**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

HC-MD-CIV-ACT-CON2016-03863

In the matter between:

**WILLEM CAREL KOTZE** **PLAINTIFF**

and

**LEMURE INVESTMENTS NUMBER SIXTY SEVEN CC** **1ST DEFENDANT**
**ELLA CATHARINA SLABBERT** **2ND DEFENDANT**

*Neutral citation:* *Kotze v Lemure Investments Number Sixty Seven* CC & *Another (2016/03863) [2017] NAHCMD 164 (16 June 2017)*

**CORAM:** **MASUKU J:**

Heard: 6 June 2017
Delivered: 16 June 2017

**Flynote: RULE 60** - Summary Judgment application - Rule 60 (5) - Content of the opposing affidavit by Defendant - whether Defendant's opposing affidavit meets the rule 60 requirements - **LAW OF CONTRACT** - **ACCEPTANCE OF**

**LIABILITY** – Whether 2nd Defendant consented to liability for the entire amount owed via email.

**Summary** : The Plaintiff, an adult male sued the 2nd Defendant, a female adult for an amount of N$ 950 179.07, interest thereon and costs. The claim is alleged to based on a suretyship agreement which the 2nd defendant is alleged to have signed as a surety and principal co-debtor in respect of loans advanced by the Plaintiff to the 1st defendant, a Close corporation in which the 2nd defendant is a member. The plaintiff also alleged that the 2nd defendant acknowledged her indebtedness to the plaintiff for the entire amount claimed. This allegation was denied by the 2nd defendant and she on this basis relied on the suretyship agreement in which, she avers limited her extent of liability to an amount of N$ 560 878.32

The plaintiff further alleged that the 2nd defendant accepted liability for the entire amount and was on that note liable for same.

*Held* - that the 2nd Defendant's extent of indebtedness to the Plaintiff was limited to the terms of the suretyship agreement and that was in the amount of N$ 560 878.32. In this regard, the 2nd Defendant's defence was a *bona fide* one.

*Held further* - that it was common cause that the 2nd Defendant made a payment of N$ 268 488.13, which amount reduced the initial amount which she stood surety for on the 1st Defendant's behalf.

*Held* - that the 2nd Defendant did not acknowledge any debt, via email or otherwise and no such acknowledgment was signed between the parties. Furthermore, even if the 2nd defendant had acknowledged liability for the entire amount, she had done so without the benefit of receiving legal advice about her rights. This must be viewed from the standpoint that the plaintiff is a lawyer and the 2nd defendant is unlettered in law. Her consent was therefore uninformed, legally invalid and not binding on her.

*Held further* - that the 2nd Defendant failed to raise a bona fide defence in respect of the residue amount claimed after the suretyship amount was reduced by the payment effected.

In conclusion, the court granted the 2nd defendant leave to defend the balance of the entire amount claimed, less the amount already paid.

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**ORDER**

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1. The application for summary judgment for the amount of N$ 950 179.07 is refused.
2. Summary judgment is granted in favour of the plaintiff in the amount of N$ 292 390.19, interest thereon at the rate of the First National Bank of Namibia Loan Base rate, less 3% per annum, a *tempore morae.*
3. The 2nd defendant is granted leave to defend the balance of the amount being the amount claimed in para 1 above, less the amount granted in terms of para 2 above.
4. Costs of the summary judgment are ordered to be decided by the trial court.
5. The 2nd defendant is ordered to file her plea and counter-claim, if any, on or before 30 June 2017.
6. The plaintiff is to file his replication, if any, on or before 10 July 2017.
7. The parties are ordered to make discovery and to exchange bundles on or before 7 August 2017.
8. The matter is postponed to 17 August 2017 for a case management conference hearing.

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**JUDGMENT**

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**MASUKU J:,**

Introduction

[1] Serving before court for determination, is an application for summary judgment in which the plaintiff, a Namibian male adult sues the 2nd

defendant a Namibian female adult, for payment of the amount of N$ 950 179. 07, interest thereon and costs.

[2] It is important to mention two important issues in this matter. First, that judgment for the amount claimed was granted against the 1st defendant which is a juristic person formed in terms of the Close Corporation Act.[1] Second, the 2nd defendant was sued in her capacity as a surety and co principal debtor with the 1st defendant. It was also claimed that she acknowledged her indebtedness to the plaintiff for the entire amount claimed. I shall, in due course, refer to the relevant clauses of the suretyship agreement and on which this claim is predicated, together with other allegations on which her alleged liability is based.

[3] In view of the fact that judgment has already been entered against the 1st defendant as stated above, I shall, for convenience, henceforth refer to the 2nd defendant in this judgment as 'the defendant'.

Background

[4] According to the plaintiff's particulars of claim, the plaintiff, in or about February 2014, lent and advanced an amount of N$ 950 179. 07 to the 1st defendant. This agreement, it is further alleged, was in part both oral and written. The written part of the contract entailed the plaintiff lending to the 1st defendant an amount of N$ 560 878. 32 in two tranches of N$ 160 878. 32 on 13 February 2014 and the other in the amount of N$ 400 000 on 19 March 2014.

[5] The second loan, which it is alleged is oral, entailed the advancement of an amount of N$ 600 000 in four tranches on named dates between June 2014 and 4 September 2015. As earlier intimated, the amounts allegedly advanced were claimed against the 1st defendant and the judgment in the entire amount claimed was granted by default against the 1st defendant. It

1 Act No. 26 of 1988.

is alleged that the 2nd defendant represented the 1st defendant in the conclusion of the agreements alleged.

[6] The basis of the claim against the defendant in this application as foreshadowed above, is predicated on a suretyship agreement, which was annexed to the particulars of claim. It is dated 7 April 2014. It is claimed that the defendant, in the aforesaid agreement, signed as surety and the co- principal debtor with the 1st defendant regarding the amounts lent and advanced by the plaintiff. There is no argument that the defendant signed the said document and that it is the single memorial of the written agreement between the parties.

Opposition to summary judgment

[7] The defendant, as she was entitled to, opted to defend the application for summary judgment and to this end, filed an affidavit in which the defences she raised to the grant of the relief sought were stated. The main question for determination is whether the said affidavit meets muster.

[8] In her defence, the defendant claims that she signed the suretyship agreement in respect of a specified amount and is for that reason, not liable for the entire amount claimed by the plaintiff in his particulars of claim. She further claims that she also paid an amount which served to reduce her liability in respect of the amount regarding which she stood as surety and co-principal debtor. It is the defendant's further defence that she promised to sign an acknowledgement of debt but never actually signed same. She also alleges that she wrote a letter in part accepting liability but that she did so under 'duress'.

Requirements for successfully resisting summary judgment

[9] Summary judgment has often been described as an extra ordinary and stringent remedy. In this regard, the court, it has been said, must be on the *qui vive* and not grant summary judgment where the defendant has, in the

affidavit in opposition to the summary judgment, raised issues which are triable and point to the possibility that some injustice may be visited on the defendant by the grant of summary judgment without a full trial.

[10] In *De Savino v Nedbank Namibia,*[2] the Supreme Court stated the duty of a defendant, in successfully deflecting summary judgment, as follows at para [24] to [26]:

'The enquiry that the court must conduct is foreshadowed in rule 32 (3) *(b)* and it is this: has the defendant "fully" disclosed the nature and grounds of the defence to be raised and the grounds of the defence upon which it is founded; and second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law

... While the defendant is not required to deal "exhaustively with the facts and the evidence relied upon to substantiate them," the defendant must at least disclose the defence to be raised and the material facts upon which it is based "with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence'. Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the rule.'

[12] What needs to be done at this juncture, is to assess the contents of the affidavit filed by the defendant in order to determine whether it meets the litmus test that has been set out by the Supreme Court in the *Di Savino* judgment as quoted immediately above.

Determination

[13] The first question is whether the defendant has raised a *bona fide* defence regarding the amount allegedly owing, or any part thereof? The first thing to consider in this regard, is the suretyship agreement itself and which the defendant's liability is exclusively based. Clause 1.1 of the suretyship agreement holds the defendant liable:

[2] 2012 (2) NR 507 (SC).

'for the due and punctual payment of the amount of N$ 560 878.32 (Five Hundred and Sixty Thousand Eight Hundred and Seventy Eight Namibian Dollars), plus interest thereon, being monies lent and advanced by the Creditor to the Debtor in terms of a written Loan Agreement dated 7 April 2014.'

[14) I am of the considered view that the extent of indebtedness to which the defendant is liable in terms of the agreement, is limited by the said agreement to the amount of N$ 560 878.32 and no more. In this regard, I am of the view that in so far as the amount claimed by the plaintiff exceeds the amount set out in the suretyship agreement, the defendant certainly has a *bona fide* defence.

[15) In this regard, it must be mentioned that the basis of the liability, as aforesaid, is the suretyship agreement and the amount set out therein. According to the particulars of claim, the amount of N$ 600 000 allegedly advanced to the 1st defendant, was based on an oral agreement. This amount clearly excludes the amount, which is subject to the written agreement. In this regard, it is abundantly clear that the extent of the defendant's indebtedness is limited to the written loan agreement dated 7 April 2014, which is the amount also set out in the suretyship agreement. This should eliminate any doubt about the extent of liability the defendant opened herself to.

[16) The defendant also claims in her affidavit that she made payment to the plaintiff in the amount of N$ 268 488.13. The payment of this amount is not disputed by the plaintiff. If anything, the documents filed by the plaintiff lend credence to the receipt of this money by the plaintiff. In view of the conclusion I reached earlier about the extent of the defendant's indebtedness as being limited to the amount stated in the suretyship agreement, I am of the considered view that the amount that the defendant is liable for in terms of the suretyship agreement must be reduced by the amount she paid to the plaintiff, thus reducing her indebtedness to the plaintiff to the amount of N$ 292 390.19.

[17) It would, in my considered opinion be unfair and unjust, in the circumstances, to hold the defendant liable to the plaintiff for an amount in the excess of what she expressly signed for in the suretyship agreement. There is, in my view, no legal basis for holding the defendant liable for the extra amount

of N$ 600 000 claimed. To that extent, I am of the view that a *bona fide* defence is borne out by the defendant's affidavit and I so hold.

[18] It must be mentioned that the plaintiff further alleges that in respect of the oral agreement for the loan of N$ 600 000, the 1st defendant 'undertook, tacitly, and/or by implication, to bind herself in *solidium* for and co-principal debtor jointly and severally with the first defendant for the due and punctual payment by the first defendant of the monies loaned by the plaintiff to the first defendant in terms of the oral part of the loan agreement .. .'[3]

[19] It bears mentioning that there is no basis, other than the averrals by the plaintiff, which may need to be proved by evidence at the trial,that the defendant tacitly or by implication agreed to stand as surety and co-principal debtor in respect of the second loan. In point of fact, the defendant explicitly denies that she entered into any further agreements for her liability as a co principal debtor for the 1st defendant's due fulfilment of its further liability to the plaintiff.[4]

[20) This, in my view raises a triable issue and would amount to some defence within the meaning of summary judgment. This is particularly the case for the reason that in most instances, including the first loan, a written agreement of suretyship was entered into and it, would, in the ordinary business intercourse be astute to conclude a written agreement in that regard. It is rather unusual, in any event, for an oral suretyship agreement to be concluded, as appears to be the insinuation in the particulars of claim.

(21] I find it prudent to address a further argument raised by Mr. Vlieghe regarding the defence in question. He claims that the defendant signed an acknowledgment of debt of the entire amount claimed and that in the premises, the defendant cannot be heard to deny the amount by making reference to the written suretyship agreement referred to earlier.

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[3] See para 13 of the particulars of claim.

[4] See para 13 of the defendants affidavit resisting summary judgment.

[22] In the first place, I stand by my finding that *prima facie,* there was no basis for suing the defendant for the increased amount regard had to the express terms of the suretyship agreement. In that regard, I maintain my view that that argument constitutes a *bona fide* defence within the meaning contemplated in the relevant rule. Furthermore, I am of that the translated version of the email written by the defendant, dated 19 July 2016 is not an acknowledgment of debt, properly so-called. I quote the contents below:

'You know its impossible to pay the amount by July 22. Kindly send a letter on which I can sign acknowledgment of debt for you.'

[23] What is apparent from the email is that the defendant did not actually sign an acknowledgment of debt in respect of the entire amount claimed. She requested the plaintiff to furnish her with an acknowledgment of debt, which she could sign. There is no evidence or averrals that she was furnished with such, despite her request.

[24] Furthermore, even if the defendant had acknowledged liability for the entire amount, as claimed by the plaintiff, she argued that she had not, at that stage, received the benefit of legal advice. Once she had been properly advised of her rights, she stated, it then dawned on her that she could only have legally been held liable for the amount recorded in the suretyship agreement. This must be considered from the standpoint that from the defendant's affidavit, the plaintiff is a lawyer and she is not one and is unlettered in law in any event, it would seem.

[25] The Constitutional Court of South Africa[5] has recently had occasion to deal with a case where the question of the binding effect of consent given by litigants to being evicted from land was up for determination. In giving the consent, the litigants had not had the benefit of legal advice and the High Court was found by the Constitutional Court to have abdicated its statutory and

[5] Occupiers of Erven 87 and 88 Berea v Christiaan Frederick De Wet *N*.0. (2017) ZACC 18 (8 June 2017).

constitutional responsibility in giving effect to the consent, thus not exercising any judicial oversight over the eviction as prescribed by law.

[26] The court, in a unanimous judgment, per Mojapelo A.J. reasoned as follows in the matter:[6]

> 'The next question that arises is whether factual consent by the appearer applicants was legally effective. For consent to be legally effective it must have been given by the applicants freely and voluntarily with full awareness of their rights being waived. It must be an informed consent in order to be valid. . . [33] It has not been disputed that the applicants were not informed of these rights. It must therefore be accepted that they were not aware of any such rights. Given that the applicants were not aware of their rights, the factual consent that they gave was not informed. Their consent is therefore not legally valid. It is not binding on them.'

[27] It would appear to me, in view of the foregoing factors, particularly that the defendant is not a lawyer and that the suretyship agreement limited the extent of her liability, the reality of her consent to liability, for the whole amount, if it exists at all, was not given with the full knowledge of her rights at law and as such, in my view, raises a *bona fide* defence to the application for summary
judgment for the entire amount claimed.

[28] Even if I may be incorrect with my conclusion in the immediately preceding paragraph, I am still of the considered view that the terms of the suretyship agreement and the reliance of same on the written loan agreement, considered *in tandem* with her denial of the tacit agreement of a suretyship agreement referred to above, provide a triable issue and which would, all things being equal, entitle the defendant to leave to defend, subject to what I say immediately below.

[29] The only remaining issue is whether the defendant is not liable to pay the amount of N$ 292 390.19. It is trite that in summary judgment, the court has the discretion, depending on the defences raised, to grant an amount that has

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[6] *Ibid* at para (32] and (33].

not, in its view, been shown to be the subject of viable defence. I am of the considered view that viewing the entire matter, at the end of the day, the following issues are clear:

(a) the defendant signed the suretyship agreement in respect of the amount of N$ 560 878.32;

(b) in reducing that indebtedness, she paid to the plaintiff an amount of N$ 268 488. 13;

(c) this leaves an amount of N$ 292 390.19 outstanding.

[30] I am of the considered view that viewed properly and its entirety, it is clear that the defendant has not, in my view advanced any defence in relation to this amount, let alone convincing one. To this extent, I am of the view that the defendant has not shown that she has a *bona fide* defence nor that she has a triable issue that would require the adjudication of the entire amount due in a trial. She has, in my view put up no defence whatsoever to this amount and I am of the view that it is only condign that I should grant summary judgment in favour of the plaintiff in that amount.

Conclusion

[31] In the premises, I am of the view that the plaintiff has failed to show that he is entitled to summary judgment in the entire amount claimed. It is my considered view that the defendant has shown on affidavit that she has a *bona fide* defence in relation to the claim for the additional N$ 600 000 loaned and advanced to the 1[51] defendant in terms of the oral agreement alleged.

[32] That notwithstanding, she has, however, failed to show that she has a *bona fide* defence nor has she raised a triable issue regarding for the amount due from her in relation to the amount which is subject to the suretyship agreement after deducting from the amount due, her part payment of N$ 268 488.13. The balance owing after the reduction of the balance is in my view one that has not been shown not to be owing. In this regard, I am of the view that the plaintiff has an answerable case, leading inexorably to a conclusion that

this is a proper case to grant summary judgment in what I have found to be an indisputable amount.

Order

[33] I accordingly grant the following order:

1. The application for summary judgment for the amount of N$ 950 179.07 is refused.
2. Summary judgment is granted in favour of the plaintiff in the amount of N$ 292 390.19, interest thereon at the rate of the First National Bank of Namibia Loan Base rate, less 3% per annum; *a tempore morae*.
3. The 2nd defendant is granted leave to defend the balance of the amount being the amount claimed in para 1 above, less the amount granted in terms of para 2 above.
4. Costs of the summary judgment are ordered to be decided by the trial court.
5. The 2nd defendant is ordered to file her plea and counter-claim, if any, on or before 30 June 2017.
6. The plaintiff is to file his replication, if any, on or before 10 July 2017.
7. The parties are ordered to make discovery and to exchange bundles on or before 7 August 2017.
8. The matter is postponed to 17 August 2017 for a case management conference hearing.

T.S. Masuku
Judge

APPEARANCES:

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| PLAINTIFF: | |
| Instructed by: | S. Vlieghe<br>Koep & Partners |
| DEFENDANT: | |
| Instructed by: | A. Delport<br>Delport-Nederlof Inc |