence and the material facts relied upon therefor' have been canvassed out by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was 'contrived', in other words, not bona fide. And the amended subrule 32(3)(b) implies that it should continue to be the indicated method... ’<sup>9</sup>*

[24] The test for resisting summary judgment accordingly remains the same. In certain circumstances when a plea is filed, it may be more difficult for a defendant to resist summary judgment if the plea does not engage fully with the plaintiff's formulated claims. In this case, it is what the third defendant omitted to do in support of his defence which is of significance,

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<sup>8</sup> Tumileng at paragraph 24.

<sup>9</sup> Tumileng at paragraph 25.

namely; (a) that he failed to provide sufficient details of his preferred defence; (b) that he failed to state the amounts allegedly misappropriated by the second defendant and, (c) that he failed to put up any documents in support of these alleged misappropriated payments by the second defendant.

[25] In addition, the third defendant argues that the plaintiff's application for summary judgment is defective because the plaintiff in his affidavit does not engage with the third defendant's defences as raised in his plea with sufficient detail. On this, I disagree because the plaintiff in his affidavit is not obliged to deal with the defences raised by the third defendant, in detail. I say this because the position in our current jurisprudence is that the plaintiff needs to go no further than the required standard established in the previous regime that existed when a plaintiff chartered for an application for summary judgement.

[26] Accordingly, I disagree with the submissions made by the third defendant in seeking to blame the plaintiff for the third defendant's failure to set out a proper defence in his affidavit opposing the application for summary judgment. As a further arrow in his bow, the third defendant, in the alternative, seeks a postponement of the summary judgment application in order to pilot an application for the rescission of the judgment that was granted against the principal debtor and the second defendant. Notably, no such application was before the court at the time of the hearing of the application for summary judgment.

[27] The core defence by the third defendant seems to be that he is not liable as a surety because the plaintiff did not undertake a stock audit of the vehicles which were subject to the finance granted under the agreement between the plaintiff and the principal debtor. The agreement does not support this interpretation as suggested by the third defendant. On a plain reading thereof, it is clear that the plaintiff was not obliged to undertake a stock audit but, merely possessed the right to undertake such a stock audit.

[28] The plaintiff emphasised that a judgment had already been granted against the principal debtor (under the agreement) for specific performance and under the circumstances, the defences contended for by the third defendant do not assist him. The third defendant is seeking an order in terms of which the plaintiff was obliged to mitigate his damages so as reduce the amount due owing and payable by the third defendant under and in terms of his surety obligation. This is against the backdrop of the trite principle that a court always has discretion as to whether or not to grant specific performance or damages.

[29] In my view, the facts of this case dictate that no such attack on the court's discretion is warranted because the third defendant has made no allegations, nor put up any documentary evidence of the values of the alleged vehicles that were sold and the actual amounts allegedly misappropriated by the second defendant. These omissions go to the issue of the *bona fides* of the third defendant. In order to successfully resist summary judgment, the third defendant was required, *inter alia*, to fully disclose the facts relied upon by him for his defences. This has in my view not been achieved.

[30] It is trite law that in order to resist summary judgment the defences put up by the third defendant, must of necessity be sufficiently complete and particularised. They do not have to be precise, but they must be complete. The third defendant was obliged to fully disclose the nature and grounds of his defences and the material facts relied upon, which he genuinely desires and intends to adduce at the trial.<sup>10</sup>

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<sup>10</sup> *Breitendach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (CT).

[31] In my view, the third defendant failed to engage with the plaintiff's claim to any significant material extent. I say this for three reasons. Firstly, the third defendant explicitly concedes that there is an amount owing to the plaintiff. Secondly, the third defendant in his plea admitted the terms of the agreement and the terms of his surety obligation. Finally, the third defendant admitted that a judgment had been granted against the principal debtor and his co-surety for the relief claimed by the plaintiff.

### ***Conclusion and costs***

[32] In conclusion, I find that the third defendant's affidavit opposing summary judgment does not set out sufficient identifiable facts with admissible evidence to render the quantum of the claim by the plaintiff, to be a triable issue. In all the circumstances of this matter, it is ordered as follows;

1. That summary judgment is hereby granted against the third defendant (to rank as a joint and several judgment with the judgment obtained against the first and the second defendants), the one paying, the other to be absolved for;
  - 1.1 Payment of the sum of R1 540 015,00.
  - 1.2 Interest on the said amount, at the rate of 7% (per annum, compounded monthly), from the date of the service of the summons to the date of payment, both days inclusive.
  - 1.3 Costs of suit (as between party and party), as taxed or agreed.

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**E. D. WILLE**  
Judge of the High Court  
Cape Town