

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Botha N.O and Others (1210/2018) [2019] ZAECHGC 118 (12 November 2019) [2019] ZAECHGC 118

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

1210/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. 1210/2018

In

the matter

between:

NEDBANK
LIMITED
Plaintiff
and
RUDOLF ALBERT BOTHA
N.O.
First Defendant
HESTER JOHANNA
ELIZABETH BOTHA N.O.
Second Defendant
GERBER BOTHA AND GOWAR
TRUSTEES (PTY) LTD
Third Defendant
BOTHA EN RETIEF
VOERKRALE CC
Fourth Defendant
RUDOLF ALBERT
BOTHA
Fifth Defendant

HESTER JOHANNA
ELIZABETH BOTHA
Sixth Defendant

JUDGMENT

Bloem J.

- [1] This is an exception taken by the plaintiff “against paragraph 7.4 of the Fourth Defendant’s Plea, as failing to disclose a defence.” The first, second and third defendants are cited in their capacity as trustees of the Herbou en Doorskraal Trust (the Trust). The fourth defendant is a close corporation while the fifth and sixth defendants are cited in their personal capacity. The first and fifth defendants are the same person. When necessary I shall hereinafter refer to him as Mr Botha. Mr Botha and one Ina Retief are members of the fourth defendant.
- [2] The plaintiff loaned money to the Trust. The plaintiff alleged in its particulars of claim that during June/July 2016 the fourth, fifth and sixth defendants bound themselves as sureties in solidum with the Trust in favour of the plaintiff for repayment of all amounts which the Trust might, at any time, owe the plaintiff.

The plaintiff instituted an action against the defendants, jointly and severally, the one paying the other to be absolved, for payment of the sum of R12 059 924.74, interest thereon and costs. The plaintiff also seeks an order against the first, second, third, fourth and fifth defendants that certain immovable properties be declared specially executable. In respect of the fourth defendant, the plaintiff alleged as follows in paragraph 10 of its particulars of claim:

“On the 14th of July 2016, and at Port Elizabeth, the Fourth Defendant, represented by the Fifth Defendant, duly authorised thereto, bound itself as surety and co-principal debtor in solidum with the Trust in favour of the Plaintiff for repayment on demand, of all amounts which the Trust might, at any time, owe the Plaintiff in terms of a written deed of suretyship, a copy whereof is annexed hereto marked annexure A.”

- [3] The suretyship document (annexure A) consists of five pages. Page 4 thereof states that in a meeting of the fourth defendant, that was held on 14 June 2016, it was resolved that the fourth defendant should enter into “this suretyship and that Rudolph Albert Botha be and is hereby authorised to settle the terms and to sign this suretyship on its behalf.” That page was signed by Mr Botha and Ina Retief.
- [4] In answer to the above allegations the fourth defendant pleaded:
- 4.1. that Mr Botha was not authorised by it to conclude or execute annexure A or to represent to the plaintiff that he had such authority;

4.2. that, to the best of its knowledge, the plaintiff's representative who completed annexure A, had knowledge (which means that the plaintiff accordingly had knowledge) that Mr Botha was in fact not authorised by the fourth respondent to conclude or execute annexure A or to represent to the plaintiff that he had such authority;

4.3. that, in terms of section 52(1) of the Close Corporations Act,[1] it was precluded from furnishing security in the form of annexure A which means that annexure A is void ab initio; and

4.4. a denial that it or any of its authorised representatives executed annexure A and accordingly denied that it is bound by the terms thereof.

[5] In paragraph 7.4 of its plea, the fourth defendant pleaded the circumstances under which Ina Retief appended her signature to page 4 of annexure A as follows:

"The Fourth Defendant pleads further, and with regard to the signature by Ina Retief of page 4 of Annexure "A", that such signature was appended in the following circumstances:

7.4.1 the Fifth Defendant had represented that the signature of certain documentation by Ina Retief as member of the Fourth Defendant was required in order to facilitate a change of the banking facilities of the Fifth Defendant or the Herbou en Doorskraal Trust from Absa to Nedbank and that the signature of such documentation was required for that purpose only and no other;

7.4.2 no indication was given that the documentation requiring signature included a document relevant to the provision of security by the Fourth Defendant for the sum of R25 000 000.00 or at all;

7.4.3 the said Ina Retief had no reason to suspect that the documentation requiring signature included such suretyship document nor what purported to be an extract of the minutes of a meeting which had not been held; and

7.4.4 she signed the documentation as requested, in good faith and without considering or acquiring knowledge of the content thereof."

[6] In his written heads of argument Mr de la Harpe, counsel for the plaintiff, submitted that section 54 of the Close Corporations Act is determinative of the exception. That section, which deals with the power of members to bind a close corporation, reads as follows:

"(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power."

- [7] In terms of section 54 an act of a member of a close corporation shall bind the close corporation. That is the case whether or not the member was authorised so to act and whether or not the member's act was performed for the purposes of carrying on the business of the close corporation. However, in terms of section 54(2) the member's act will not bind the close corporation when the third party knew, or ought reasonably to have known, that the member of the close corporation did not have authority to act for the close corporation in that particular matter.[2] It means that a member of a close corporation will bind such close corporation through its act, whether or not such an act is performed for the carrying on of the business of the close corporation or whether or not the member in fact had authority to act for the close corporation. It is only when the third party knows, or ought reasonably to have known, that the member of the close corporation did not in fact have power to act for the close corporation in that particular matter that section 54 will not protect such third party.[3]
- [8] In paragraph 10 of its particulars of claim the plaintiff alleged that Mr Botha, as member of the fourth defendant, acted as the fourth defendant's agent in relation to it (the plaintiff) when he signed annexure A. He accordingly bound the fourth defendant when he so signed annexure A. The plaintiff will, however, on the pleadings, not enjoy the protection of section 54 if it is pleaded by the fourth defendant that it knew, or ought reasonably to have known, that Mr Botha did not have the power to act for the fourth defendant when he signed annexure A. In paragraph 7.1.2 of its plea the fourth defendant pleaded that at the time when Mr Botha signed annexure A he was not authorised to represent it in signing or executing annexure A and in paragraph 7.2.2 it pleaded that annexure A was completed in circumstances where the plaintiff, through its representative, knew that Mr Botha in fact had not been authorised by the fourth defendant to represent it nor to sign

or execute annexure A. On the pleadings, section 54 does not afford the plaintiff the protection it was contended for because,

according to the fourth defendant's plea, the plaintiff knew that Mr Botha in fact had not been authorised by the fourth defendant to represent it nor to sign or execute annexure A. The evidence might show that the plaintiff is protected by section 54.

- [9] Regarding paragraph 7.4, it will be remembered that page 4 of annexure A was signed by the two members of the fourth defendant, namely Mr Botha and Ina Retief. Ex facie that page creates the impression that both members, on behalf of the fourth defendant, authorised Mr Botha to enter into the suretyship with the plaintiff. What paragraph 7.4 seeks to achieve is to explain the circumstances under which Ina Retief appended her signature. At the trial there would be a duty on the fourth defendant to lead evidence to explain the circumstances under which Ina Retief signed page 4 of annexure A if it persists with its reliance on the contention that Mr Botha was not authorised by the fourth defendant to enter into the suretyship with the plaintiff. If the allegations in that regard are supported by evidence at the trial, it will go a long way to show that Mr Botha misrepresented to Ina Retief the need to sign that page. It will accordingly assist the fourth defendant's claim that Mr Botha was not

authorised to enter into the suretyship with the plaintiff. Under the circumstances, I do not agree that the allegations contained in paragraph 7.4 of the fourth defendant's plea are irrelevant.

[10] Furthermore, paragraph 7.4 of the fourth defendant's plea cannot be read in isolation. It must be read together with all the allegations contained in paragraph 7 of that plea, which are the fourth defendant's answer to the plaintiff's allegations contained in paragraph 10 of its particulars of claim.[4] The allegations contained in paragraph 7.4 do not amount to a separate defence. An exception cannot be taken to part of a plea unless that part amounts to a separate defence and can therefore be struck out without affecting the remainder of the plea.[5] If the special plea is upheld, the fourth defendant might be precluded from leading evidence at the trial if it wanted to

demonstrate the circumstances under which Ina Retief signed page 4 of annexure A on the basis that those circumstances had not been pleaded by it.

[11] In all the circumstances, the exception must accordingly be dismissed. There is no reason why the general rule, that costs must follow the result, should not apply.

[12] In the result, the plaintiff's exception to the fourth defendant's plea is dismissed with costs.

G H BLOEM

Judge of the High Court

For the plaintiff/excipient: Adv DH de la Harpe SC, instructed by Whitesides Attorneys, Grahamstown.

For the fourth defendant: Adv EAS Ford SC, instructed by Huxtable Attorneys, Grahamstown.

Date of hearing:

31 October 2019.

Date of delivery of the judgment:

12 November 2019.

[1] Close Corporations Act, 1984 (Act No. 69 of 1984).

[2] Klaas v Summers and others

[2007] ZAWCHC 76; 2008 (4) SA 182 (C) at 192F-J.

[3] Boerboonfontein BK v la Grange NO en 'n ander

[2010] ZAWCHC 81; 2011 (1) SA 58 (WCC) at 69E.

[4] See allegations pleaded by the fourth defendant at paragraph [4] above.

[5] Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (AD) at 553F-G.

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Prepared on 14 October 2026 · Esheria