IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 11200/2019

FRUTAROM (PTY) LTD Plaintiff

v

6 INCHES (PTY) LTD First Defendant

SHUREEZ BRENNER Second Defendant

JUDGMENT DELIVERED ON THIS 6th DAY OF APRIL 2023

FORTUIN, J:

A. INTRODUCTION

[1] During 2017 and 2018, the plaintiff, Frutarom (Pty) Ltd, supplied goods (snack flavouring) to the first defendant, 6 Inches (Pty) Ltd. The goods were sold on account pursuant to a written credit agreement ("the agreement"). The second defendant, Mr Shureez Brenner, signed suretyship for the first defendant's obligations under the agreement. The first defendant allegedly failed to pay, which failure triggered the second defendant's obligation as surety. This is a claim for the sum of R1 609 280.08 in terms of the agreement.

B. COMMON CAUSE BACKGROUND FACTS

[2] It is common cause that a written agreement was concluded between the parties.

C. THE PLAINTIFF'S CASE

[3] It is the plaintiff's case that it delivered the goods ordered by the first defendant and that the latter failed to pay for these goods. This failure resulted in the plaintiff declining to deliver the last order, which order was then retained on the plaintiff's stock floor.

[4] The plaintiff called two witnesses, i.e. Mr Jurgens Eichstadt, the plaintiff's erstwhile sales director and Ms Natasha Hern, the first defendant's erstwhile operations manager.

[5] **Mr Eichstadt** testified that he had been the plaintiff's sales director until he left the plaintiff's employ in May 2021. The plaintiff was previously known as Unique Flavours. The agreement had been approved by both him and the plaintiff's erstwhile Chief Executive Officer.

[6] It was his evidence that most of the defendant's orders were placed via e-mail. He dealt with the then operations manager of the defendant, Ms Natasha Hern. According to him, all orders would be delivered to the defendant and the transport cots would be billed to the plaintiff with no mark-up.

[7] He testified that all the defendant's orders recorded in the plaintiff's statement of account were delivered to the defendant, except the stock retained on the floor. This was a portion of the last order for which the defendant failed to pay.

[8] According to this witness, the first defendant gave various undertakings to settle the outstanding amount. Firstly, one Mr Dorian Overberg addressed a letter to the witness dated 13 April 2018, stating that according to the first defendant's records "*… there are amounts overdue and payable to your company*." Moreover, the letter stated that the first

defendant was in the process of obtaining a credit facility from which, once approved, a suitable payment arrangement would be made to "*… settle outstanding amounts in full*." On his version, this however never transpired.

[9] Following this, the plaintiff strived to structure a payment plan which was put to the first defendant on 31 August 2018. In response hereto, the witness received a response from Ms Hern on behalf of the first defendant in an e-mail dated 7 September 2018, in which the first defendant committed to pay an amount of R85 000 per month towards settling the debt. This unfortunately also did not materialise.

[10] **Ms Natasha Hern** was the second witness for the plaintiff. She had been the operations manager for the first defendant. Ms Hern confirmed the signature of the second defendant on the agreement. The witness completed the credit application form. She had placed all the orders with the plaintiff. Most of these orders were via e-mail. Occasionally, she placed telephonic orders.

[11] She testified that the first defendant received all the orders placed with the exception of the last order which was listed on the statement as "stock on floor". It was her evidence that the reason why this order was not delivered was as a result of the first defendant's outstanding account with the plaintiff.

[12] The witness corroborated Mr Eichstad's evidence in relation to their discussion about the outstanding account. Moreover, she testified that the first defended did not pay the outstanding amount, because it did not have the money to pay it. She denied that the account was not paid because of non-delivery by the plaintiff.

D. THE DEFENDANTS' CASE

[13] The defendants, in its plea, admit that an agreement was entered into on 19 July 2017, but deny the terms of the document attached to the particulars of claim.

[14] It is the defendants' submission that there is no evidence that the plaintiff accepted the first defendant's order by issuing a written Order Acknowledgement. In support of this submission, the defendant relies of clause 3.2 of the agreements, which reads as follows:

> *"There shall be no Contract until the Seller has accepted the Buyer's order by issuing an Order of Acknowledgement."*

[15] Furthermore, is it the defendants' submission that the witnesses for the plaintiff could not identify which of the orders in the statement of account were placed via email and which were placed telephonically. Consequently, the court was asked to accept that there was non-compliance with clause 3.2 and therefore that there was no evidence that

the plaintiff accepted the disputed orders. Accordingly, it was submitted that no valid contract came into being.

[16] The defendants closed their case without calling any witnesses.

E. ISSUES IN DISPUTE

[17] It is in dispute whether the agreement signed on 19 July 2017 is the agreement on which this claim is based, and to which the second defendant signed as surety. Moreover, whether the goods were delivered to the first defendant, and whether the defendants paid for the goods.

F. RELEVANT LEGAL PRINCIPLES

a. Interpretation of contracts

[18] As stated in **KPMG Chartered Accountants (SA) v Securefin Ltd**[1]

> *"First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not*

[1] 2009 (4) SA 399 (SCA) at para 39.

*contradict, add to or modify its meaning (Johnson v Leal **1980 (3) SA 927** (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) para 33-64)."*

b. Rule 18(6)

[19] Rule 18(6) provides that:

"A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded."

c. Onus of proof in suretyship agreements

[20] The law in respect of surety agreements, and in particular the onus of proof, was decided in **Di Guilio v First National Bank of South Africa Ltd**[2].

"*[26] In any claim against a surety the plaintiff must, at the outset, prove the existence of a valid contract of suretyship. He must then prove that the source of indebtedness (*causa debiti*) in terms of such agreement is one in respect of which the defendant undertook to be liable. Finally he must prove that the said indebtedness is due and payable."*[3]

[2] 2002(6) SA 281 (CPD).
[3] *Supra*, para [26].

G. DISCUSSION

[21] In evaluating the two witnesses for the plaintiff, I find them to be honest and reliable. I have no reason to question their objectivity and independence. I therefore accept their evidence in respect of the nature of the business relationship between the parties as well as their evidence on the details of the discussions regarding the indebtedness of the defendants.

[22] Likewise, an evaluation of the documentary evidence left me with no option but to conclude that the defendants were indebted to the plaintiff and that they in fact acknowledged this indebtedness and, in addition, they proposed a payment arrangement. This documentary evidence was not challenged by the defendants.

[23] I find the defendants' decision to continue to defend this matter in the face of the documentary evidence presented, in addition to the fact they had no witnesses to call to support their case, and after learning that one of their own employees was going to testify for the plaintiff, extremely peculiar. Surely, it should have been obvious to the defendant that, on a balance of probabilities, the probabilities favour the plaintiff.

[24] Clause 15 of the document annexed to the particulars of claim provides for attorney-client costs where there is any breach of the agreement.

H. CONCLUSION

[25] In the circumstances I find that the plaintiff proved its claim and consequently make the following order:

The plaintiff's claim against both defendants is upheld, the one paying the other to be absolved, for:

1. **Payment of R1 609 280,08;**
2. **Interest at the prescribed legal rate calculated from 5 January 2019 to date of final payment, both dates inclusive; and**
3. **Costs of suit on the scale as between attorney and client.**

FORTUIN, J

Date of hearing;	11 October 2022
	9 November 2022
Date of judgment:	6 April 2023

Counsel for plaintiff:	Adv P Mackenzie
Instructed by:	Van der Spuy Attorneys

Counsel for defendants:	Adv Papier
Instructed by:	Tobin Attorneys