

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Adonis and Others (M169/2023) [2024] ZANWHC 214 (21 August 2024) [2024] ZANWHC 214

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

M169/2023

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: M169/2023

Reportable:

YES/NO

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to Judges: YES/NO

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to Magistrates: YES/NO

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to Regional Magistrates: YES/NO

In the matter between:-

FIRSTRAND

BANK LIMITED

Applicant

and

CLINT

BRUCE ADONIS

(ID

NO: 7[...])

1st

Respondent

RUDOLPH

JOHANNES SCHOEMAN JNR

(ID

NO: 8[...])

2nd

Respondent

RUDOLPH

JOHANNES SCHOEMAN SNR

(ID

NO: 5[...])

3rd

Respondent

This judgment is

handed down by e-mail correspondence to the legal representative of the parties. The date of the judgment is 21 AUGUST 2024.

JUDGMENT

FMM REID J:

Introduction:

- [1] This is an application for monetary payment in the amount of R6,011,784.98 (Six Million Eleven Thousand Seven Hundred and Eighty Four Rand and Ninety Eight Cents) on the basis of suretyships signed by the 1st, 2nd and 3rd respondents for debt incurred by the Principal Debtor, namely CMS Water Engineering CC (“Principal Debtor”).
- [2] The Principal Debtor is currently in liquidation and not part of these proceedings.
- [3] The 2nd respondent passed away during the weekend of 4 March 2023. An executor has been appointed in the deceased estate, namely Michelle Schoeman. The 2nd respondent has not been replaced by the executor of the deceased estate.
- [4] The application is opposed by the respondents on the following grounds:
 - 4.1. The respondents are non-suited in the absence of the executor of the deceased estate of the 2nd respondent replacing the 2nd respondent, who is cited in person despite being deceased.
 - 4.2. The applicant is a concurrent debtor of the Principal Debtor, which is under liquidation. The respondents argue that the applicant attempts to elevate its status to that of a preferent liquidator against the remaining members of the Principal Debtor Close Corporation in obtaining the court order as prayed for in the relief.

4.3. The overdraft facilities of the Principal Debtor were paid in full at various year ends, and at the renewal of the overdraft facilities of the Principal Debtor. As such, the initial surety agreement cannot be enforced as it extinguished when the debt was paid in full.

4.4. That sureties were signed by the 1st respondent on 4 July 2009 and by the 3rd respondent on 31 December 2012. The respondents claim that the sureties relied on by the applicant in the application in casu, have not been signed by the 1st and 3rd respondents. The sureties relied on by the applicant is signed solely by the 2nd respondent and a factual dispute exists whether the 2nd respondent was duly mandated to sign surety on behalf of the Principal Debtor, 1st and 2nd respondent.

4.5. The amounts due and payable is disputed on the basis that payments were made which has not been taken into consideration and calculated in the certificates of balance.

[5] The 1st and 3rd respondents state that the 2nd respondent requested permission during his tenure as a member of the Principal Debtor, to renew the overdraft facility on various occasions. However, the 1st and 3rd respondents deny that permission was granted in writing, as required in section 52 of the Close Corporations Act 69 of 1984.

Material background facts

[6] The Principal Debtor received an overdraft facility from the applicant during October 2021 with account number 6[...]. A further overdraft facility was granted in October 2021 with account number 6[...].

[7] On 4 July 2009, 31 December 2012, 18 March 2015 and 20 March 2019 the 1st, 2nd and 3rd respondents bound themselves in writing to the applicant, jointly and severally as sureties and co-principal debtors for all sums of money which the Principal Debtor may from time to time owe the applicant.

[8] The 1st, 2nd and 3rd respondents also stood surety jointly and severally and were co-principal debtors in favour of the Principal Debtor, in terms of a deeds of surety signed on 24 January 2017. The applicant further claims that the applicant and Principal Debtor concluded further written overdraft agreements on 9 April 2018, 12 March 2019 and 1 October 2020.

[9] The applicant attaches certificates of balance in the amounts of R2,097,317.68 and R3,914,467.30 in support of the application.

Legal position

[10] It is common cause that the 2nd respondent has passed away and has not been substituted by the appointed executor.

[11] Rule 15(3) of the Uniform Rules of Court deals with proceedings where a party to the proceedings dies, and reads as follows:

“(3) Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted.”

- [12] It is trite law that a party that dies, should be substituted by the executor of the estate. The following is said in Erasmus: Superior Court Jutastat e-publications CD-Rom & Intranet: ISSN 1561-7467 Internet: ISSN 1561-7475 RS 23, 2024, D1 Rule 15-1 that:

“...the court will not allow any further steps to be taken in the proceedings until an executor, curator, trustee or similar legal representative has, in terms of the subrule, been substituted.”

See: Estate Huisman v Visse 1967

- (1) SA 470 (T), Dlwati v King Sabata Dalindyebo FET College (2021) 42 ILJ 2427 (LC) at paragraphs [18]–[21].
- [13] The woes of the applicant do not end with substitution of the 2nd respondent. A claim that has been issued in the name of a persona who did not exist at the date of the issue of the claim, is a nullity and the court cannot by substitution retrospectively revive it to the date of issue of the claim. See: Van Heerden v Du Plessis 1969
- (3) SA 298 (O); Devonian Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening) 1994
- (2) SA 363 (C) at 369J–370A; Friends of the Sick Association v Commercial Properties (Pty) Ltd 1996
- (4) SA 154 (D).
- [14] The 2nd respondent passed away on 4 March 2023 and the claim was issued by application proceedings on 19 April 2023, one month after the 2nd respondent’s death.
- [15] It follows that the application against the 2nd respondent is a nullity. The claims against the 1st and 3rd respondent do, however, remain alive in this application.
- [16] The disputes between the parties in relation to the amounts due as sureties, the mandate of the 2nd respondent to bind the 1st and 3rd respondents in all subsequent overdraft facilities after the initial overdraft facility was granted, and the defence of the respondents that the suretyship does not extend to additional sureties after the full payment of the initial overdrafts, are issues that this Court cannot determine on paper.
- [17] In not being able to determine the matter on papers, the court is to resort to Rule 6(5)(g) of the Uniform Rules of Court, which reads as follows:

“6(5)(g) 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. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to

appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

[18] In terms of Rule 6(5)(g) the court has the discretion to do any of the following, when the matter cannot be decided on the affidavits before court:

18.1. Dismiss the application.

18.2. Make an order with the view of a just and expeditious disposal of the matter.

18.3. Direct that oral evidence is to be heard on specified issues or refer the matter to trial, with appropriate directions as to pleadings or definition of issues.

[19] I hold the view that dismissing the application would not be a just and fair remedy. Prima facie it appears that the applicant might have a valid claim against the respondents. Dismissing the application would also not be just and fair on the basis that the amount claimed is extremely large, being in the excess of R6 million. In addition, dismissal of the application may result in a plea of res judicata when an action is instituted for the same claim.

[20] To refer the matter for oral evidence or trial would also not be an appropriate order on the basis that the 2nd respondent has passed away and is not substituted with the deceased estate executor. This would result in further steps being taken without compliance with common-law principles of substitution of the deceased with the executor.

[21] This Court is left with the option to make an order with the view of a just and expeditious disposal of the matter. If the matter is struck from the roll, the applicant as dominus litis is left with the decision whether to substitute the 2nd respondent with the executor, or to institute action proceedings.

[22] In my view, an order that the matter is struck from the roll would be just and fair to all the parties. With one party deceased (who stood surety) and the Principal Debtor in liquidation, an order that strikes the matter from the roll will keep the matter alive for the applicant to effect substitution, should it so wish.

[23] In striking the matter from the roll, all parties would be able to reconsider their respective positions in law.

[24] I also add that this matter appears to be one that may be able to be amicably resolved through mediation in terms of Rule 41A. The applicant has filed a notice objecting to mediation on 5 June 2023. The respondents have not filed same. Although the court cannot force mediation process, it can encourage it, as it hereby does.

[25] It is for the above reasons that I deem an order to strike the matter from the roll, an appropriate order.

Costs

[26] The respondents request costs on the basis that the applicant insisted on proceeding with the application despite becoming aware of the 2nd respondent's passing and without substituting the 2nd respondent with the executor of the deceased estate.

[27] The general principle in litigation is that the successful party is entitled to its costs. In striking the matter from the roll, the respondents are substantially successful. I find no reason to deviate from the general principle relating to costs.

Order:

[28] In the premise I make the following order:

- i) The application is struck from the roll.
- ii) The applicant is to pay the costs of the 1st and 2nd respondent, on Scale C, party and party basis.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

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