

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Baba (6535/2024)

[2025] ZAWCHC 176 (25 April 2025)

[2025] ZAWCHC 176**COURT**

Western Cape High Court, Cape Town

BEFORE

E Nel

CASE / FILE NUMBER

6535/2024

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN CAPE****DIVISION, CAPE TOWN)****Case****no: 6535/2024****In the matter between:****NEDBANK****LIMITED****Applicant****and****MOUSSA****BABA****Respondent****Court:****Acting Justice E Nel****Heard:****22 April 2025****Delivered:****25 April 2025**

JUDGMENT

NEL AJ:

1. The present matter is an opposed application in terms whereof the applicant seeks payment of the sum of R 15 000 000.00 together with interest and costs of suit from the respondent in his capacity as surety and co-principal debtor for the debts of Bestinver Company South Africa (Pty) Ltd (now in liquidation) (“Bestinver”).
2. On 18 July 2011 the applicant and Bestinver, both duly represented, concluded a written loan agreement in terms whereof the applicant

loaned and advanced the sum of R 15 000 000.00 to Bestinver. It was a further term of the loan agreement that Bestinver would be liable for interest at the prevailing prime interest rate from time to time less 1% per annum. The loan was to be repaid in 240 monthly instalments of R 125 523.01 (inclusive of the monthly service fee; and subject to fluctuation in the prime interest rate). The first instalment was due on the first day of the month following the month during which the loan or part thereof had been advanced to Bestinver. The agreement furthermore provided that in the event of Bestinver breaching any of its terms, the applicant would be entitled to claim repayment of the balance outstanding under the loan, which would become immediately due and payable. Pursuant to the loan agreement two mortgage bonds were registered over immovable property owned by Bestinver in favour of the applicant for the sums of R 9 500 000.00 and R 1 500 000.00 respectively.[1] This was in addition to an existing mortgage bond over the immovable property in favour of the applicant in the sum of R 3 000 000.00.

3. The applicant alleges that Bestinver from or about 7 November 2020 failed to effect payment of the monthly instalments to the applicant, thereby breaching the agreement, and entitling it to claim payment of the balance outstanding together with interest and costs of suit.
4. Furthermore, on 17 June 2021, I granted an order placing Bestinver under final liquidation.
5. The applicant attached a certificate of balance, as provided for in the loan agreement, to its founding papers, which states that Bestinver is indebted to the applicant in the sum of R 16 313 121.26 together with interest thereon at the prevailing prime interest rate less 4.75% per annum[2] from 15 February 2024 to date of final payment.
6. On 28 June 2011, the respondent concluded a suretyship agreement in favour of the applicant in terms whereof he bound himself, jointly and severally as surety and co-principal debtor in solidum with Bestinver, limited to the sum of R 15 000 000.00 plus interest and legal costs on the attorney and client scale. The respondent also renounced the benefit of excussion.
7. The applicant, as it did in respect of Bestinver, attached a certificate of balance, as provided for in the suretyship agreement,

to its founding papers, which provides that the respondent is indebted to the applicant in the sum of R

15 000 000.00 together with further interest thereon at the rate of 7% per annum (being the prevailing prime interest rate less 4.75%) as from 15 February 2024 to date of final payment.

8. It is evident that Bestinver was a juristic entity and that the loan agreement it concluded with the applicant constituted a large agreement as defined in section 9(4) of the National Credit Act 34 of 2005 (“the NCA”). In accordance with section

4(1)(b) of the NCA its provisions therefore did not apply to the loan agreement, and consequently in terms of section 4(2)(c) it does not apply to the suretyship agreement.

9. The applicant accordingly seeks the relief set out in paragraph 1 above.

10. The respondent filed a notice of intention to oppose the application but failed to file opposing papers timeously,[3] which prompted the applicant to bring a chamberbook application to compel the respondent to do so. An order was accordingly

granted on 21 June 2024[4] compelling the respondent to file opposing papers within 5 days of service of the order on his attorneys of record. On 24 June 2024, the respondent’s attorney of record, Mr. Waleed Saban, filed an affidavit in which he stated that the respondent would be out of the country from 22 June 2024 to 5 July 2024 and accordingly requested an indulgence until August 2024 to file opposing papers. The chamberbook order was served on the respondent’s attorneys of record, shortly thereafter.[5]

11. The respondent failed to file opposing papers as directed in the order granted on 21 June 2024, and the applicant therefore set the matter down on the third division unopposed motion court roll on 15 August

2024. On that date the matter was postponed by agreement for hearing on the semi-urgent roll on 30 October 2024,[6] and the respondent was once again ordered to file opposing papers, if any, by 10 September 2024. Despite the provisions of the latter order the respondent only filed opposing papers on 19 September 2024.

12. The papers were not accompanied by a condonation application, however, the respondent in the opposing affidavit itself seeks condonation for the late filing thereof. The reasons for the late filing of the opposing affidavit are so closely linked to the grounds of opposition to the applicant’s claim that it is best to simply deal with them together.

13. The respondent admits that he concluded the suretyship agreement, and does not deny that Bestinver is indebted to the applicant in the sum of R 16 313 121.26 in accordance with the aforementioned loan agreement. The respondent however attempts to escape liability for the reasons that follow.

14. Ahmadou Baba, who the respondent describes as “the patriarch of the Baba family” and who is his father, was the sole shareholder in Bestinver. A company, called Elite Vision Investments (Pty) Ltd (“Elite Vision”), which is wholly owned by the respondent’s family, and one of the liquidators of Bestinver (namely the late Cloete Murray N.O.) concluded a deed of sale in terms whereof Elite Vision would purchase the immovable property from Bestinver for a purchase price of R 14 000 000.00. It was a further term of the agreement that Elite Vision would have to comply with the relevant provisions of the Financial Intelligence Centre Act 38 of 2001 (“FICA”).
15. Kim Warren Inc t/a KWA Attorneys (who are also the applicant’s attorneys of record in the present matter) were appointed as the conveyancing attorneys in the deed of sale, and Elite Vision had paid the full purchase price to KWA Attorneys at the date of signature of the deed of sale. The transfer fees were also paid over to KWA Attorneys in March 2023. No date of transfer was specified in the deed of sale and it simply provided that transfer would be effected as soon as reasonably practicable, and after Elite Vision had complied with the conditions contained in the deed of sale (although no conditions other than FICA compliance are contained therein), and subject to the parties complying with their obligations in terms of the agreement, inter alia, to effect payment of all costs, rates, taxes and other charges due to the local authority.
16. From the deed of sale it is evident that it was concluded on 10 January 2023 (although the respondent’s opposing affidavit

states 10 January 2022 – this is clearly a typographical error). The respondent states that because Ahmadou Baba was

based in Cameroon “there was a lapse in time for the required FICA documents to be obtained and made available”, and that “for some inexplicable reason the liquidators appeared to have withdrawn from the sale” despite all requirements having been met for the sale to Elite vision to proceed. The respondent states further that unbeknownst to him the liquidators of Bestinver had raised a query regarding the nature and purpose of Elite Vision’s payment in respect of the sale of the immovable property, and as a result there is now pending litigation between Ahmadou Baba and Elite Vision against the liquidators of Bestinver in the Gauteng High Court (which has been transferred to the Western Cape High Court). The respondent states further that Ahmadou Baba and Elite Vision “seek a declarator confirming that the Baba’s are indeed the true intended recipients of the R 14 million advanced by Elite Vision and that it was never the latter’s intention to make Bestinver the beneficial owner of the funds”.

17. The crux of the respondent’s opposition is that the applicant will not be prejudiced should the present matter be postponed pending finalization of the aforementioned litigation as KWA Attorneys, being the applicant’s attorneys of record, hold R 14 000 000.00 in their trust account. Moreover, the respondent contends that should Ahmadou Baba be successful in such litigation, the funds currently held by KWA Attorneys would be paid over to the applicant in settlement of its claim. The respondent accordingly denies that he is “currently

liable” to pay the applicant as Elite Vision remains a willing buyer and has already made the full purchase price available.

18. In an attempt to explain the delay of the filing of his papers, the respondent states that he is based in Dubai and was unaware of

the fact that there was a difficulty with the sale of the immovable property, and therefore thought that the matter was being resolved.

For that reason, he did not see the need to further oppose the present application, and by that one must presume that he did not see the need to file any opposing papers. He states that his siblings are based all over the world making it difficult to keep abreast of all developments regarding the family business, and that he is not fully aware of the current status of all of the family’s litigation in South Africa. He has however now had to return to South Africa to deal with this matter. He does not state when, but at some point he was alerted to the fact that the sale of the immovable property was not proceeding. There were unsuccessful settlement negotiations between the parties between the period of 5 September 2024 and 11 September 2024, as a result, the applicant’s attorneys had agreed to an extension to 16 September 2024 for the filing of the respondent’s opposing papers. As stated above, the opposing papers were only filed on 19 September 2024, being three court days later.

19. On 17 April 2025, one court day prior to the hearing of the matter, the respondent’s attorneys of record emailed a “supplementary condonation affidavit” to Ms. Lizette Potgieter. Such affidavit was filed without the leave of the court, however, it does further and better explain the reasons for the delay in the respondent’s filing of his opposing affidavit. Although the parties had agreed to his affidavit being filed on 16 September 2024, the respondent’s attorney of record sent him the draft affidavit via WhatsApp on 17 September

2024. The respondent intended on getting the affidavit commissioned at the South African Consulate in Dubai, but later discovered that he could only attend at the Consulate’s Office by making an appointment online. This the respondent was not able to do timeously, and he elected to rather fly back to South Africa and had the affidavit commissioned the following day, being 18 September 2024. The commissioned affidavit was sent via WhatsApp to the applicant’s attorney of record on the same date.

Condonation for the late filing of the opposing papers:

Explanation of default:

20. Condonation of the non-observance of court orders and rules is not a mere formality. A party seeking condonation must satisfy the court that there is sufficient or good cause for excusing the non-compliance. Whether condonation should be granted or not is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case.[7] It is trite that an applicant in an application for condonation must provide a reasonable explanation of their default and show that they have a bona fide defence to the claim against them.[8]

21. In the present matter the applicant submits that the respondent ought to provide a full explanation of his default from the date that his opposing affidavit was due on 28 May 2024 to the filing thereof on 19 September 2024. I don't agree. Once the order was taken by agreement on 15 August 2024 setting out the further timeline of the matter, and therein directing the respondent to file his opposing affidavit by 10 September 2024, the slate was wiped clean so to speak, and in my view the respondent only has to show a reasonable explanation of his default from 10 September 2024 to 19 September 2024.
22. Moreover, as set out above, the applicant had granted the respondent an extension of time, despite the provisions of the order granted on 15 August 2024, to file his opposing affidavit by 16 September 2024. I am of the view that the respondent has set out sufficient reasons explaining the lateness in the filing of his opposing affidavit.
23. However, for the reasons enunciated below, the respondent has failed to set out a bona fide defence to the applicant's claim. The averments which he has set out do not entitle him to a dismissal of the applicant's claim or a postponement thereof pending finalization of the litigation between Ahmadou Baba and the liquidators of Bestinver. What the respondent in fact seeks is an indulgence from the applicant; however, his averments do not amount a legal defence to the claim of the applicant.

Merits of defence raised:

24. It is common cause that the respondent has bound himself as a co-principal debtor with Bestinver and renounced the benefit of excussion.
25. Mr. Botha, who appeared on behalf of the respondent, submitted during argument, that the debt of Bestinver has been extinguished by the payment of the purchase price of the immovable property into the trust account of KWA Attorneys. I asked Mr. Botha whether he had any legal authority for such submission, and he indicated that he did not, but that those were

simply his instructions. Mr. Botha evidently had no confidence in this argument, and neither do I.

26. Bestinver's debt to the applicant has not been settled. Whilst a portion thereof may be settled if Ahmadou Baba is successful in the litigation that he has instituted against the liquidators of Bestinver, this is by no means a guarantee.[9] There is also no duty whatsoever on the applicant to await the outcome of such litigation before proceeding against the respondent

as surety and co-principal debtor.

27. The fact that the applicant's attorneys of record hold the R 14 000 000.00 purchase price and transfer costs in respect of

the sale of the immovable property between the liquidators of Bestinver and Elite Vision does not assist the respondent. KWA Attorneys are holding those funds as a stakeholder and as conveyancer in such transaction, and not for the benefit of the applicant in the present matter. What is evident is that irrespective of who the successful party is in the litigation between Ahmadou Baba and the liquidators of Bestinver, the funds held by KWA Attorneys will not be paid directly to the applicant, but would rather be paid to presumably one of the parties in that suit. Should Ahmadou Baba be successful in such litigation, the applicant's claim would not be settled in full but it will rather receive a dividend from the liquidators, after deduction of the relevant costs and charges.

28. A surety's obligations are coterminous with those of the principal debtor.[10] Where the surety signs as co-principal debtor, as the respondent did, the addition of those words shows that the surety is assuming the same obligations as the principal debtor. That means that the applicant is at liberty to pursue payment of the monies owing by Bestinver to the applicant, subject to the monetary limitation contained in the deed of suretyship.
29. Mr. Botha argued in the alternative that the present application ought to be postponed pending the determination of the litigation between Ahmadou Baba and the liquidators of Bestinver. He conceded that such a request amounted to seeking an indulgence from the applicant; an indulgence which the applicant is not prepared to grant.
30. As I have stated above, there no obligation on the applicant to first await payment of any dividends from the liquidators of Bestinver.[11] The applicant is fully entitled to seek payment of the debt of Bestiver from the respondent now.
31. In the circumstances, even if I were to grant the respondent condonation for the late filing of his answering affidavit, he has failed to set out any defence to the applicant's claim.
32. I accordingly grant the following order:

ORDER:

1. Judgment is granted in favour of the applicant and against the respondent for:

1.1 Payment of the sum of R 15 000 000.00 together with interest thereon at the prevailing prime interest rate from time to time less 4.75% per annum, calculated daily and compounded monthly as from 15 February 2024 to date of final payment both days inclusive;

1.2 Costs of suit on the attorney and client scale.

NEL AJ

APPEARANCES:

For applicant:

Adv D R de Wet

Instructed by:

Dunsters Attorneys Incorporated

For first respondent: Adv M Botha

Instructed by:

ZS Incorporated

- [1] The immovable is described as Portion 141 (a portion of portion 36) of the farm Zandfontein No. 42, Registration division I.R., the province of Gauteng, measuring 1,1434 (one comma one four three four) hectares, held by Deed of Transfer No. T[...] (“the immovable property”).
- [2] I was informed by Mr. de Wet, who appeared on behalf of the applicant, that this lower interest rate, than the one provided for in the loan agreement, was charged by the applicant when Bestinver went into liquidation.
- [3] The application was served upon the respondent on 30 April 2024. The respondent delivered a notice of intention to oppose the application on 6 May 2024 with the result that his opposing papers were due on 28 May 2024.
- [4] The order was issued on 28 June 2024.
- [5] The date of receipt is not clear on the receipt stamp of the respondent’s attorneys of record; however, it is evident that the order was issued on 28 June 2024, and filing sheet has a date stamp on of 1 July 2024, and the order was presumably served on or about such date.
- [6] The matter was not allocated for hearing on 30 October 2024 and was instead postponed for hearing to 22 April 2025.
- [7] See *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at para [7].
- [8] See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 (later repeated in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA (E) 705 at 708H.
- [9] It is also worth pointing out that the respondent is not a party to those legal proceedings.
- [10] See *Van Zyl v Auto Commodities (Pty) Ltd* 2021 (5) SA 171 (SCA) at para [11].
- [11] See *Consolidated Textile Mills Ltd v Weiniger* 1961 (3) SA 335 (O) at 338C.

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