SOUTH AFRICA / JUDGMENT

Nedbank Limited v Botes (3225/2020) [2021] ZAFSHC 95 (23 March 2021)

[2021] ZAFSHC 95

COURT
Free State High Court, Bloemfontein

BEFORE
Opperman, J

CASE / FILE NUMBER
3225/2020

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IN
THE HIGH COURT OF SOUTH AFRICA
FREE
STATE PROVINCIAL DIVISION
Case
No.: 3225/2020
In

the matter between:	NEDBANK LIMITED[1] Plaintiff (Registration number: 1951/000009/06) and LOUIS FREDERIK BOTES[2] Defendant
Coram:	Opperman, J Date of hearing: 18 March 2021
Delivered:	The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 23 March 2021. The date and time for hand-down is deemed to be 23 March 2021 at 15h00

Summary: Application for summary judgment – bona fide defence – novation of agreement

JUDGMENT

[1] On 18 March 1958 Boshoff J heard an application for summary judgment in Meek v Kruger 1958 (3) SA 154 (T) and confirmed that the purpose of summary judgment is to assist a plaintiff where a defendant who cannot set up a bona fide defence or raise an issue to be tried, enters appearance simply to delay judgment. On 18 March 2021 the plaintiff applied in casu for summary judgment in terms of Rule 32 against the defendant for the following:

1. Payment of the amount of R 2 902 831.01;
2. Interest on the aforesaid amount calculated at 17,50% per annum from 1 August 2020 to date of payment;
3. Costs on attorney and client scale;
4. Further and/or alternative relief.

[2] The defendant opposes the summary judgment and claims a bona fide defence on the following factual premise:

1.

The defendant, together with his previous co-director of one Tritice Auto (Pty) Ltd[3], one Mr. Tiaan Dames bound themselves as surety and co-principle debtors in May 2018 in respect of an overdraft facility which Tritice Auto held with Nedbank.

2.

Botes filed a plea to the particulars of claim but Nedbank contends that the plea does not raise any trialable issue. In opposition to the application for summary judgment Botes explained to the court that he intends to amend his plea and to raise a bona fide and trialable defence. This will entail that:

2.1 From February 2019 he had no affiliation with Tritice Auto or Dames. Dames continued with the business.

2.2 In March 2019 Botes had a meeting with Nedbank as represented by Mr. Arnold Du Toit and Mrs. Simone Nieuwoudt. He wanted to be removed as surety for Tritice Auto because the busines relationship came to an end.

2.3 Botes is adamant that Nedbank agreed that he shall from then on only be held accountable in an amount of R1,5 million which would be payable in instalments.

2.4 During a subsequent meeting held with Nedbank and this time represented by one Erna Cramer, a Credit Risk Manager, in July 2019 the agreement was reiterated and confirmed.

2.5 This amounted into the suretyship being novated. The novation constituted an agreement that extinguished the obligation under the suretyship. Nedbank is in result precluded from relying on the suretyship agreement as basis for its cause of action. The novation constitutes a waiver of rights which accrued exclusively to Nedbank.

2.6 In fact, Botes claimed that he had started to pay the debt of R1,5 million by an instalment of R100 000.00 per month up until he ran into financial challenges during Covid. The first instalment was on 15 August 2019. He has to date paid R650 000.00 to Nedbank in terms of the agreement. During March 2020 he arranged with one Lemmetjies at Nedbank for the instalment to be reduced to R50 000.00 due to Covid. In April 2020 Botes arranged a "payment holiday". The payment holiday was confirmed to be until the end of July 2020.

2.7 He regrets the delay in his reply to the litigation because he was unable to consult with counsel due to the fact that he resides in Pretoria and the action was instituted in Bloemfontein. He succinctly provided instructions to his attorney, but was only able to properly consult with counsel on 15 February 2021.

3.

Nedbank's claim is based on breach of contract and is for the payment of an ascertained amount based on a certificate of balance but Botes claims that the suretyship was replaced by mutual agreement between the parties with a new obligation which is regulated by a new substantive and self-standing verbal agreement. His defence is bona fide against the claim of Nedbank, which if proven at trial, will constitute a complete defence.

[3] Nedbank takes issue with the aforesaid and submits that the original suretyship contains a non-variation or so-called Shifren-clause which specifically determines that all amendments to the suretyship shall be required to be in writing.

[4] It is trite that a non-variation clause such as relied upon by Nedbank, curtails the common law freedom to contract and must be restrictively interpreted. This is specifically so in the post-constitutional era and in the atmosphere of the National Credit Act 34 of 2005 that makes ample provision for variation of credit agreements in certain circumstances. In the absence of a clause precluding an oral or tacit novation, a subsequent agreement is not prohibited by a so-called Shifren-clause in the circumstances of this case. It is the will and consensus of the parties that shall prevail. See in this regard Klub Lekkerrus /Libertas v Troye Villa (Pty) Ltd 2011 JDR 0590 (SCA). The evidence before court indicates that the matter is trialable and the defence thus bona fide.

[5] ORDER

1.

In result the application for summary judgment is dismissed;

2.

The defendant is granted leave to defend the plaintiff's action;

3.

The costs of the application for summary judgment are to be costs in the action and thus for the decision of the trial court.

M OPPERMAN, J

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[1] "Nedbank".

[2] "Botes".

[3] "Tritice Auto".

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Prepared on 28 October 2026 · Esheria