



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/4/16

CASE NO: 32975/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
29-APRIL-2016	
DATE	SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

SINDILE PROJECT ENTERPRISE CC

First Defendant

SINDILE SEWULA MTHOMBENI

Second Defendant

THULANI PATRICK MTHOMBENI

Third Defendant

DATE OF HEARING

:

26 FEBRUARY 2016

DATE OF JUDGMENT

:

29 APRIL 2016

JUDGMENT

MANAMELA AJ

Introduction

[1] Plaintiff (the Bank) claims an amount of R339 246.12 first defendant (Sindile Project) in respect of an overdraft facility based on an alleged oral agreement. Second and third defendants (the Sureties) are before the court due to a limited suretyship agreement they signed for indebtedness of Sindile Project to the Bank.

[2] Sindile Project denies entering into an oral agreement with the Bank. On the other hand, the Sureties admit liability to the Bank to the extent proven by the Bank against Sindile Project. In other words the success of the Bank's case against Sindile Project will trigger the liability of the Sureties for the proven amount.

[3] The matter came before me as a trial on 26 February 2016 and the parties agreed, with my approval, at the end of the trial to file heads of argument by 04 March (for the plaintiff) and 08 March 2016 (for the defendants). I am grateful for the filed heads of argument. I will deal with the material from the heads of argument, including the events at the trial a bit later. First the pleaded cases of the contending parties.

The Bank's pleaded case

[4] The Bank pleaded, in its particulars of claim, the following case against Sindile Project. Sindile Project holds or held at the material times, a business current account with the Bank (the Bank Account).¹ On or about 26 October 2006, at Brakpan, the Bank and Sindile Project entered into an oral agreement for an overdraft facility, for an unspecified

¹ See par 5 of the particulars of claim on indexed p 4 of the pleadings bundle; pp 1-6 of the trial bundle.

amount, based on the Bank Account.² The express, alternatively implied terms³ of the oral agreement were, among others, that Sindile Project would be liable for interest at the rate of 17.10% or as advised from time to time;⁴ the money due on the overdraft facility would become immediately due and payable on demand by the Bank,⁵ and a certificate signed by any manager or administrator of the Bank, whose appointment need not be proved shall be proof of the contents thereof until shown or proven otherwise.⁶ The Bank demanded payment of the amount of R339 246.12, plus interest at the rate of 17.10% calculated daily and compounded monthly in arrears from 25 February 2014 to date of payment from Sindile Project, but in vain.⁷ The claimed amount also appears on a certificate of balance attached to the particulars of claim.⁸

[5] Against the Sureties, the Bank essentially pleaded the following case. On or about 15 March 2012 at Brakpan,⁹ the Sureties, other than binding themselves as such, also bound themselves as co-principal debtors *in solidum* to the Bank in respect of Sindile Project's existing (then) and any future liability¹⁰ to the Bank. The "salient terms" of the suretyship were that the Sureties, among others, are jointly and severally bound; and a certificate signed by any manager or accountant of the Bank, whose appointment need not be proved shall be *prima facie* proof of the contents thereof. The Bank demanded payment of the outstanding

² *Ibid.*

³ See par 6 of the particulars of claim on indexed p 4 of the pleadings bundle.

⁴ See par 7.2 of the particulars of claim on indexed p 4 of the pleadings bundle.

⁵ See par 7.1 of the particulars of claim on indexed p 4 of the pleadings bundle.

⁶ See par 7.3 of the particulars of claim on indexed pp 4-5 of the pleadings bundle.

⁷ See prayer 2 of the particulars of claim on indexed p17 of the pleadings bundle; par 8 of the particulars of claim on indexed p 5.

⁸ See par 7.4 of the particulars of claim on indexed p 5; annexure "A" on indexed p 19 of the pleadings bundle.

⁹ See par 9 of the particulars of claim on indexed p 5; annexure "B" on indexed p 20 of the pleadings bundle.

¹⁰ The liability or indebtedness included loans; promissory notes; overdrafts and credit and debit card transactions. See pars 10.2.3-11.6 of the particulars of claim on indexed pp 6-10 of the pleadings bundle.

amount from the Sureties and complied with the requirements of National Credit Act 34 of 2005, but in vain.¹¹ No payment was received from the Sureties.

Sindile Project's pleaded defence

[6] As stated above, Sindile Project denies the alleged oral agreement and its terms.¹² It does not appear to deny operating the Bank Account though.¹³ Consequently, it denies liability and dispute the certificate of balance verifying the outstanding amount.

The Sureties' pleaded defence

[7] On the other hand, the Sureties admit signing the suretyship, but deny, in some respects, the terms thereof as pleaded by the Bank.¹⁴ The essence of the Sureties' defence is captured in the following:

"To the extent that the Plaintiff may be successful in obtaining judgement against the First Defendant in terms of this proceedings, the Second and Third Defendants admit their liability for payment thereof as sureties in terms of the Deed of Suretyship "B", limited to the amount of R500 000-00."¹⁵

[underlining added]

[8] The Sureties also admit receiving notices from the Bank in terms of section 129 of the National Credit Act.

¹¹ See par 15 of the particulars of claim on indexed pp 14-16 of the pleadings bundle.

¹² See pars 3-5 of the first, second and defendants' plea (defendants' plea) on indexed p 30 of the pleadings bundle.

¹³ See par 3 of the defendants' plea on indexed p 30 of the pleadings bundle.

¹⁴ See pars 7 and 8 of the defendants' plea on indexed p 31 of the pleadings bundle.

¹⁵ See par 9 of the defendants' plea on indexed p 31 of the pleadings bundle.

[9] The minutes of the pre-trial conference do not reflect anything of particular significance to the issues in contention herein, except that the documents contained in the trial bundle are what they purport to be, although the correctness thereof remained in dispute.¹⁶ The Bank unsuccessfully sought admissions on several issues in contention from the defendants.

The Trial

[10] At the trial, the Bank called as witnesses, two of its employees, namely Ms Somayya Koobair and Ms Nyameka Jaca. Both of them were not subjected to cross-examination by Mr HP West, appearing on behalf of the defendants. This means they simply stepped down after being led by Ms U Lottering, on behalf of the Bank.

[11] Ms Koobair, was the relationship manager of business accounts. Ms Koobair assisted the second defendant, Mr Sindile Mthombeni to open up the Bank Account of Sindile Project at Brakpan. For the rest of her evidence, she relied on printouts or extracts from an electronic or computer system called CCDS, also called the Notepad system. The Notepad system is used by employees of the Bank and is only accessible to them. In the form of entries captured on the Notepad system, employees of the Bank record activities on customers' accounts, including telephonic and personal communications with customers. The entries are numbered sequentially and once captured they cannot be deleted. Correction of entries made or data already captured is only possible by means of subsequent or new entries of the system.

¹⁶ See par 10.1 on indexed p 7 of the pre-trial bundle.

[12] Ms Koobair further testified as follows. The “Customer” called the Bank and requested “overdraft facility or working capital” on 24 June 2006.¹⁷ She explained that the reference to the “Customer” is to Sindile Project. The telephone call would in all probabilities have been made by the second defendant acting on behalf of Sindile Project.¹⁸ The Bank Account belongs to Sindile Project.¹⁹ The overdraft facility was to be for R300 000.00,²⁰ which was awarded against security of the suretyship. She also referred to other Notepad system entries between 16 and 24 March 2012.²¹ These entries refer to an overdraft facility of R300 000.00. The note made on 24 March 2012 reads in the material part:

“R500K held as per previous notes... Out of NCA. Agreed to facility R300K @ prime + 8.60% until 2013.03.24 as same is scored and justified by t/o generated . Subject to por confirming FICA compliance. Once condition has been met, kindly contact Tracy Murugan for the limit to be loaded.”²²

[13] She also referred to statement issued by the Bank to Sindile Project dated 31 March 2012.²³ This statement states the overdraft limit as R300 000 and applicable rate of interest of 17.600% on the Bank Account. She said that the facility did not reflect frequent deposits or payments and ultimately it was placed in what is called “lock-up”. She explained this to mean that, although deposits may be made into the account no withdrawals are possible when an account is in “lock-up”. This appears to have happened twice in this matter. The Sureties had made payment after the first “lock-up” and the account released. She also referred to other entries on the Notepad system.

¹⁷ See trial bundle p 21.

¹⁸ The pronoun used is “he” and the rest of the material attributed to the telephone conversation leaves no doubt that it was someone in authority from Sindile Project.

¹⁹ See trial bundle pp 1-6.

²⁰ See Notepad entries 125-128 on 16-24 March 2012 on indexed pp 51-55 of the pre-trial bundle.

²¹ See trial bundle pp 51-55.

²² See trial bundle pp 55.

²³ See trial bundle pp 111.

[14] Ms Jaca, employed as the Bank's business lending and manager at the Bank's call centre, also relied on the printouts or extracts from the Notepad system for her testimony. For most of her testimony she repeated what was said by Koobair. She confirmed that she knew the author of the balance certificate as her senior manager²⁴ and also commented on the outstanding amount as reflected thereon. She was the second and final witness for the Bank. The Bank closed its case after her testimony.

[15] The defendants did not lead any evidence and closed their case without calling any witness. As indicated above, there was no cross-examination of the two witnesses for the Bank. The parties agreed with the sanction of the court to file heads of argument in *lieu* of closing legal arguments.²⁵

The Bank's heads of argument

[16] The heads of argument quite expectedly served as a substitute for closing arguments by counsel on behalf of the parties. Therein, the Bank appreciated the obligation to establish the oral agreement regarding the overdraft facility between itself and Sindile Project. In this regard, it is submitted that, the Bank needs to prove the *essentialia* of the contract between the parties consisting of the parties; material terms; date and place of the agreement.²⁶

[17] It is submitted that the extracts or printout from the Bank's Notepad system as certified and confirmed under oath by the Bank's manager: legal, personal and business

²⁴ See annexure "A" on indexed p 19 of the pleadings bundle.

²⁵ See par 3 above.

²⁶ See Harms LTC *Amler's Precedents of Pleadings* 8th edition (LexisNexis Durban 2015) (*Amlers*) at pp 104-110; Christie RH and Bradfield GB *Christie's The Law of Contract in South Africa* 6th edition (LexisNexis Durban 2011) at pp 164-165; generally *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A).

banking credit division²⁷ should be accepted in terms of section 15(4) of the Electronic Communications and Transactions Act 25 of 2002.²⁸

[18] The submissions conclude that the Bank has acquitted itself well regarding proving its case against the defendants. The court must accept the version placed before the court by the witnesses on behalf of the Bank, as no questions were posed to the witnesses and no version was put to the witnesses on behalf of the defendants.

Defendants' Heads of argument

[19] The Bank's case against the defendants is *ex contractu* and is premised on an oral agreement in respect of Sindile Project and written suretyship in respect of the Sureties, it is submitted. The cause of action against Sindile Project is distinct from the cause of action against the Sureties, although the two are closely related.

[20] Regarding the terms of the oral agreement, it is submitted that although there is mention of the rate of interest at 17.10% or as advised from time to time in the summons,²⁹ there is no specificity on how and when the interest would be calculated. The argument on behalf of the defendants in this regard is the conclusion that it is "improbable that parties would agree to such a vague term regarding interest".³⁰ Further, in the Notepad entries and the bank statement, reference is made to an interest rate of 17.6%, which is at odds with the rate of 17.10% allegedly agreed upon by the parties upon conclusion of the oral agreement.

²⁷ See trial bundle pp 70-71.

²⁸ See par 24 below.

²⁹ See par 7.2 on p 4 of the pleadings bundle.

³⁰ See par 3.2 of the defendants' heads of argument.

[21] It is also submitted that it is improbable that the parties would have agreed to a term providing that a balance certificate is to be used for proof of a loan and/or any other amount and did not mention or refer to the overdraft facility. Further, it is pointed out that the Bank may have been able to prove the capital amount drawn in terms of the overdraft, but this is not the pleaded case for the Bank. Therefore, the Bank has also failed to prove the other terms and conditions of the alleged oral agreement, it is contended.

[22] Regarding the claim against the Sureties it is submitted that they bound themselves as sureties and co-principal debtors in *solidum* to the Bank. The Bank has to prove the *causa debitis* in respect of the principal debtor's undertaken liability³¹ and the amount owed or indebtedness of the principal debtor. It is submitted that there may be a conundrum in terms of the latter issue as the suretyship provides that a certificate signed by any of the Bank's managers constitute sufficient proof of any amount due in terms of the suretyship until the contrary is proved. However, it is submitted that the Sureties are entitled to raise or rely on any defence, which is *in rem* (i.e. arising from the obligation) available to Sindile Project, as the principal debtor. As indicated above, the Sureties rely on the Bank's failure to prove the amount owed by Sindile Project, as both its witnesses could not give admissible evidence regarding the outstanding balance.³²

[23] Further the defendants dispute the validity of the Bank's reliance on provisions of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA) for the bank statements referred to during the trial. It is argued that the certificate accompanying the documents only refer "the actual copies of the data stored" on the Bank's electronic computer

³¹ See *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) 431.

³² See *La Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd* 2011 (4) SA 577 (GSJ) at 592D at par 19.

system, and not the bank statements.³³ Therefore, the bank statement is not admissible as evidence in terms of the Bank's certificate prepared in terms of the provisions of the ECTA. It is argued that the certificate also did not identify the Sureties and the witnesses failed to establish the signatory to the certificate as a manager of the Bank. This, it is argued, makes the balance certificate not to be admissible or renders it lacking of *prima facie* proof as it is not signed by a manager of the Bank.

Applicable legal principles

[24] The evidence in this matter is significantly located in the printouts of data from the Bank's Notepad system. Section 15 of the ECTA carries the most relevant legal principles in this regard. It reads in the material part:

“15. Admissibility and evidential weight of data messages.—(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence—

- (a) on the mere grounds that it is constituted by a data message; or
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message must be given due evidential weight.
- (3) In assessing the evidential weight of a data message, regard must be had to—
 - (a) the reliability of the manner in which the data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was maintained;
 - (c) the manner in which its originator was identified; and
 - (d) any other relevant factor.

³³ See generally *La Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd* 2011 (4) SA 577 (GSJ).

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

[I added underlining for emphasis]

[25] This provision was relied upon by the Bank for establishing admissibility and evidential weight of the Notepad entries. In terms of section 1 of the ECTA “data message” is

“data generated, sent, received or stored by electronic means and includes—

- (a) voice, where the voice is used in an automated transaction; and
- (b) a stored record”

[26] Without much ado on this, I accept that the Notepad entries relied upon by the Bank constitute data messages and therefore their admissibility and evidential weight is competent through compliance with provisions of section 15 of the ECTA.³⁴ I also find that the Bank has met the statutory requirements to rely on this evidence.

[27] It is common cause that the Bank needs to establish and prove, for a successful claim based on an oral agreement, against Sindile Project, the following formalities: parties, place,

³⁴ See *La Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd* 2011 (4) SA 577 (GSJ) at 592D at par 19.

date and terms of agreement.³⁵ It is also common cause that the alleged agreement between the parties, concerns monies lent and advanced in terms of the overdraft facility. Therefore, the terms of the alleged agreement has to include the amount advanced; how and when is the money repayable.³⁶ I make use of subheadings to deal with the evidence on these issues.

Parties, date and place of agreement

[28] From the evidence led at the trial in the form of Notepad entries, there was a telephone call or calls on behalf of Sindile Project requesting “overdraft facility or working capital” on 24 June 2006.³⁷ Ms Koobair testified that the reference to the “Customer” on the entry is to Sindile Project. The telephone call probably made by the second or third defendant on behalf of Sindile Project.³⁸ The Bank Account belongs to Sindile Project.³⁹ Other entries made between 16 and 24 March 2012, were also referred to by Ms Koobair.⁴⁰ These entries refer to an overdraft facility of R300 000.00.

[29] With these I am convinced that the parties to the alleged agreement have been established or proven as the Bank and Sindile Project. Both parties have acted through their representatives who orally interacted with each other.

³⁵ See *Amlers* at pp 104-105; Christie RH and Bradfield GB *Christie's The Law of Contract in South Africa* 6th edition (LexisNexis Durban 2011) at pp 164-165; generally *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A).

³⁶ See *Amlers* at p 144.

³⁷ See trial bundle p 21.

³⁸ The pronoun used is “he” and the rest of the material attributed to the telephone conversation leaves no doubt that it was someone in authority from Sindile Project.

³⁹ See trial bundle pp 1-6.

⁴⁰ See trial bundle pp 51-55.

[30] However, the dates of the aforementioned entries differ with the pleaded date of the agreement: 26 October 2006.⁴¹ It may be that this date was erroneous, as it is when the bank account for Sindile Project was opened, which is in writing,⁴² and not the agreement for overdraft facility. The possible date of agreement is either 24 March 2012 or 24 June 2006 or both. The same error appears to have been made in respect of the place of agreement.⁴³

Terms of agreement

[31] Although the Notepad entry above refers to the request for an overdraft facility or working capital, it also refers to other issues which are not clear whether they formed part of the call or were notes made by the recipient of the call on behalf of the Bank. For example, the note on 24 June 2006 refers to “*FICA compliant. Suretyship held as per previous history note. Interest rate loaded as per GRG. Limit loaded into CL and BRI.*”⁴⁴ [italics added] Be that as it may, the only relevant aspect of the italicised words, in my view, is the reference to the interest rate. But the rate and how it is to be computed is not indicated. The amount agreed upon for the overdraft facility is also not stated.

[32] Further, in terms of the note made on 15 June 2006, Sindile Project needed 10% deposit towards a motor vehicle; to make payment to SARS on 25 June 2006 and “requested overdraft of R30k to assist with payments”.⁴⁵ Therefore, according to this note the overdraft was for R30 000.00. However, in terms of the Notepad entries 125-128 between 16 and 24

⁴¹ See par 5 on pleadings bundle p 4; par 7 of the defendants’ heads of argument.

⁴² See trial bundle pp 1-6.

⁴³ *Ibid.*

⁴⁴ See trial bundle p 21.

⁴⁵ See trial bundle p 20.

March 2012, there was another request for an overdraft.⁴⁶ The amount for the latter request or overdraft facility was R300 000.00.⁴⁷

[33] Therefore, from the above entries there were requests for an overdraft facility in June 2006 for R30 000.00 and March 2012 for R300 000.00. With regard to the R300 000.00 facility, there is also mention of the applicable rate of interest stated as prime plus 8.60% and it also appears that the facility was until 24 March 2013, which would have been about a year from date of the note (i.e. 24 March 2012). There is no mention of how the rate is to be calculated and at what intervals. It ought to be borne in mind that the Bank's pleaded case, in this regard, is that Sindile Project is liable for interest on all overdue accounts at the rate of 17.10% or as advised from time to time.⁴⁸ The rate of interest is also stated on statement issued by the plaintiff to Sindile Project dated 31 March 2012. However, there is no evidence confirming that this was the only rate of interest used for calculating the outstanding amount or whether there were any changes. Also there is no evidence confirming that Sindile Project accepted this and other terms of the alleged agreement with the plaintiff. Therefore, I find that the Bank has failed to establish the existence of an oral agreement with Sindile Project as alleged.

[34] Although, it is clear that monies were advanced in terms of the overdraft facility, there is no evidence on the repayment terms thereof. Although, Ms Koobair testified about the balance of R339 246.12 reflected on bank statement as at 28 February 2014, as owing, there was no evidence of how the amount is made up. The certificate of balance is also not

⁴⁶ See trial bundle pp 51-55.

⁴⁷ See trial bundle p 55; pars 12 and 28 above.

⁴⁸ See pleadings bundle on p 4; par 14 of plaintiff's heads of argument.

sustained by the proven facts, as it is grounded on existence of the oral agreement. As stated above the overdraft facility was in a capital amount of R300 000.00 and therefore the outstanding amount comprises the capital amount and interest charges. It is also conceivable that there would have been other charges by the Bank for operation of the Bank Account and availing or “initiating” the overdraft facility.⁴⁹ The certificate of balance attached to the papers is disputed and therefore unhelpful in this regard.

Suretyship and the Sureties

[35] Now briefly on the suretyship and the Sureties. There is no real dispute between the Bank and the Sureties, as the Sureties have admitted liability in respect of any amount the Bank successfully proves against Sindile Project up to their suretyship limit of R500 000.00. They rely on the same defence raised by Sindile Project as the principal debtor, being to deny existence of the indebtedness based on the oral agreement. This is a defence *in rem* as opposed to a defence *in personam* to the principal debtor.⁵⁰ In *Muller and others v Botswana Development Corporation Ltd*⁵¹ the following was said:

“The general rule relating to sureties is that a surety may rely on any defence which is open to the principal debtor, provided such defence arises upon the obligation (one *in rem*) and not from some personal privilege granted to the debtor (a defence *in personam*).”

[quoted without accompanying authorities]

⁴⁹ See trial bundle p 53.

⁵⁰ See Du Bois F (ed) *Wille's Principles of South African Law* 9th edition (Juta Cape Town 2007) on pp 1022-1025.

⁵¹ [2002] 3 All SA 663 (SCA).

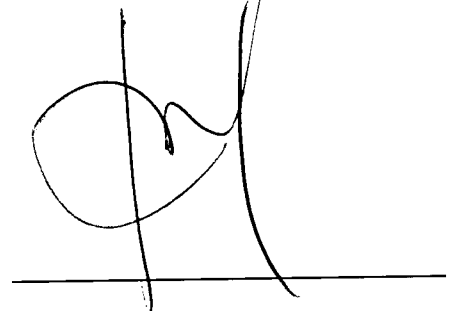
[36] Therefore, in my view, the claim against the Sureties will fail because of the failure of the claim against Sindile Project. This is so, despite the fact that the certificate of balance, in terms of the suretyship agreement, constitutes *prima facie* proof of indebtedness against the Sureties. Such certificate is only a form or means of proving indebtedness and not the substance of the indebtedness. Absent proof of indebtedness on the side of the Sureties due to failure of the Bank's case against Sindile Project, the certificate is incompetent of proving any liability for the Sureties.

Conclusion and Order

[37] Against the backdrop of what is stated above, I find that the claim by the Bank, as plaintiff, against Sindile Project, as first defendant, and the Sureties, as second and third defendants, is unsuccessful. Costs will follow this result.

[38] In the premises, I make the following order:

- (a) The plaintiff's claim against first, second and third defendants is dismissed with costs.

A handwritten signature in black ink, appearing to be 'K. La M. Manamela', written over a horizontal line.

K. La M. Manamela
Acting Judge of the High Court
29 April 2016

Appearances:

For the Plaintiff	:	Adv U Lottering
Instructed by	:	Findlay & Niemeyer Attorneys Pretoria
For the 1 st , 2 nd and 3 rd Defendants	:	Adv HP West
Instructed by	:	Locketts Attorneys Pretoria