

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Selloe and Others (M276/2017) [2019] ZANWHC 32 (14 February 2019)

[2019] ZANWHC 32

COURT

North West High Court, Mafikeng

BEFORE

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CASE / FILE NUMBER

M276/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

CASE NUMBER: M276/2017

In

the matter between:

FIRSTRAND
BANK LIMITED APPLICANT
AND
APRIL
MAGASE SELLOE
1ST
RESPONDENT
BAREND
JOHANNES VAN KASTEROP
2ND RESPONDENT
IZAK
SCHALK VAN DEN BERG
3RD RESPONDENT
JOHN
ODIRILE LEBELELA
4TH RESPONDENT
WILLIAM
HENRY KRUGER
5TH
RESPONDENT

JUDGMENT

DJAJE J

[1] This is an application wherein the Applicant claims for payment in the sum of one million eight hundred and seventy nine thousand five hundred and eighty two rand and fifty seven cents (R1 879 582-57) from various Respondents who signed as sureties on behalf of Lebola Mining and Engineering Supplies CC (“principal debtor”). The third and fourth Respondent did not oppose the application and the Applicant sought default judgement against them if the court

finds that they are liable for the amount claimed.

[2] The first and second Respondents were members of the principal debtor and they both sold their shares to other third parties. The first Respondent sold his shares to the third Respondent in the amount of R1.3 million and the purchase price was payable on or before 5 June 2015. The second Respondent on the other hand sold his shares to the third and fourth Respondents and one Jacobus Pretorius (“Pretorius”) in the amount of R1 million. This therefore means that the first and second Respondents ceased to be members of the principal debtor in June

2015. The fifth Respondent as well was a member of the principal debtor from September 2011 and ceased to be a member on 11 June 2015 after selling his shares to the second Respondent.

[3] The Applicant brought this application to recover monies owed to it by the principal debtor from the Respondents in their capacities as sureties. It is common cause that the principal debtor was voluntarily wound up by special resolution registered on 1 February 2017. In its founding affidavit the Applicant’s claim arises from a facility agreement dated 15 June 2016. The said facility comprised of a short term direct working capital facility in the sum of R2 000 000-00 which was repayable upon demand and subject to annual review. The facility was availed to the principal debtor by way of overdrafts and/or such other facilities as the Applicant may from time to time allow and subject to availability. The utilisation of the facility was subject to conditions of furnishing collateral inter alia suretyships by the members of the principal debtor. The Applicant alleges that the principal debtor breached the terms of the agreement by failing to make payment of the amount owed to the Applicant on demand as reflected in the letter of demand dated 13 January 2017.

[4] The Respondents in their answering affidavits raised a defence that the facility referred to in the founding affidavit was signed between the Applicant and the principal debtor after they had resigned as members of the principal debtor. On this point the Applicant in the replying affidavit attached a facility agreement signed with the principal debtor in October 2014 whilst the Respondents were still members of the principal debtor. It was at that time that the first, second and fifth Respondents signed as sureties for the principal debtor in favour

of the Applicant. In the facility agreement of October 2014 an overdraft facility of R2 000 000-00 was made available to the principal debtor. The principal debtor immediately utilised the facility.

[5] It is the Applicant's case that at the time of the conclusion of the June 2016 agreement there was a debit balance owed by the principal debtor in respect of the overdraft of October 2015 in the amount of R1 931 373-01. The said balance was then incorporated into the amount afforded to the principal debtor in terms of the facility agreement concluded in June

2016. In its argument the Applicant argued that the Respondents signed deeds of suretyship in favour of the Applicant in October 2014 for the past, present and future debts of the principal debtor. Further that the Respondents never requested the Applicant to release

them from their obligations under the suretyship when they resigned as members of the principal debtor or notify the Applicant of their intention to terminate their deeds of suretyship.

[6] The first and second Respondent deposed to the answering affidavit together and as such I will deal with the defences they raised separate from those of the fifth Respondent. The argument raised by the first and second Respondents was that the Applicant in its founding affidavit failed to establish their liability in connection with the June 2016 facility. In that, at the time of the conclusion of that facility the two Respondents had already resigned as members of the principal

debtor. Further that the relevant deed of suretyship for the two Respondents was concluded two years before the facility referred to in the founding affidavit was advanced. It is their case that the Applicant's attempt of referring to the October 2014 facility agreement in its replying affidavit is bad in law as a party needs to make out its case in the founding affidavit.

[7] The other argument raised by the Respondents was that reliance on the 2014 suretyship agreement against the two Respondents is against public policy and thus inimical to the Constitution. The basis for this argument by the Respondents was that the Applicant relies upon a credit facility advanced after the Respondents had disposed of their member's interest in the principal debtor. The argument advanced was further that the only conclusion can be that the funds advanced for the June 2016 facility would have been used to settle the outstanding 2014 facility and thus discharging the first credit facility. On the issue of being released from the suretyship agreement the argument for the Respondents was that the clause that the Respondents would not be released from the suretyship without the Applicant's written consent is contrary to public policy. Reference was made to the matter of *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd and Others* 1993 (4) SA 206 (W) where the following was said: "I am of the view that the provision that the suretyship is only terminable if the creditor agrees is wholly unnecessary to protect the rights of the creditor, serves no legitimate purpose and is contra bonos mores."

- [8] The fifth Respondent deposed to his separate answering affidavit. The argument raised by the fifth Respondent was firstly that the 2014 facility agreement had strict monitoring and review conditions with which the principal debtor had to comply to enable the ongoing availability of the facility. What the fifth Respondent argued in essence was that the Applicant failed to call up and enforce the 2014 facility and instead offered the 2016 facility to extend the principal debtor's obligations. This conduct of the Applicant is seen by the fifth Respondent as prejudicial to the sureties who signed for the 2014 facility because they accepted that the Applicant should have adhered to the monitoring and reviews conditions and enforce same. According to the fifth Respondent if monitoring was done by the Applicant, it could have seen that the principal debtor was not conducting the facility in accordance with its purpose and not being able to settle its indebtedness.
- [9] There is allegation made by the fifth Respondent that the Applicant has not obtained suretyship from the other members of the principal debtor in 2016 or has lost those suretyship, which is in breach with the facility of 2016.
- [10] The Applicant in its founding affidavit relies on the 2016 facility and holds the Respondents liable to it as sureties based on the said facility. After the Respondents raised the 2014 facility in their answering affidavits, the Applicant then makes reference to the 2014 facility in the replying affidavit. It is trite that an Applicant should make out its case in the founding affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the Applicant's favour. An Applicant must stand and fall by his/her founding affidavit. See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H- 636D where the following was stated:

"When as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and has been said in many other cases'.....an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny"

- [11] The Applicant in the founding affidavit at paragraphs 14 and 15 stated as follows:

"The Facility Agreement

14. On 15 June 2016 and at Rustenburg, the Applicant, represented by duly authorised representatives, and the principal debtor, represented by the third respondent, he being duly authorised thereto, entered into a written facility agreement comprising a Facility Letter, dated 26 April 2016, and General Terms and Conditions applicable to the Facility ("the Facility Agreement").

15. A true copy of the Facility Agreement is annexed hereto marked 'FA2'. The applicant prays that the express terms of the Facility Agreement be incorporated herein as if specifically alleged. A true copy of the resolution authorising the conclusion of the Facility Agreement and authorising the third respondent to conclude it on behalf of the principal debtor, dated 1 June 2016, is annexed hereto and marked 'FA2A'."
- [12] It is common cause that the first, second and fifth Respondents were no longer members of the principal debtor in June 2016 when the facility was advanced to the principal debtor. There were new members who must have approached the Applicant for a short term facility. In terms of the facility agreement the utilisation of the facility was conditional upon the provision of collateral/agreements. The collateral referred to in the agreement are the suretyship of the first, second, fifth Respondents and the current members of the principal debtor. The Respondents were not aware of such an agreement entered into and did not sign any surety in 2016 in favour of the Applicant. However the surety agreement of the Respondents attached to the founding affidavit are those dated 2014. On the face of the founding affidavit there is no connection established by the Applicant between the 2016 facility and the Respondents. On this point alone this matter stands to fail as the Applicant has failed to make out its case against the Respondents in the founding affidavit. This point is dispositive of the whole matter and I see no point in dealing with the rest of the defences raised by the Respondents.
- [13] Having considered the submissions made, I am of the view that the Applicant has not made out a case against the Respondents and the application should be dismissed. As far as costs are concerned it would be appropriate to order costs against the Applicant.
- [14] As stated above the third and fourth Respondents have not filed any opposing papers in this matter and I see no reason why judgment cannot be made against them for payment of the amount claimed by the Applicant. The third and fourth Respondents were members of the principal debtor at the time of the 2016 facility agreement.

Order

- [15] Consequently, the following order is made:
1. The application against the first, second and fifth Respondents is dismissed.
 2. The Applicant is ordered to pay costs.
 3. Payment of the sum of R1 870 582.57 by the third and fourth Respondent;
 4. Interest on the said amount at the rate of 10.50% per annum calculated daily and compounded monthly from 1 March 2017 to date of payment;
 5. Costs to of suit by the third and fourth Respondents.

J T DJAJE

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 30 NOVEMBER 2018

DATE OF JUDGMENT

: 14 FEBRUARY 2019

COUNSEL FOR THE APPLICANT

: ADV. M. DE OLIVEIRA

COUNSEL FOR THE 1ST AND 2ND RESPONDENTS : MR M. WESSELS

COUNSEL FOR THE 5TH RESPONDENTS : ADV C. BOONZAAIER

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Prepared on 12 October 2026 · Esheria