

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 25921/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

Date: 20 September 2023

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED (Registration No:1962[...])	Plaintiff
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And

INFOGOLD INVESTMENTS CC (Registration No: 2002[...])	1 st Defendant
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TOVA SHAHAR (ID. 45[...])	2 nd Defendant
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ISAC SHAHAR (ID. 41[...])	3 rd Defendant
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COLIN WAINE SILVERSTONE (ID. 6[...])	4 th Defendant
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NURIT SILVERSTONE	5 th Defendant
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JUDGEMENT

MOOKI AJ

1 The matter is before court as a stated case. The plaintiff (“the bank”) instituted action against the first defendant (“close corporation” or “the company”) seeking payment in the sum of R3,189,326.54. The bank also sought an order declaring immovable property executable. The property is described.

2 The bank claims an amount of R1,355,000.00 against the second to fifth defendants, jointly and severally, the one paying the other to be absolved. The second to fifth defendants bound themselves as sureties in favour of the bank against debts of the close corporation. The second defendant has died. The bank seeks relief against the third to fifth defendants.

3 The discovered documents constitute the evidence bundle. The documents are what they purport to be, without the need to adduce further evidence.

4 The following facts are common cause:

4.1 The plaintiff and defendant concluded a home loan agreement on 19 August 2002 under account number 2[...] in terms of which the plaintiff lent and advanced the sum of R670,000.00 to the first defendant.

4.2 The loans were secured by a mortgage bond and two continuing covering mortgage bonds registered in favour of the plaintiff over the immovable property.

4.3 The plaintiff advanced monies as reflected in the loan agreements.

4.4 The second, third, fourth and fifth defendants bound themselves as

sureties for payment when due of all the present and future debts of any kind of the first defendant.

4.5 The first defendant defaulted on its payment in respect of the loan agreements.

4.6 The total amount of the debts which the plaintiff may recover from the defendants under the suretyships is limited to R1,355,000.00

5 The following facts are in dispute:

5.1 The plaintiff and defendant entered into a home loan agreement on 19 August 2002 and account number 2[...] in terms of which the plaintiff lent and advanced the sum of R1,355,000 to the first defendant.

5.2 The certificate of balance as well as statement of account reflected the amount due and payable by the first, third, fourth and fifth defendant.

5.3 The section 129 notices were despatched to the chosen *domicilium citandi et executandi*.

5.4 The registered slips and track and trace reports of the section 129 notices.

6 The court is to determine the following issues:

6.1 What is the effect of the absence of the fourth defendant's signature on the loan agreement for the sum of R1,355,000?

6.2 What is the proven quantum of the plaintiff's claim against the defendants?

6.3 The plaintiff's compliance with the provisions of Section 129 of the National Credit Act 34 of 2005.

7 Contentions by the plaintiff:

7.1 The absence of a signature by the fourth defendant in the loan agreement advancing the sum of R1,355,000.00 to the first defendant does not invalidate the agreement.

7.2 Three of the four members of the first defendant signed the agreement, each holding a 25% members interest in the first defendant.

7.3 The representation made by signatories holding a 75% interest is that the first defendant applied for the loan.

7.4 The Turquant rule applies.

7.5 The certificate of balance is *prima facie* proof of indebtedness with respect to the outstanding balance and the establishment of the claim.

7.6 The statement archive is reflective of all amounts of monies advanced, paid by the defendants, the resultant default as well as the balance outstanding as at the date of the issuing of the certificate of balance.

7.7 The plaintiff complied with section 129 of the National Credit Act.

7.8 The chosen postal and physical addresses were used for the purposes of sending the section 129 notices in terms of the mortgage bond.

7.9 The suretyship agreements reflect the addresses for service of the third, fourth and fifth defendant.

7.10 The section 129 notice was sent to the first defendant via registered post to its chosen address.

7.11 The track and trace for the section 129 notice sent to the first defendant reflect first notification to recipient.

7.12 The section 129 notice was sent to the third defendant via registered post to the chosen address.

7.13 The track and trace for the section 129 notice sent to the third defendant reflect first notification to recipient.

7.14 The section 129 notice was sent to the fourth defendant by race opposed to its chosen address.

7.15 The track and trace for the section 129 notice sent to the fourth defendant reflect first notification to recipient.

7.16 The section 129 notice was sent to the fifth defendant via registered post to its chosen address.

7.17 The track and trace for the section 129 notice sent to the fifth defendant reflect first notification to recipient.

8 Contentions by the defendants:

8.1 The loan agreement advancing the sum of R1,355,000.00 to the first defendant does not contain the signature of the fourth defendant. The absence of that signature invalidates the agreement.

8.2 Three of the four members of the first defendant signed the agreement without the requisite authority. The three members signed in their capacity as sureties. The three did not sign on behalf of the first defendant, or sign with the intention to bind the first defendant.

8.3 The plaintiff, as the author of the documents, had a duty to ensure

that the loan agreement was valid and signed by the party authorised to represent the first defendant.

8.4 The Turquand Rule does not apply.

8.5 Admits that there is authority to the effect that the certificate of balance is prima facie proof of indebtedness with respect to the outstanding balance and the establishment of the claim.

8.6 The statement archive is reflective of all amounts of monies advanced and amounts paid by the first defendant, the resultant default as well as the balance outstanding as at the date of the issuing of the certificate of balance.

8.7 The certificate of balance does not reflect proof of the quantum as against the second to fifth defendants.

8.8 The plaintiff did not comply with section 129 of the National Credit Act.

8.9 The following is admitted:

8.9.1 The chosen postal and physical addresses were used for the purposes of sending the section 129 notices in terms of the mortgage bond.

8.9.2 The suretyship agreements reflect addresses for service of the third, fourth and fifth defendants.

8.9.3 The track and trace reflects first notification to recipient.

8.10 The section 129 notice was not sent to the third defendant by registered post to the chosen address. It is admitted that the track and trace reflects first notification to recipient.

8.11 The section 129 notice was not sent to the fourth defendant by registered post to the chosen address. It is admitted that the track and trace reflects first notification to recipient.

8.12 The section 129 notice was not sent to the fifth defendant by registered post to the chosen address. It is admitted that the track and trace reflects first notification to recipient.

9 The section 129 notice was not sent to the third, fourth, and fifth defendant as stated above for the following reasons:

9.1 The postal slips regarding the letters in respect of the first to fifth defendants do not contain the initial of the post office official (the accepting officer) and thus there has not been compliance with the requirements of evidence substantiating that the letters were in fact despatched in compliance with the National Credit Act.

9.2 All that *prima facie* has been submitted is that there exists a section 129 letter, a postal slip and a track and trace report. There is no evidence reflecting that such letters to each recipient absent the initial of the post office official on the post office slips. The slips require that the post office official affix his or her initial to the document as evidence of receipt and despatch of the document.

Analysis

10 There are three loan agreements that are relevant to the dispute among the parties. There is one account for all three agreements. Only the validity of one agreement is in dispute. Validity is disputed in part because not all four members of the close corporation signed the agreement. The fourth defendant did not sign. Validity is also disputed because the section in the agreement for a signatory in the name of the close corporation was left blank.

11 I find that the loan agreement binds the close corporation.

12 The disputed home loan agreement was secured by the registration of a mortgage bond over immovable property. Second, third and fifth defendants signed the agreement. The three signatories constitute 75% of the membership of the close corporation. Their conduct made the close corporation a party to the loan agreement, as contemplated in section 46(b)(iv) of the Close Corporation Act.¹

13 The contentions by the defendants that the close corporation was not a party to the loan agreement is, in any event, inconsistent with the conduct of the parties following the conclusion of the agreement. The inconsistency is demonstrated by the fact that the close corporation made withdrawals from the home loan account within three weeks of the signing of the agreement.

14 The defendants cited *Venter v Kruger* 1971 (3) SA 848 (N) as support that the close corporation was not bound to the loan agreement because the fourth defendant did not sign the document. *Venter* did not deal with whether all members of a close corporation must sign an agreement for such agreement to bind a close corporation.

15 The contention that the close corporation is not bound by the home loan agreement because the second, third, and fifth defendants signed only as “sureties” is unsound. That is because these defendants cannot be sureties absent a principal debtor. The close corporation, in this instance, is the principal debtor.

16 The defendants referred to *Merifon (Pty) Limited v Greater Letaba Municipality and Another*² as further support that the agreement did not bind the close corporation.

17 The dispute between the parties does not concern a public body as was the case in *Merifon*. *Merifon* concerned performance by a public body of an act

¹ Act No 69 of 1984

² 2022 (9) BCLR 1090 (CC) (4 July 2022)

or exercise of public power without compliance with applicable prescripts. The court found the conduct void.

18 The defendants accepted during argument that members of a close corporation, if authorised, can bind a close corporation. Defendants did not make submissions why the three members of the first defendant who signed the home loan agreement lacked authority to bind the first defendant. The defendants did not seek to persuade the court that section 46(b)(iv) of the Close Corporations Act did not support the case made for the plaintiff.

19 It is unnecessary to consider the Tarquand rule given the findings as stated above.

20 The signatories to the home loan agreement were competent to conclude that agreement, rendering the close corporation a party to the agreement.

Section 129 Notices

21 Section 129(1) of the National Credit Act³ requires that a debtor be notified before a creditor could enforce a debt. The Act prescribes how such a notice must be delivered. The Act does not define “delivery” in relation to the sending of a notice. The Regulation⁴ contains the following definition:

‘delivered’ unless otherwise provided for, means sending a document by hand, by fax, by email, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient’s registered address.

22 Section 129(7) details that the following constitutes satisfactory proof of delivery:

(a) Confirmation by the Postal Service or its authorised agent, of delivery to the relevant post office or postal agency; or

³ Act No 34 of 2005

⁴ Regulation 1, Definitions

(b) the signature or identifying mark of the recipient contemplated in subsection (5)(b)

23 The defendants accepted, during argument, that the plaintiff used the close corporation's postal and business addresses for the section 129 notice. It was submitted; however, that the plaintiff did not send section 129 notices to the chosen addresses of the third to fifth defendants.

24 I do not accept that the plaintiff did not send section 129 notices to the chosen addresses of the third to fifth defendants. These defendants specified their chosen addresses in the suretyship agreement. The plaintiff used those addresses for sending the section 129 notices.

25 The defendants deny that the section 129 documents were despatched from the post office. That is because, according to the defendants, the postal slips associated with the documents are not signed or initialled by an official from the post office as evidence of receipt and despatch of the documents by the post office.

26 The plaintiff maintains that there is no requirement for an official at a post office to initial or sign a postal slip as proof of delivery by a post office. It was submitted on behalf of the plaintiff that the track and trace reports constitute satisfactory proof of delivery of the section 129 letters. The defendants accept that the track and trace reports constitute first notification to a recipient.

27 The defendants did not substantiate their contention that a signed or initialed postal slip is evidence of receipt and despatch of a document from a post office. They did not cite any law or a practice accepted by the courts in that regard.

28 The Constitutional Court has said the following regarding the subject:⁵

⁵ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (8) BCLR 785 (CC) (7 June 2012) (internal footnotes omitted)

[75] Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letters may go astray, at least there is a “high degree of probability that most of them are delivered.” But the mishap that afflicted the Sebolds’ notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

[76] In practical terms, this means the credit provider must obtain a post-despatch “track and trace” print-out from the website of the South African Post Office. As BASA’s submission explained, the “track and trace” service enables a despatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item’s number is entered, the location of the item appears, and it can be printed.

29 The defendants cannot, on the one hand, accept that a track and trace report constitute a first notification to a recipient while, on the other hand, disputing that the post office despatched a document. A track and trace report logically pertains to the fate of a document despatched from a post office.

30 The track and trace reports could not have been issued without the prior despatch of documents associated with the notifications. I find that the plaintiff did deliver the section 129 notices to the defendants, as required by the Act.

Quantum

31 The plaintiff maintains that the certificate of balance and the statement of account reflect the amount due and payable by the defendants. The defendants say that the certificate of balance is not proof of the quantum against the second

to fifth defendant.

32 The defendants do not state the basis for saying the amounts are neither due nor payable. It was submitted that the third to fifth defendants are not liable to the plaintiff if the suretyship agreement were invalid. This submission does not address the quantum.

33 It was further submitted for the defendants that not all parties signed the suretyship agreement, rendering that agreement invalid. Counsel for the defendants was invited to refer the court to authority supporting the submission. No authority could be cited to the court.

34 The defendants accept that the certificate of balance is *prima facie* proof of indebtedness and that the statement archive reflects all amounts advanced and repaid by the close corporation. The defendants also accept the outstanding balance as at the date of issuing of the certificate of balance.

35 The suretyship agreement is ancillary to the home loan agreement between the bank and the close corporation. The second to fifth defendants concluded the suretyship agreement as co-principal debtors with the close corporation. They are jointly and severally liable for the obligations of the close corporation.

36 The certificate of balance reflects the indebtedness of the second to fifth defendants in their capacity as co-principal debtors. The second to fifth defendants remain liable in their capacity as sureties. Their liability as sureties is as set out in the suretyship agreement.

37 Clause 3.1 of the suretyship agreement provides that “If there are more than one of us, this suretyship applies to us individually and to any combination of us together (joint and several liability).”

38 Clause 6 of the suretyship agreement deals with recoverability of capital, interest and costs. Clause 6.1 stipulates that:

The total amount of the Debts which the Bank may recover from us under this suretyship is limited to R1355000,00 (ONE MILLION THREE HUNDRED AND FIFTY FIVE THOUSAND RAND) ...”

39 Proof of the first defendant’s indebtedness is stipulated as follows:

The amount of the indebtedness of the Mortgagor to the Bank at any time which is secured by this bond (including any interest and the rate at which and the period for which interest is calculable) and the fact that such indebtedness is due and payable may be determined and proved by a certificate stating the same signed by any manager or administrator of the Bank, whose appointment and authority to sign need not be proved. Such certificate shall be accepted as proof of the facts therein stated, unless the Mortgagor is able to prove the facts incorrect, and shall be sufficient for purposes of obtaining provisional sentence or summary judgement against the Mortgagor.

40 The first defendant has produced a certificate of balance detailing an indebtedness by the close corporation in the amount of R3 189 326.54.

41 The defendants accept that the statement archive is reflective of all amounts of monies advanced and amounts paid by the close corporation, the resultant default and the balance outstanding as at the date of the issuing of the certificate of balance.

42 The certificate of balance is based on the statement archive, which the defendants accept as correct. The close corporation does not contend that the facts recorded in the certificate of balance are wrong. I find that the certificate of balance reflects the indebtedness of the defendants to the plaintiff.

43 I make the following order:

(1) The first defendant is ordered to pay to the plaintiff the sum of R

3 189 326.54;

(2) The first defendant is ordered to pay interest on the amount of R 3 189 326.54 at the rate of 10.50% per annum with effect from 16 MARCH 2017 to date of payment, both days inclusive;

(3) The first defendant is ordered to pay the plaintiff the sum of R 1 212.67 per month with effect from 16 MARCH 2017 to date of payment;

(4) The first defendant is ordered to pay costs as between attorney and own client.

(5) It is declared that PORTION 1 OF ERF 2[...] WOODMEAD EXTENSION 1 TOWNSHIP REGISTRATION DIVISION I.R, THE PROVINCE OF GAUTENG MEASURING 1,122 HECTARES HELD BY CERTIFICATE OF REGISTERED TITLE T33[...] be specially executable.

(6) The Registrar is directed to issue a Warrant of Execution against immovable property mentioned in paragraph 5, in terms of Rule 46(1) of the Uniform Rules of Court.

(7) It is ordered, as against the third, fourth, and fifth defendants, jointly and severally with the First Defendant, the one paying the other to be absolved, for:

a. Payment to the First Defendant of the sum of R1 355 000.00;

b. Interest on the amount of R1 355 000.00 at the rate of 10.50% per annum with effect from 16 March 2017 to date of payment, both days inclusive.

(8) The third, fourth and fifth defendants are ordered to pay costs as between attorney and client.

Omphemetse Mooki
Judge of the High Court (Acting)

Heard on: 8 August 2023

Delivered on: 20 September 2023

For the Plaintiff: K Kollapen

Instructed by: Haasbroek & Boezaart Inc.

For the first to fifth defendants:

Instructed by: Larry Marks Attorneys