

SOUTH AFRICA / JUDGMENT

Engen Petroleum Limited v Scheepers and Others (2020/708) [2023] ZAGPJHC 291 (3 April 2023)

[2023] ZAGPJHC 291

COURT

South Gauteng High Court, Johannesburg

BEFORE

A Friedman

CASE / FILE NUMBER

2020/708

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IN THE HIGH

COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case no: 2020/708

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

In the matter between:

ENGEN
PETROLEUM LIMITED
Applicant
and
SCHEEPERS,
MARTHINUS JACOBUS
First
Respondent
SCHEEPERS,
ANDRIES
Second
Respondent
MAYEKISO,
FANI WILLIAM
Third
Respondent
SAIYA,
JOSEPH

Fourth
Respondent

JUDGMENT

FRIEDMAN AJ:

1 In this matter, the applicant (“Engen”) concluded an agreement for the sale and delivery of fuel and fuel-related products with a close corporation called Anmarkati Verspreiders CC. The parties have described the close corporation as “Anmar” in the papers, and I shall do the same.

2 Anmar breached the agreement by failing to pay for the fuel products which it bought from Engen. It therefore signed an Acknowledgement of Debt (“the AOD”) on 24 April 2019 in favour of Engen. In November 2019, Anmar was liquidated and Engen has been unable to recover the sum owed to it under the AOD and a separate agreement discussed below. The respondents each executed written deeds of suretyship in favour of Engen and bound themselves, jointly and severally, as sureties and co-principal debtors for the discharge of Anmar’s indebtedness to Engen. When Anmar was liquidated, and Engen was unable to reclaim the sums owed to it, it instituted the present application.

3 There are two separate claims encompassed in this application. The first relates directly to the AOD. In terms of the AOD, Anmar agreed to pay to Engen the sum of R11 668 973.03 plus interest at 12% per annum, compounded monthly from 1 April 2019 to date of final payment. The agreement provided for Anmar to make six monthly payments of R2 013 462.24 each, beginning on 30 April 2019 and continuing on the last day of each month until the debt was paid off. Anmar made payment of the instalments for the first three months, but then ceased making payments. Engen – in what it has described as Claim A – therefore claims what remains owing in terms of the AOD. In the founding affidavit, it relied on a certificate of balance which shows the final amount owing to Engen, taking into account the interest of 12%. However, in the proceedings before me it seeks a revised sum in respect of claim A, reflected in an updated certificate of balance, which demonstrates that the indebtedness in respect of claim A is R5 725 367.53 as of 23 July 2020. The need for this adjustment, as explained in the replying affidavit, is that the liquidators of Anmar made a payment of R270 000 to Engen and a further sum of R45 019.19 was received from one of Anmar’s debtors. Engen therefore claims a slightly smaller sum than reflected in the founding affidavit, which takes account of these payments.

4 Engen then sues on a separate agreement which it concluded with Anmar. During and after the period in which the AOD was signed by Anmar, Engen continued to supply fuel products to it. These products were supplied under the original reseller agreement concluded by the parties in 2015. It was this original agreement which gave rise to the AOD, but leaving the AOD aside, Engen continued to supply fuel products to Anmar under the reseller agreement both before and after the AOD was signed. The reseller agreement provides that a breach of the agreement by non-payment by Anmar of the sums due for the purchase of the fuel products would entitle Engen to recover the outstanding sums, plus interest at prime plus 4%. Since Anmar defaulted on its

obligations under the reseller agreement, Engen sues the sureties for the outstanding sum – it describes this as Claim B. At the time when the application was launched, prime was 10%. Engen relies on a certificate of balance in respect of the Claim B, which demonstrates that Anmar owes Engen R7 157 396.04 plus interest at 14%.

5 The reseller agreement provides that a certificate of balance issued by Engen “shall at the instance of Engen constitute conclusive proof of the existence of the amount of the indebtedness at that time”. It then provides that, if this provision is not enforceable against Anmar for any reason, “then such certificate shall at the instance of Engen constitute prima facie evidence of the existence and amount of that indebtedness at that time”. The AOD provides that a certificate signed by a manager of Engen “shall be sufficient and prima facie proof of the balance outstanding under this Acknowledgment of Debt at any time”.

6 Each of the suretyship agreements provides that, if Engen has to sue on the agreement, each surety “undertakes to keep Engen indemnified against all costs actually incurred in connection with the enforcement of this surety, whether or not taxed or based on any prescribed tariff”.

7 This matter was launched in 2020. It was initially argued before Thlothlamaje AJ but he fell ill and was not well enough to render a judgment. On 11 January 2023, the Deputy Judge President directed that the matter should be reargued, which is how it came before me. I mention this because, although the matter is not urgent in the traditional sense, there has been an unfortunate delay caused through no fault of the parties. In the meantime, interest has continued to run on the debts, and is reaching a point where the in duplem rule may come into play. I have accordingly prepared this judgment as quickly as possible. In the circumstances, it has not been possible for me to deal in detail with each point raised in the papers. I confine myself to a broad explanation of my reasons for the order which I make below.

8 One other point which I should make by way of introduction: the third respondent, one of the sureties, did not oppose this application. An order was therefore made against him on the unopposed roll. The present application is an opposed application in which Engen seeks relief against the sureties which opposed its application; ie, the first, second and fourth respondents. For convenience, I shall refer to them simply as “the respondents” below.

9 Even from the brief discussion above, it should be clear that the strong starting point in this matter is that Engen has made out a case for the relief which it seeks. Its certificates of balance substantiate the amounts claimed – at least prima facie – and it is common cause that the debts secured by the sureties have not been paid. This is the type of matter which, frankly, would more often than not be determined in the unopposed court.

10 But the respondents have raised a number of defences, and it is necessary to consider them carefully. In the discussion below, I therefore focus almost exclusively on the question whether any of the defences raised by the respondents serves to dislodge the assumption that Engen should be granted the relief which it seeks.

11 I say “almost exclusively” because there is one additional issue which I must address: the respondents have brought a strike-out application in respect of certain allegations in Engen’s replying affidavit. Because the issues raised by the strike-out application are interlinked with some of the issues relevant to the respondents’ defences, it is most convenient for me to deal with the strike-out application last. The approach which I adopt to the strike-out application will, in any event, emerge from my discussion of the respondents’ defences.

THE RESPONDENT’S DEFENCES

12 The respondents’ defences may broadly be broken down into the following categories:

12.1 The respondents take an authority point, which I understand to take the form of a contention that the deponent to the founding affidavit, Ms Abader, did not have authority to launch the application on behalf of Engen.

12.2 The respondents rely on a series of what they describe as disputes of fact, which they wish to be referred to trial.

12.3 The respondents raise certain constitutional issues.

Lack of authority

13 It is common cause that no rule 7 notice was filed by the respondents in this matter. They take the position that there was no need to file a rule 7 notice because they do not challenge the authority of Engen’s attorneys to represent them in these proceedings. Rather, they refer to a delegation of authority attached to Engen’s replying affidavit (after the authority point was taken in the answering affidavit) and contend that it does not authorise Ms Abader to depose to affidavits or launch this application.

14 This argument may be discounted swiftly. In *Unlawful Occupiers, School Site v City of Johannesburg* 2005

(4) SA 199 (SCA), the SCA dealt with a challenge to authority which was not dissimilar to the point taken by the respondents in this case. In the founding affidavit, the deponent simply alleged that he was “duly authorised by delegated power to bring this application and to make this affidavit on behalf of the applicant”. In the answering affidavit, the respondents denied this contention

and “put the applicant to the proof thereof”. In reply, the applicant produced a resolution of the municipal council (ie, the governing body of the applicant) which it alleged constituted the evidence of the delegation. The respondents argued (as the respondents seek to argue in the present case) that the document did not adequately show that the power had indeed been delegated to the official in question.[1]

15 The SCA referred to, and approved,[2] the decision of Flemming DJP in *Eskom v Soweto City Council* 1992

(2) SA 703 (W) at 705D-H, in which he said the following:

“The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. . . .

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1).”

16 The SCA in *Unlawful Occupiers, School Site* also approved[3] the following remarks of Flemming DJP in *Eskom v Soweto City Council* at 706B-D:

“If the applicant had qualms about whether the ‘interlocutory application’ is authorised by the respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.”

17 In the full-bench decision in *ANC Umvoti Council Caucus v Umvoti Municipality* 2010 (3) SA 31 (KZP), Gorven J (as he then was) considered these authorities carefully (see paragraphs 14 to 27) and concluded that (at paragraph 28):

“absent a specific challenge by way of rule 7(1), ‘the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant’ is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used.”

18 Having made these remarks, Gorven J rejected the argument of counsel for the appellants that a party wishing to challenge authority of a company to launch litigation has an election as to whether to use rule 7. He held that the only vehicle through which a litigant may raise a challenge based on lack of authority is through rule 7(1) of the Uniform Rules (at paragraph 28).

19 These cases constitute the complete answer to the respondents’ challenge to Ms Abader’s authority. It is misdirected and, since no rule 7(1) notice was filed, cannot succeed.

Disputes of fact

20 The respondents have raised the following issues, which they say constitute disputes of fact which should be referred to trial:

20.1 First, they refer to the fact that, before Anmar was liquidated, Engen took cession of Anmar's entire debtor's book. However, the only sum which Engen was able to recover from Anmar's debtors was the R45 019.19 which I mentioned in paragraph 3 above. The respondents argue that "acceptance of a receipt of a mere R45 109.19 from a debtor's book totalling over R13 000 000 is unfathomable and is indicative of a will to hold the respondents personally liable failing all else." Despite making this statement – which, while ascribing an improper motive to Engen, appears to accept the factual premise that only R45 019.19 was recovered – the respondents then seem to dispute the total amount recovered from debtors, which in turn (they say) triggers a dispute of fact about the total amount outstanding in relation to Anmar's (and therefore their) debt to Engen. They seem also to suggest that the matter should be referred to trial so that Anmar's liquidators may be joined (presumably as defendants, although this is not spelled out) and "so that the Honourable Court can have sight of the Final Liquidation and Distribution account".

20.2 Secondly, the respondents refer to the fact that Engen took cession of movable assets, via a notarial bond, in an amount of R1 350 000. They criticise the explanation given in the replying affidavit that the liquidators were able only to recover R270 000 for the benefit of Engen from the sale of "an undisclosed number of vehicles". Part of the criticism appears to be that the allegation was made in reply. But the main criticism is that the respondents do not appear to accept the word of Engen that it received only R270 000 from the liquidators and say that it is the liquidators of Anmar which should be providing this evidence.

20.3 Thirdly, the respondents raise a number of complaints, some of which are hard to follow, about the quantification of the sums owing. The most notable relates to interest. They criticise the fact that "Engen claims a combined balance of R13 197 782.80 in paragraph 19, yet charges 2 different rates of interest, namely 12% p.a. from 1 April 2019 and 14% from 30 September 2019 on Sub-balances which I showed above to be clearly wrong". (The reference to paragraph 19, is to paragraph 19 of the founding affidavit.)

20.4 Fourthly, the respondents have another criticism relating to the question of interest. It will be recalled from my brief discussion of the facts above that the claim relating to the AOD stems from the fact that Anmar undertook to repay the amount outstanding at the time by making six equal payments of roughly R2m each. They paid three out of the six, but not the other three. So, the claim against the respondents based on the AOD is for the outstanding capital amount reflected in the roughly R6m in unpaid instalments, plus interest. As far as I understand the respondents' complaint, they say that the intention of the parties was for interest to be included in each of the instalments. They therefore say (again, as far as I understand the contention correctly) that the certificate of balance inflates the indebtedness of the respondents by roughly R400 000. It appears that the discrepancy arises from the fact that Engen's certificate of balance is based on the fact that interest is "compounded monthly from 01 April 2019 to date of payment", to

use the wording of the AOD.

21 The respondents say in their heads of argument that they have raised 8 disputes of fact. I have summarised the main ones. The remaining ones overlap with, or are closely related to, the main complaints listed above and do not need to be considered separately.

The proper approach to the disputes of fact

22 Rule 6(5)(g) provides that, “where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision.” One of the orders that a court may make to ensure a just and expeditious decision is to refer the matter to trial. The respondents have not relied on rule 6(5)(g) expressly in their answering affidavits or heads of argument. However, they have repeatedly suggested that there are irresolvable disputes of fact on the papers, which warrant the matter being referred to trial. So, the stance taken by them brings rule 6(5)(g) into play.

23 In *Lombaard*,^[4] an application was brought in the High Court by Mr Lombaard to transfer certain immovable property to him. His application failed

and he appealed to the SCA. There was no application in the High Court for the matter to be referred for the hearing of oral evidence

or to trial. The High Court simply determined the matter on the papers. But, in the SCA, a debate arose as to whether the matter

ought to have been, and therefore should now be, referred to oral evidence. The majority of the SCA held that a proper factual basis for a defence had been set out in the answering affidavit and had not been addressed by the applicant (now appellant) in his replying affidavit. In holding that it would not be appropriate to refer the matter to oral evidence – and that, instead, it was appropriate for the SCA to confirm that the application was rightly dismissed by the High Court – the SCA said the following:

“An order to refer a matter to oral evidence presupposes a genuine dispute of fact (Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163; Ripoll-Dausa v Middleton NO and others 2005 (3) SA 141 (C) at 151F ff [also reported at [2005] 2 All SA 83 (C) – Ed]). The appellant chose not to respond to the factual allegations concerning rectification. He did so at his peril . . .”^[5]

24 There are several ways in which the *Lombaard* matter is distinguishable from the present case. But, I have referred to *Lombaard* because it is helpful in the following respect: when there are genuine disputes of fact, the court will normally dismiss an application in circumstances where the applicant ought reasonably to have anticipated them.^[6] However, before a court even enters into an enquiry as to whether the applicant ought to have anticipated that there would be genuine

disputes of fact on the papers, it has to be convinced that there are genuine disputes of fact on the papers in the first place. If there are not, no purpose would be served in referring the matter for the hearing of oral evidence or trial under rule 6(5)(g). Rather, the result of the application

will be determined largely by the question of which party has failed to raise a genuine dispute of fact: if it is the respondent, then the application would normally be granted on the basis of the principles expressed in *Plascon-Evans*.^[7] If it is the applicant – which would arise in circumstances such as in *Lombaard* when the applicant fails to address a genuine factual defence put up in the answering affidavit – then the application would simply be dismissed.

25 To determine that there is a genuine dispute of facts, it is necessary to consider the allegations in the affidavits of each side and ask: if the allegations made in the papers of each side turn out, with the leading of oral evidence, to be true, would they disclose a cause of action or defence? To give an easy example (and let us leave aside that an applicant would be most unlikely to bring a claim of this nature on application): a particular applicant sues a respondent for R500 000 in delict for intentional damage to property. In her founding affidavit, she gives a detailed narrative of how the respondent caused extensive damage to the applicant's car. In the respondent's answering affidavit, he gives a detailed narrative of how he had nothing to do with the damage and was out of the country at the time. If the applicant's version is true, she must win. If the respondent's version is true, he must win. This is a genuine dispute of fact.

26 On the other hand, a genuine dispute of fact will not even be triggered if the respondent puts up a version saying something along the lines of: the applicant is wrong when she says that I destroyed her car with a hammer, I actually did it with explosives. Yes, the parties may have different factual versions as to what actually happened. But, on either of their versions, the applicant must win.

27 Therefore, it seems to me that a court faced with a rule 6(5)(g) application should ask the following questions:

27.1 Is there a genuine dispute of facts on the papers?

27.2 If there is, then the next question is: ought the applicant to have anticipated these disputes of fact when launching the application? If the answer to that is yes, then ordinarily the court would dismiss the application.

27.3 If the applicant cannot have anticipated that disputes of fact would arise, or there is some other compelling consideration, the court would then ask whether it is in the interests of justice for the matter to be referred to trial or for a referral to oral evidence in respect of a discrete topic to be made. This will depend on the facts of each case.

Application of these principles to the respondents' case

28 In my view, the second and third questions do not even arise in this case. For the reasons given below, I do not believe that there is a genuine dispute of fact on the papers. In my view, the respondents have not adduced any facts which cast doubt on the case as framed by Engen in its founding affidavit.

29 It is convenient to distinguish between the various criticisms advanced by the respondents as to the manner of the calculation of the quantum, on the one hand, and their criticisms relating to the alternatives to recover Engen's indebtedness (ie, the assumption that insufficient information about the liquidation account is available and the arguments relating to the cession of movables), on the other.

30 As to the quantum:

30.1 As noted above, when it comes to the reseller agreement, the certificate of balance is "conclusive proof" of the counter-party's indebtedness. But, to cater for the possibility that that rule is unenforceable against the debtor, the reseller agreement provides, essentially in the alternative, that the certificate of balance constitutes prima facie proof of the debtor's indebtedness.

30.2 When it comes to the AOD, a certificate of balance is prima facie proof of the debtor's indebtedness.

31 The alternative included in the reseller agreement was clearly inserted to cater for a finding that the "conclusive proof" clause was contrary to public policy. In *Ex Parte Minister of Justice: In Re Nedbank v Abstein Distributors (Pty) Ltd* 1995 (3) SA 1 (A), the Appellate Division (as it then was) held that such clauses are indeed contrary to public policy because they preclude the debtor from being able to challenge the quantum said to be owing. Although he did not refer to any of these cases, it is probably for this reason that Mr Aucamp, who appeared for Engen, quite properly did not try to argue that the certificate of balance in respect of the reseller agreement was conclusive proof of the respondents' indebtedness. It seems clear from the caselaw that the prima facie standard must be applicable to both agreements.

32 That being the case, the applicable approach is this: the certificates of balance constitute evidence of the respondents' indebtedness so that, without a cogent explanation from the respondents as to why they are incorrect for any reason, effect must be given to them.

33 In this case, the respondents have not given any cogent explanation of what is wrong with what is reflected in the certificates. The attack based on the interest applied to each debt, and the different interest rates, is clearly misplaced. When it comes to the interest on the AOD, the agreement makes clear that interest is to be charged at a rate of 12% per annum, compounded monthly from 1 April 2019 until payment. The capital amount recorded in the AOD was R11 668 973.03. What this means is that interest would be charged at a rate of 12% p.a. on this amount, but would be compounded monthly until the debt was discharged. This makes it clear that the respondents' argument that the three instalments which Anmar paid included all of the interest envisaged by the AOD- so that no further interest could be charged – is unsustainable. The clear implication of the agreement is that interest would continue to run – on the formula described above – until the full outstanding amount was paid. It is common cause that the three payments by Anmar did not extinguish its indebtedness under the AOD, so interest continued to run on the balance owing.

34 When it comes to the fact that interest is charged at different rates – this self-evidently relates to the different interest rates applicable to the reseller agreement, on the one hand, and the AOD on the other.

35 As to the more substantive question of whether sufficient information about alternatives to calling on the suretyship has been provided:

35.1 In simple terms, the respondents seek to trigger a dispute of fact by saying that there is insufficient evidence as to (a) why Engen did not recover more from the liquidation of Anmar and (b) why the cession of movables worth more than R1m recovered so little.

35.2 Engen did not deal with either of these issues in the founding affidavit, presumably because it did not consider it necessary to do so. It simply pleaded the terms of the agreements and the fact that Anmar had been placed into liquidation and could not, therefore, repay the two debts (ie, under Claim A and Claim B). It then pleaded the terms of the suretyship agreements signed by each of the respondents, and explained why, on the basis of those agreements, it was entitled to the relief sought. In short, Engen's founding affidavit contains all of the necessary averments to sustain its cause of action in this matter.

35.3 In the answering affidavit, the respondents raised the disputes which I have summarised above. Therefore, Engen dealt with the complaints raised by the respondents in its replying affidavit. It explained that Engen took cession of Anmar's entire debtor's book, which stood at R13 263 077.36 as of 30 October 2019. It also held further security in the form of a special notarial bond to the value of R1.9m in relation to Anmar's indebtedness to Engen. Engen explained that a large component of Anmar's debt was owed to it by a company called Laduma Liquid Company, which the deponent to the replying affidavit describes as a related entity to Anmar. The replying affidavit explains, with reference to emails exchanged at the relevant time (ie, October 2019), that Engen had reason to believe that the respondents were obstructing its ability to call on the book debt, by encouraging debtors of Anmar to make payments to alternative bank accounts (ie, to bypass the need to repay the sums owing by them to Engen, as the holder of the debt in terms of the cession).

35.4 The replying affidavit was filed in August 2020. Rather than seeking to file a further affidavit to respond to these allegations, the respondents elected to seek to strike out these allegations from the replying affidavit. I return briefly below to deal with the strike-out application. But at this stage I may simply note that there is nothing before me to contradict what Engen says about its inability to recover Anmar's book debt. And, at the risk of repetition, I again emphasise that the starting assumption is that Engen had an unqualified right to call on the suretyships after Anmar failed to repay the debts which it owed to Engen.

35.5 If the respondents wished to make something of Engen's inability to recover the debt owing to Anmar from other sources – to the extent that that issue is relevant at all to Engen's entitlement to relief in these proceedings – then they had to place facts before this Court to explain their complaint. As it turns out, they have put no evidence whatsoever before this Court on that subject and have failed to put up any version in response to Engen's hard-hitting allegations about attempts to obstruct it from recovering from Anmar's debtors.

35.6 Engen has also said under oath in the replying affidavit that it only managed to recover a small fraction of the amount owing to it, from the liquidation account of Anmar. It makes the point that, under the suretyship agreement, it has the unqualified right to claim from the respondents. It nevertheless explains that it recovered only R270 000 from the liquidation of Anmar. Importantly, the respondents have, again, failed to provide any basis for me to go behind what Engen says in this regard. Mr Webbstock, who appeared for the respondents, was constrained to argue that this matter should be sent to trial so that the liquidators can be joined or called as witnesses to explain why Engen was able to recover so little from Anmar's liquidation. But there is simply no legal basis for me to take such a course of action. Engen, as it was entitled to do, proceeded in this matter by way of motion proceedings because it did not anticipate material disputes of fact to arise in relation to its cause of action. And what the discussion above demonstrates is that none did arise. It must be accepted as the starting point that Engen had the unqualified right to call on the respondents to make good Anmar's debt. Therefore, in the absence of any evidence to demonstrate that

Engen somehow behaved in an unconscionable way in relation to the suretyship agreement (by, for instance, deliberately failing to make good on the security that it held), by simply annexing the suretyship agreement and the relevant certificates of balance, Engen's cause of action was adequately established.

36 It follows from what I have said above that there are no genuine disputes of fact on the papers. The respondents have not pointed to any reasons to discount the version advanced by Engen in its founding affidavit. When it comes to the question of quantum, the respondents have not done anything to undermine the certificates of balance or to dislodge the prima facie assumption that the sums reflected in them are an accurate statement of the respondents' indebtedness. It follows that, unless the respondents' constitutional challenge (addressed next), has any merit, Engen's claim must succeed.

Constitutional issues

37 The respondents have filed a rule 16A notice in which they set out extensive grounds on which it is contended that sections 4(1)(a)(i), 4(1)(b) and 4(2)(c) of the National Credit Act 34 of 2005 are unconstitutional.

38 In the heads of argument filed for the respondents, this point was pressed. But the respondents also advanced a separate argument, essentially to the effect that certain provisions of the suretyship agreement are unconstitutional. It is, with respect, not an easy task to follow the constitutional argument set out in the heads of argument. But, as far as I can discern, the

argument boils down to the following propositions (a) fairness is a constitutional value (b) some of the terms of the suretyship agreement are draconian and (c) the suretyships offend the rule of law and create a form of strict liability which permits self-help.

39 In argument, I directed Mr Webbstock to the provisions of rule 10A of the Uniform Rules. Since he accepted that the Minister who administers the National Credit Act (being the Minister of Trade, Industry and Competition) had not been joined to these proceedings, he had to accept that he could not advance his challenge to the various provisions of section 4 of the National Credit Act. He did persist in the remaining constitutional claims, but they appeared to transform somewhat. If I understood the argument in the hearing, Mr Webbstock's submission was that there was a *prima facie* case that the suretyship agreements were in conflict with the Constitution and that this issue should be referred to trial.

Does the constitutional complaint have merit?

40 The procedure followed by the respondents on the constitutional leg of their case was defective from beginning to end. The respondents took the effort to file a rule 16A notice, but did not join the Minister as a respondent to the litigation. I have not dwelled on the contents of the rule 16A notice because I cannot entertain the attack on section 4 of the NCA, but I may simply remark that the substantive constitutional attacks summarised in the notice are hard to follow and lack coherence. The same applies to the formulation of the complaint in the answering affidavit and the heads of argument. Statements are made such as: "very few sureties actually contemplate or anticipate as a *fait accompli* that they will in fact be performing the debtor's obligation since that will probably amount to some form of donation rather than to the giving of security". Or, "where the termination of a continuing suretyship is within the exclusive discretion of the creditor, as is the case in this matter, the surety's position is somewhat insecure, especially if the obligations undertaken by the surety are of the widest possible nature regarding the principal debtor's indebtedness or the obligations for which the surety undertakes liability as well as in regard to the duration of the suretyship". But the link between these statements and any applicable provisions of the Constitution is

never explained.

41 In fairness to the respondents, and reading their papers and heads of argument very generously, the high watermark of their constitutional attack seems to be the following proposition: a suretyship will be "disproportional" where "that part of the surety's income which is not subject to distress, is insufficient to cover the monthly interest rate" and that this is an issue which must be referred to trial.

42 As I have already intimated in dealing with the respondents' arguments based on disputes of fact above, the general approach of the respondents is to imply that there are complex factual matters which can only be resolved in due course at a trial, without ever precisely formulating what they are. And, more importantly, without laying a proper factual foundation for the premise, in their answering affidavit. If the individual financial position of the respondents is seen by them to be relevant to the constitutional attack, then it is not sufficient for them simply to

ask for the matter to go to trial. They were required to set out a detailed version of the facts in their answering affidavit which they considered to be relevant to their constitutional cause of action.

43 Mr Webbstock referred to the seminal decision of the Constitutional Court in *Barkhuizen v Napier* [2007] ZACC 5; 2007

- (5) SA 323 (CC) in his heads of argument. He did not, either in his heads of argument, or in argument before me, characterise his case in the way envisaged by *Barkhuizen* – ie, by arguing that the suretyship agreement, or parts of it, are contrary to public policy because they are inconsistent with the values of the Constitution.[8] However, if one approaches the argument generously, that would seem to be the respondents' case. They say on more than one occasion that the suretyship is unfair, oppressive and one-sided. They say that fairness is a constitutional value. Clearly, they attempt to bring themselves within the test envisaged by *Barkhuizen*.

44 The difficulty is that the respondents have not, other than referring to a general standard of fairness, referred to any concrete constitutional value with which they say the suretyship agreements conflict. Fairness is a constitutional value, as far as it goes, but a party wishing to impugn a contract as contrary to constitutional values (and therefore public policy) must formulate the complaint with more precision than simply saying that it is unfair. It is notionally possible for a contractual term to conflict with one of the foundational values of the Constitution, such as the rule of law, even though most commonly the complaint will be based on a provision of the Bill of Rights. In fact, there is a reference to the rule of law in the respondents' papers, but it is never made clear how the suretyship agreements are said to offend the rule of law. In all cases, the party raising the

complaint has a duty to explain the cause of action properly and to motivate it with proper evidence.

45 In this case, for instance, a major consideration underlying the constitutional cause of action – although admittedly one has to do some reading between the lines to discern this – appears to be the respondents' complaint of an inability to afford to fulfil the terms of the suretyship without causing themselves financial hardship. But it is not good enough for a judge to be left to infer this from the papers, and less so without a factual substratum from which to draw legal conclusions. It is not good enough to make allegations in the baldest of terms, and then simply ask that the matter be referred to trial. The precise details of the constitutional complaint, and the facts on which it is based, must be set out so that the court may assess them properly. That was not done in this case.

46 The approach followed by the Constitutional Court in *Barkhuizen* demonstrates the application of what I have said above. *Barkhuizen* makes clear that a claim that a contractual term is contrary to the values of the Constitution and therefore public policy will always involve the balancing of constitutional values. This is because:

“public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.”[9]

47 The reference to the maxim pacta sunt servanda is a reference to the principle of sanctity of contract – ie, that parties must comply with commitments freely given. The remarks of Ngcobo J (as he then was) reproduced above demonstrate the important constitutional value in compliance with agreements. This suggests that a party who wishes to make out a case that a contractual term is contrary to public policy (for any reason) must make out the case clearly and precisely. Put differently – a compelling reason should be given to depart from the sanctity of contract.

48 Since no proper explanation has been given of the constitutional complaint, it follows that it does not avail the respondents.

SUMMARY – THE MERITS

49 As shown above, none of the three categories of defence raised by the respondents serves to dislodge Engen’s case. Engen has established its entitlement to rely on the suretyship agreements, and its claim must succeed.

THE STRIKE OUT APPLICATION

50 Before concluding, I must deal briefly with the strike-out application.

51 Engen did not discuss, in its founding affidavit, the reasons why its other potential forms of redress (such as receiving funds from the liquidation of Anmar and the different forms of security which it held) were inadequate. In other words, it did not put in any energy to establishing that it invoked the suretyship agreements as a matter of last resort. This is because, based on the unqualified language in the suretyship agreements, it had no obligation to do so. It was the respondents, in their answering affidavit, who put this issue into play. This compelled Engen to address the issue in the reply, and it was there that the narrative about the respondents’ supposedly obstructive conduct was explained. Rather than seeking to address this in a further affidavit, the respondents seek to have the allegations about their obstructive conduct struck out.

52 There is a simple reason why the strike-out application is misconceived. This is because the side issue to which it relates – the issue of whether the respondents were complicit in Engen’s inability to recover more from Anmar’s debtors – is irrelevant to Engen’s cause of action. The strike-out application therefore does not relate to anything which is material to the relief sought by Engen. That being the case, it cannot be granted because of rule 23(2)(b) of the Uniform Rules. That provision says that a strike-out application may only be granted if the applicant (ie, the respondents in this case) will be prejudiced in the conduct of its claim or defence if the application is not granted. By definition, the respondents cannot be prejudiced if the strike-out application is not granted, because whether or not the allegations are struck out will have no

impact on Engen's claim or their defence. This makes it unnecessary to consider whether the allegations are scandalous, vexatious and/or irrelevant.

53 It follows that the strike-out application must be dismissed.

CONCLUSION AND ORDER

54 I have referred, in paragraph 6 above, to the provision in the suretyship agreements relating to costs. It follows from the way that the suretyship agreements deal with that issue that Engen is entitled to costs on the attorney-client scale.

55 I must highlight one issue in respect of interest. Both the certificate of balance and the most recent draft order put up by Engen (dated 25 January 2022) record the outstanding balance in respect of claim A as R5 725 367.53 and say nothing about interest. (Although an earlier draft order does indeed seek the interest, mirroring the wording of the AOD in this regard.) This must be contrasted with the certificate of balance in respect of claim B, which expressly deals with interest. The notice of motion, however, asks for interest at 12% per annum, compounded monthly, from 1 April 2019 (which is the date from which interest begins to run in terms of the AOD) in relation to Claim A.

56 I cannot undertake the job of trying to work out how much interest was or was not included in the three payments made to Engen by Anmar in 2019 (ie, on 30 April, 31 May and 30 June 2019). Since Engen has not assisted me in that regard, I intend to order that interest on Claim A is to run from 1 August 2019. This is because it is common cause that the last payment by Anmar under the AOD was due on 31 July 2019. Since it was not paid on that date, Anmar (and therefore the sureties) were clearly in mora from no later than 1 August 2019. I appreciate that this is not a precise way to deal with the interest because the initial outstanding capital amount (ie, as at 1 August 2019) would have been higher than it is now (taking into account that the roughly R310 000 received from other sources only came in later), which would have a knock-on effect on interest. Again, however, Engen ought to have explained this issue clearly, and in the absence of a clear explanation, I have to make an order which deals with this issue as fairly as possibly.

57 I therefore make the following order:

1. The strike-out application brought by the first, second and fourth respondents in respect of paragraphs 7, 8 and 32 of the applicant's replying affidavit, is dismissed.
2. The costs of the strike-out application are to be costs in the main application.
3. The first, second and fourth respondents are to pay to the applicant:
 - 3.1. In respect of claim A:
 - 3.1.1. R5 725 367.53.

3.1.2. Interest on the sum of R5 725 367.53 at the rate of 12% per annum, compounded monthly, to run from 1 August 2019.

3.2. In respect of claim B:

3.2.1. R7 157 396.04.

3.2.2. Interest on the sum of R7 157 396.04 at the prime rate of interest plus 4%, which is to run from 30 September 2019 to date of payment.

4. The first, second and fourth respondents are to pay the costs of this application, including the strike-out application, on the

attorney-client scale.

ADRIAN FRIEDMAN

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 3 April 2023.

APPEARANCES:

Attorney for the applicant: Mathopo Moshimane Mulangaphuma Inc Counsel for the applicant: S Aucamp Attorney for the first, second and fourth respondents: JC Van der Merwe Attorneys Counsel for the first, second and fourth respondents: M Webbstock (Attorney with right of appearance) Date of hearing: 16 March 2023 Date of judgment: 3 April 2023

[1] See Unlawful Occupiers, School Site at paras 12 to 13

[2] See Unlawful Occupiers, School Site at para 14

[3] Also in paragraph 14 of the judgment

[4] Lombaard v Droprop CC [2010] 4 All 229 (SCA)

[5] Lombaard (supra) at para 26

[6] See Economic Freedom Fights v Manual 2021 (3) SA 425 (SCA) at para 114

[7] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634-5

[8] Barkhuizen at paras 28 to 29

[9] Barkhuizen at para 57

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