IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE DATE: 15 February 2023

Case No. 9859/2020

In the matter between:

GUARDRISK LIFE LIMITED Applicant

and

FML LIFE (PTY) LTD First Respondent

BALDWIN PHILLIP KOCK Second Respondent

JUDGMENT

WILSON J:

1 In terms of an intermediary agreement, the first respondent, FML, collected insurance premiums to the value of R25 779 571.51 on behalf of the applicant, Guardrisk, between October 2018 and July 2019. Instead of paying the premiums over to Guardrisk, FML applied them to its own business expenses.

2 In response to this misappropriation, Guardrisk demanded that the second respondent, Mr. Kock, who is a director of FML, stand surety for the "due performance of all obligations which are, or may at any time in future become, owing by" FML to Guardrisk. These obligations included all of FML's obligations under the intermediary agreement. Mr. Kock agreed to, and signed, a suretyship on these terms, on 23 October 2019. Guardrisk says that the effect of the suretyship is that Mr. Kock immediately became liable for the performance of FML's obligation to pay the misappropriated premiums to Guardrisk in the event that FML did not.

3 In due course Guardrisk instituted action against FML and Mr. Kock for the payment of the misappropriated premiums, and took default judgment against FML for R25 779 571.51. Guardrisk now seeks summary judgment against Mr. Kock on the suretyship.

4 Mr. Kock resists summary judgment on two bases. His first defence is a technical one. Mr. Kock says that the deponent to Guardrisk's affidavit in support of its summary judgment application, Amelia Costa, lacks personal knowledge of the cause of action underlying Guardrisk's claim. That the deponent must have such knowledge is an incident of Rule 32 (2), which requires the deponent to an affidavit in support of a summary judgment application to be in a position to "swear positively to the facts" underlying the cause of action (Rule 32 (2) (a)), and to "verify" that cause of action and the amount claimed (Rule 32 (2) (b)). Since Ms. Costa, who is Guardrisk's attorney, has no direct knowledge of the suretyship, or the circumstances under which it was signed, Mr. Kock contends that she is not the sort of

deponent that Rule 32 requires to swear to an affidavit in support of a summary judgment application. It follows, says Mr. Kock, that the Rule has not been complied with, and summary judgment must be refused.

5 Mr. Kock's second contention is that he has two *bona fide* defences to Guardrisk's claim on the suretyship. These are, first, that the suretyship, properly interpreted, only applies to obligations that arose after it was signed. Since FML's liability for the R25 779 571.51 Guardrisk now claims arose before Mr. Kock entered into the suretyship, Mr. Kock contends that he did not in fact stand surety for it. In the alternative, Mr. Kock contends that, if the suretyship cannot be interpreted in that manner, then it must be rectified to bear that meaning. As currently written, the suretyship document fails to reflect Guardrisk's and Mr. Kock's common intention at the point it was signed: viz. that Mr. Kock would only stand surety for obligations arising thereafter, and not for any of FML's existing obligations to Guardrisk at that time.

6 In response to the first contention, Guardrisk accepts that Ms. Costa does not have the kind of knowledge Rule 32 normally requires of a deponent to an affidavit in support of a summary judgment application. Guardrisk nevertheless points out that all the facts underlying Guardrisk's cause of action are undisputed. Accordingly, Guardrisk says that it does not matter whether Ms. Costa has personal knowledge of those facts, since the purpose of the Rule – to ensure that the cause of action on which the claim is based is verified under oath – has been served, and there is no warrant to refuse summary judgment merely because Ms. Costa does not have direct knowledge of them.

7 I accept that the absence of a deponent's direct knowledge of the facts underlying a cause of action is not an insuperable obstacle to a claim for summary judgment where those facts are not in dispute. However, I think that the purpose of requiring a deponent to an affidavit in support of summary judgment to be able to "swear positively to the facts" spans wider than the mere verification of the cause of action upon which the application relies. The deponent to such an affidavit must also be in a position to "explain briefly" why any defences outlined in an affidavit resisting summary judgment do not "raise any issue for trial" (Rule 32 (2) (b)). It seems plain to me that a person who seeks to advance such an explanation must have personal knowledge of the facts that exclude the good faith of such defences.

8 Ms. Costa obviously has no personal knowledge of the facts that might sustain the defences upon which Mr. Kock relies. It follows that, unless the defences Mr. Kock raises are demonstrably bad in law, even on Mr. Kock's own version, then Ms. Costa cannot be said to have "explained" why they do not raise a triable issue, and summary judgment must be refused.

9 That said, it is clear that the first defence Mr. Kock raises is indeed demonstrably bad in law. The text of the suretyship is unambiguous. It plainly applies both to FML's indebtedness to Guardrisk at the time the suretyship was entered into and to any obligations that may arise thereafter. There is no other meaning reasonably attributable to the text of the suretyship.

10 This leaves Mr. Kock's second contention – that the text of the suretyship did not reflect the parties' common intention to exclude FML's existing indebtedness to Guardrisk at the time the suretyship was concluded. Whether

or not there was such a common intention depends, at least in part, on the state of mind of the parties at the time the suretyship was concluded.

11 Ms. Costa obviously has no direct knowledge of what Guardrisk intended when it entered into the suretyship. Nor does she attempt to explain in her affidavit why the rectification defence fails to raise a triable issue. To illustrate the parties' true intent, Guardrisk instead relies upon correspondence exchanged between the parties and annexed to Mr. Kock's affidavit resisting summary judgment. In his written submissions, Mr. Green, who appeared for Guardrisk before me, argued that the correspondence is "completely destructive" of the rectification defence, and in fact reinforces Guardrisk's contention that the parties' common intention is directly reflected in the suretyship as signed.

12 The question at the summary judgment stage is not whether a pleaded defence stands good prospects of success. It is whether the defence is genuinely advanced *(Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraph 23). A defence that is obviously unsustainable on the facts that are alleged to underpin it, or that is bad in law, cannot be genuinely advanced. But it is critical to any assessment of the question that the person who deposes to the affidavit in support of summary judgment is in a position to say whether or not the defence advanced in the plea is genuine and sustainable on facts known to them. A person, like Ms. Costa, whose knowledge of the facts is "purely a matter of hearsay" is not in that position (*Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP), paragraph 7). Accordingly, Ms. Costa is unable

to say anything meaningful about what Guardrisk intended the suretyship to mean.

13 The content of the correspondence annexed to Mr. Kock's affidavit does not seem to me to bear the weight that Mr. Kock places on it. Nor, however, is it "completely destructive" of Mr. Kock's reliance on the defence of rectification. Nor does it exclude the possibility that the rectification defence is advanced in good faith.

14 Much of the debate between the parties centred on the senses in which the parties jointly understood the use of the word "outstanding" in the phrase "the amount outstanding" in some of the correspondence, and whether the intention behind the use of the word was to refer to present or future amounts outstanding. In an email to Mr. Kock dated 15 September 2019, for example, Jacobus Claasen, a marketing executive acting on behalf of Guardrisk, proposed that FML makes an "immediate lump sum payment" of R10 million, followed by settlement of the outstanding balance of the misappropriated premiums by 30 June 2020. It is then proposed that "all directors" of FML "sign personal surety for the outstanding balance of the premiums" (my emphasis).

15 The question arises whether the emphasised word, "outstanding", refers to the amounts outstanding at the time the message was written, to those outstanding after the immediate payment of R10 million, to those outstanding that the time the suretyship is entered into, or to those outstanding after the settlement of the balance by 30 June 2020. I incline toward the view that both parties understood the word in the sense of amounts "outstanding" at the time the message was written or, at the latest, at the time the suretyship was

entered into. But in summary judgment proceedings such an inclination is not enough. I must be satisfied that the correspondence is so unambiguous that it is not necessary to hear evidence to fix its meaning, and that Mr. Kock has attempted, insincerely, to create ambiguity where there is none. I do not think that I can be that sure.

16 In light of this, and given also that Ms. Costa cannot say from her own knowledge whether the rectification defence is advanced sincerely, it seems to me that Mr. Kock is entitled to the benefit of the doubt, at least at the summary judgment stage.

17 Accordingly –

17.1 Summary judgment is refused.

17.2 The second respondent is granted leave to defend the action.

17.3 The costs in this application are costs in the trial.

S D J WILSON
Judge of the High Court

HEARD ON:	25 January 2023
DECIDED ON:	15 February 2023
For the Applicant:	I P Green SC Instructed by Clyde & Co Inc
For the Second Respondent:	M Coovadia Instructed by Ramiah and Associates