

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Stroh and Others (22990/2022) [2022]

ZAGPPHC 909 (22 November 2022)

[2022] ZAGPPHC 909

COURT

North Gauteng High Court, Pretoria

BEFORE

Davis

CASE / FILE NUMBER

22990/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 22990/2022

DATE: 2022-11-10

REPORTABLE: NO.
OF
INTEREST TO OTHER JUDGES: NO.
REVISED.

DATE: 22 NOVEMBER 2022

In
the matter between
NEDBANK
LIMITED
Plaintiff
and
JACQUES
DAVID STROH
First
Defendant
SONENI
PHILEMON MAHLANGU Second
Defendant
WARREN

ANDREW PATTERSON Third
defendant

JUDGMENT

DAVIS J:

This is the ex tempore judgment in matter number 37 on the opposed motion court roll. There are two applications before the Court. I shall refer to the parties as in the main proceedings, Nedbank Limited being the plaintiff, Mr Jacques David Stroh being the first defendant, Mr Soneni Philemon Mahlangu the second defendant and Mr Warren Andrew Patterson the third defendant.

The first and third defendants did not deliver notices of intention to defend and for reasons of its own, the plaintiff is today no longer pursuing with the application for default judgment against the first defendant, and requested it to be postponed sine die.

The plaintiff, however, on the basis of a default of notification of an intention to defend, still applies for default judgment against the third defendant.

The second defendant has not only delivered a notice of intention to defend but also a plea. Pursuant thereto, the plaintiff

proceeded with an application for summary judgment and it is that opposed application which served before this Court today.

I need to refer to the plaintiff's cause of action as against the second defendant for purposes hereof. In the particulars of claim it is pleaded that the principal debtor, being Pretoria Utility Information Systems (Pty) Ltd is indebted to the plaintiff in the sum of R3 570 556,60 as the balance outstanding pursuant to a settlement agreement between the plaintiff and the principal debtor. The settlement agreement had been made an order of court on 30 April

2019. The amount mentioned has been proven by way of a certificate of balance provided for in that settlement agreement.

The allegations against the second defendant are that on or about 31 August 2015, and at or near Witbank, alternately near Richards Bay, he bound himself as surety and as co-principal debtor in solidum to the plaintiff for the due and proper fulfilment of the principal debtor's obligations.

A copy of his suretyship, the terms of which have been pleaded in the particulars of claim, has been annexed thereto as annexure E. Annexure E is a composite document. The first portion of the document is a three-page document with a substantial number of terms. The last term thereof, which is term 25, reads: "The suretyship was complete in all respects when I signed it."

Each of the initial two pages of the suretyship bear initials at the bottom thereof, and the third page bears what appears to be a corresponding initial as well as the signature of the second defendant as surety.

Part of the suretyship is a further set of documents consisting of three pages, being two claims letters. These are bank generated

documents directed to the principal debtor, notifying it of a cession of claims. The body of the letters each read as follows:

"As the above claims have been ceded by Mr Soneni Philemon Mahlangu ... (followed by his ID number) ... to Nedbank Limited (followed by the registration number) in terms of a suretyship incorporating a cession of claims dated 31 August 2015, you are hereby notified that all payments in respect thereof have to be made to the bank. We advise you the bank has been duly authorised to receive any monies payable by you to Mr Mahlangu, and to give you a valid discharge."

The letters end with a request for confirmation that the principal debtor has taken notice of this cession. There is a manuscript

indication that it should be signed by all directors. Each of the letters are initialled at the bottom thereof in similar fashion as the suretyship itself had been initialled.

The last page of this composite set of documents is a confirmation letter reading as follows:

"We confirm that we have recorded the cession of claims, and that all future payments will be made to yourselves."

It is dated the same day as the cession and it bears a signature under the heading "surety" and it also bears a number of signatures under the typewritten particulars of the principal debtor Utility Information Systems (Pty) Ltd (presumably by the directors thereof)

There is a second page to this confirmation letter, which accords with the first, but which only bears the signatures of the directors or purported directors of Utility Information Systems (Pty) Ltd, but where the suretyship portion has been left blank. Clearly one document has been signed by Utility Systems' directors first and subsequently completed or signed by the surety.

There also a marital status declaration annexed to the particulars of claim of Mr Soneni Philemon Mahlangu, indicating the particulars of his spouse, with her identity number and their marital property regime. It also bears a signature of the declarant thereto as well as that of two witnesses.

The spouse referred to in the declaration has completed part B of that document, being a consent by the spouse, Mrs Nomvula Mahlangu,

identifying herself and the principal debtor. Part B of the document incorporates Mrs Mahlangu's unreserved consent to her spouse, the second defendant, to provide the bank with collateral security in support of the cession of claims. The document bears the signature of the "declarant's spouse" and two witnesses.

So far the documentation pertaining to the second defendant annexed to the particulars of claim. The second defendant's plea is very cursory. In it he chose to deal only with selected paragraphs of the particulars of claim. Referring to those paragraphs mentioning the second defendant, the plea indicates that the second defendant had not signed the deed of settlement, which had been made an order of court. Regarding the suretyship, the plea reads as follows:

"The second defendant denies the contents of this paragraph and denies signing a deed of suretyship."

Faced with the plea, the plaintiff proceeded to apply for summary judgment. In terms of rule 32(2)(b), a plaintiff must, in an affidavit, verify the cause of action and amount claimed, and identify any point of law relied on and: "explain briefly why the defence as pleaded, does not raise any issue for trial."

In the affidavit delivered in support of the application for summary judgment, the deponent, on behalf of the plaintiff states that the denial of the second defendant's signing of the document cannot stand. The deponent relies on a statement by a witness who says she signed as a witness to a person signing a deed of suretyship who had identified himself as Mr Mahlangu.

I have some doubt whether the plaintiff is entitled to rely on this witness affidavit as rule 32(4) precludes any evidence being adduced by a plaintiff other than the affidavit referred to in subrule (2).

If one ignores the affidavit of the witness, then one should have regard to the remainder of the issues. The plaintiff sets out that none of the other contents of the particulars of claim have been attacked. None of the terms of the suretyship, none of the terms of cessions of claims or the supporting documents have been denied, in fact they have not even been alluded to or dealt with in the plea. It has also not been pleaded that whatever signature has been appended to or appears on the deed of suretyship, must be a forgery.

If one then turns to the affidavit of the second defendant, where he has an opportunity to deal with the plaintiff's affidavit in order to, in the words of rule 32(3)(b): "Satisfy the Court by affidavit that he has a bona fide defence to the action, and wherein such affidavit disclose fully the nature and grounds of the defence and the material facts relied upon therefore" then one is faced with a scantily clad version. In the affidavit opposing summary judgment, the second defendant tersely says the following in the relevant paragraph: "I did not sign this document and I did not meet the deponent Brian Farum. I have never been to Witbank to sign this surety agreement." The denial is repeated in paragraph 6.3 as follows: "I wish to highlight that I did not sign the surety agreement."

Nothing is said in this affidavit regarding the alternate place of signature which has both been pleaded and which is reflected on the documents, being Richards Bay. Nothing is said about the cessions of claims, and more importantly, nothing is said about the second defendant's spouse consenting to his furnishing of a suretyship to the plaintiff or his own marital status declaration.

If one has to consider then whether sufficient material has been disclosed, which at a trial would uphold a defence, then the answer

must be in the negative. If all the documentary evidence that I have referred to were to constitute the evidence at a trial, then surely the scales would be tipped against the second defendant. All indications, and there are a number of them, both extraneous and also emanating from either him or his spouse, are that he had indeed signed the deed of suretyship.

I therefore find that, if one has regard to the other requirements set out in various decisions regarding applications for summary judgment, such as *Saglo Auto (Pty) Limited v Black Shades Investments (Pty) Limited* 2021 (2) SA 587 (GP), being a recent decision of this court, referring to various well known decisions dealing with the extent to which a defendant should go in order to satisfy a Court that a bona fide defence exists, then I find that those requirements have not been met by the second defendant.

Accordingly, in addition to the default judgment to be granted against the third defendant, there shall be summary judgment jointly and severally thereto, against the second defendant in terms of a draft order, which I have marked X.

DAVIS J

JUDGE OF THE HIGH COURT

DATE OF HANDING DOWN OF

JUDGMENT:

10 NOVEMBER 2022

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Prepared on 12 October 2026 · Esheria