

SOUTH AFRICA / JUDGMENT

ARB Electrical Wholesalers (Pty) Ltd v De Jager Electrical Maintenance CC and Another (2022/20849) [2023] ZAGPJHC 701 (14 June 2023) [2023] ZAGPJHC 701

COURT

South Gauteng High Court, Johannesburg

BEFORE

P Coppin

CASE / FILE NUMBER

2022/20849

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/20849

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between

ARB ELECTRICAL WHOLESALERS (PTY) LTD Applicant And DE JAGER ELECTRICAL &
MAINTENANCE CC First Respondent DE JAGER, TOBIE DANIEL Second Respondent

JUDGMENT

COPPIN J

- [1] This is a summary judgment application in terms of which the applicant seeks an order (as foreshadowed in the combined summons) against the second respondent for payment: (a) of the sum of R1,633,888-66; (b) interest on that amount at the rate of 2% per month (being the maximum permissible rate in terms of the National Credit Act 34 of 2005) from 1 April 2022 to date of final payment; and (c) costs of suit to be taxed on the scale as between attorney and client.
- [2] The second respondent, who had filed a joint plea with the first respondent, is opposing the application.

- [3] In terms of the applicant's particulars of claim the applicant and the first respondent, duly represented by the second respondent, concluded a written agreement in terms of which the applicant extended credit facilities to the first respondent, which would purchase electrical goods from it in terms of such agreement (the agreement).
- [4] In terms of the agreement the first respondent had to pay the applicant's usual, alternatively, reasonable price for the goods purchased, within 30 days of a statement rendered by the applicant to the first respondent. In the event of the first respondent not making a payment of any amount on due date the full amount owing at the time of the default would immediately become due and payable and the first respondent would also be liable to pay (a) interest of the maximum permissible rate in terms of the National Credit Act[1] from the due date until the date of full and final payment; (b) any legal costs incurred by the applicant in recovering any outstanding

amount, on the attorney and client scale. The agreement also provided, inter-alia, that a certificate signed by a director of the

applicant would be prima facie proof of the amount owing by the first applicant in terms of the agreement.

- [5] In terms of a written suretyship agreement (the suretyship) the second respondent bound himself as surety and co-principal debtor with the first respondent, for the due and punctual performance of the first respondent's obligations in terms of the agreement. In terms of the suretyship the second respondent, inter-alia, renounced the benefits of excussion, division and cession of actions, and the suretyship also provides for the amount of indebtedness to be prima facie established by means of a certificate signed by a director of the applicant, and that the second respondent would be liable for

legal costs incurred by the applicant on the attorney and client scale.

- [6] In its particulars of claim the applicant alleges that during February, March, and April 2022 it sold and delivered electrical goods to the first respondent in terms of the agreement for a total amount of R1,633,888-66, which the first applicant failed to pay, despite the amount been due and payable. It relies on a certificate of indebtedness to prove the amount as contemplated in the agreement. The applicant further alleges that the respondent failed to respond to its notice in terms of section 129 of the National Credit Act although it also alleges that the said provisions are not applicable to the agreement by virtue of the provisions of section 4(1)(a)(1), alternatively section 4(1) (b) of that Act. Accordingly, in its combined summons the applicant sought judgment against the respondents jointly and severally for the amount, the interest and costs.
- [7] In a joint plea the first and second respondents, inter-alia, admitted the terms of the agreement, the purchase and delivery of the goods and the first respondent's indebtedness, but pleaded the following in effect:

- (a) (i) that the first respondent was in the process of being placed under supervision in terms of the business rescue provisions of the Companies Act, 2008[2] (the Companies Act); (ii) that the applicant was precluded from instituting legal action for the recovery of the amount from the first respondent in terms of the moratorium envisaged in section 133 of the Companies Act; (iii) the applicant was also precluded by the moratorium from instituting legal action against the second respondent for that debt; and (iv) that the business rescue plan (that was anticipated at the time) may in due course release the first respondent in full or in part from its debt.
- [8] Further in their joint plea the respondents denied that the second respondent bound himself as surety and co-principal debtor as alleged by the applicant. The second respondent specifically denied that the consequences of the suretyship had been “explained” to him, alternatively, he alleged that he was not informed (either expressly, or tacitly) that by merely signing the deed of suretyship and the credit application form (i.e. the agreement) he would be bound as surety, and particularly, “jointly in solidum as surety and co-principal debtor in favour of” the applicant. He also denied that he had been informed that by signing of the deed of surety ship he would be renouncing the benefits of excussion and division. He also denied that the suretyship complied with the statutory requirements for validity, and ultimately that he was liable for the debts of the first respondent.
- [9] Ironically, elsewhere in the plea, the respondents “admit that they are in default and have been so for 20 business days” and they further admit that they “failed and/or neglected to pay the amount mentioned”.
- [10] In due time the applicant brought the application for summary judgment only against the second respondent. In the affidavit filed in support of the application the causes of action in the combined summons and the amounts claimed are verified and the facts set out therein are confirmed and sworn to positively. The applicant further avers that the respondents have no bona fide defence to its claim and entered an appearance to defend the claim and filed a plea solely for the purposes of delay.
- [11] It also appears from the affidavit in support of summary judgment that the business rescue practitioner appointed in respect of the first respondent had delivered a notice in terms of section 141(2)(a) of the Companies Act indicating that there was no reasonable prospect of the first respondent being rescued and that an application would be brought to discontinue the business rescue proceedings and to place the first respondent in liquidation. The applicant accepted that in all those circumstances all legal proceedings against the first respondent were suspended and therefore that it would only be persisting with its claim against the second respondent.

- [12] The applicant, inter-alia, denied that the second defendant enjoyed the protection of the moratorium; contended that the second respondent was properly bound by the suretyship; that the suretyship was valid and that it had been completed by the second respondent (in his own hand) and that the second respondent had no bona fide defence to its claim against him.
- [13] In his affidavit resisting summary judgment the second respondent raised the following defences: (a) that he enjoyed the protection of the moratorium envisaged in section 133(2) of the Companies Act; (b) the suretyship was not valid because it does not comply with the legal requirements for such a document to be binding on and enforceable against him; (c) effectively, that he did not believe that he was bound as surety merely by signing the suretyship; (d) that the suretyship was for an unlimited amount and therefore the deed of suretyship did not constitute a liquid amount; and lastly, (e) the second respondent (despite the admissions in the plea to that effect) denied that the goods were delivered and collected by the first respondent, i.e. he denied that delivery ever occurred.
- [14] At the hearing of this application the second respondent's counsel (correctly) conceded that the defences relating to the protection of the moratorium and the validity and enforceability of the suretyship against the second respondent, had no merit, but persisted with the latter two arguments or defences, namely those pertaining to the liquidity of the deed of suretyship, and the denial of the delivery of the goods.
- [15] In brief, regarding the aspects conceded. In the absence of a specific provision in a business rescue plan for the protection of a surety of the company in business rescue, the liability of the surety remains unaffected thereby[3]. Further, the requirements for a valid suretyship as envisaged in section 6 of the General Laws Amendment Act[4] are met. The suretyship, in this instance, is in writing and it is signed by the surety himself. The identities of the creditor, the debtor and the surety, as well as the nature of the amount of the principal debt are all clearly reflected in the document. The surety agreement is therefore valid and binding. The second respondent not only completed the spaces in the deed himself, but the fact that it constituted a suretyship agreement is apparent from the document itself, and that fact is unmistakable. By appending his signature to the deed of suretyship the second respondent indicated his assent to its contents. It is clear from the document itself that it contains contractual terms and the second respondent does not claim that he could not read the document. He is bound by its terms.
- [16] Turning to the defences that were persisted with. The defence regarding the delivery of the goods clearly lacks merit. Firstly, in their joint plea the respondents admitted the purchase, delivery and the amount of indebtedness. The second respondent does not explain the volte-face in his affidavit resisting summary judgment. In any event, the actual buyer, namely the first respondent, did not withdraw its admission of delivery made in the joint plea. The second respondent, even though a co-debtor, was not the buyer of the goods and his liability did not stem from the agreement, but from the suretyship. He is being sued in his capacity as surety[5].

- [17] In argument counsel for the second respondent elaborated on the technical point of liquidity as follows. She submitted that the suretyship itself was not liquid and that the certificate of balance, which would render the amount claimed liquid, had not been attached to the application for summary judgment as is required in terms of Rule 32(2); that the Rule was peremptory and that the failure to attach the certificate was fatal to the application. It was further argued that because the remedy of summary judgment is “extraordinary, very stringent and closes the doors of the court to a defendant, a plaintiff seeking such relief “must comply with the requirements of Rule 32”.
- [18] Counsel for the applicant submitted in brief, that the claim was indeed for a liquidated amount of money and was not based on a liquid document and that in any event the suretyship and the certificate of balance are part of the combined summons and had been verified and confirmed by the applicant and that this defence was technical and opportunistic and had been raised as a last resort. Counsel for the applicant further submitted that non-compliance with Rule 32(2) was, in any event, condonable and that the second respondent, who had no bona fide defence, would not be prejudiced if the non-compliance were to be condoned.
- [19] Even though the suretyship and certificate of indebtedness were not attached to the affidavit they were attached to the particulars of claim and the causes of action in the combined summons (which include the particulars of claim) were verified. Attaching them again may have been superfluous and unnecessary in the circumstances of this case. The second respondent would not be prejudiced by the fact that there were also not attached to the affidavit. In fact, in his affidavit resisting summary judgment the second respondent did not raise this issue. In any event, insofar as such an attachment may have been necessary in terms of Rule 32(2), the non-compliance is condoned[6].
- [20] The defences raised by the second respondent are not bona fide defences and are clearly merely dilatory. It would be remiss for this court to allow such defences to defeat the applicant’s claim for summary judgment[7].
- [21] Accordingly an order is granted in the following terms: The second respondent is ordered to pay to the applicant the following:
- (1) the amount of R1, 633, 888 – 64; (2) interest on that amount at the rate of 2% monthly from 1 April 2022 to date of full and final payment; (3) costs of suit to be taxed on the scale as between attorney and client.

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JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

APPEARANCES:

Counsel for the Applicant: A Scott Instructed by: Lomas-Walker Attorneys Counsel for the second respondent: A Granova Instructed by: Wentzel & Partners Attorneys

Date of Hearing: 6,7 June 2023

Date of Judgement: 14 June 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been on 14 June 2023

[1] Act 34 of 2005.

[2] Act 71 of 2008.

[3] See, inter alia, New Port Finance Co(Pty) Ltd and Another v Nedbank Ltd 2016 (5) SA 503 (SCA); Investec Bank Ltd v Bruyns 2012 (5) SA 430 (WCC); Jeany Industrial Holdings (Pty) Ltd and Others v Zungu-Elgin Engineering (Pty) Ltd 2020 (2) SA 504 (KZD); Nedbank Ltd v Zevoli 208 (Pty) Ltd 2017

(6) SA 318 (KZP); African Banking of Botswana v Kariba Furniture Manufacturers 2013

(6) SA 471 (GNP) par 69.

[4] Act 50 of 1956.

[5] Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978

(1) SA 463 (A).

[6] Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd 2005

(2) SA 432 (C) par 5; ABSA Bank v Botha NO & Others 2013 (50 SA 563 (GNP) par 16.

[7] Maharaj v Barclays National Bank Ltd 1976 (10 SA 418 (A) 432.

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