REPUBLIC OF SOUTH AFRICA

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

Case Number: 2023-060147

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

2025/01/15
DATE

[redacted]
SIGNATURE

In the matter between:

EVORAIL (PTY) LTD **Plaintiff**

and

REGINALD TAYLOR **First Defendant**

VUYISEKA MKELE **Second Defendant**

Summary

Summary judgment – bona fide defence – doubt as to the merits of each party's version – discretion exercised against granting summary judgment despite deficiencies in opposing affidavit

JUDGMENT

FRIEDMAN AJ:

[1] On 22 June 2023, the plaintiff launched a trial action against two defendants (who I describe below as "Mr Taylor" (the first defendant) and "Ms Mkele" (the second defendant)). According to the particulars of claim, in 2017 the plaintiff concluded an oral agreement with a company called VR Squared Engineering (Pty) Ltd ("the principal debtor") in terms of which the plaintiff would lend the principal debtor money, from time to time, to operate its business. According to the particulars of claim, a specific interest rate was agreed but no fixed date of repayment was determined by the contract. It is alleged by the plaintiff that, as of "July 2022", the balance of the loan owed by the principal debtor to the plaintiff was R2 072 318.00.

[2] The pleaded basis of the plaintiff's claim is straightforward. It is alleged that, on 4 July 2018, Mr Taylor and Ms Mkele each concluded a separate suretyship agreement ("the first suretyship" and the "second suretyship") with the plaintiff, in which they bound themselves as sureties and co-principal debtors jointly and severally with the principal debtor.

[3] The plaintiff alleges that, on 3 July 2022, the principal debtor, represented by Ms Mkele, acknowledged liability to the plaintiff in the amount now claimed. The plaintiff sues on the suretyship agreements, and also seeks rectification of certain wording in those agreements in its particulars of claim.

[4] On 31 October 2023, the plaintiff brought a summary judgment application against Mr Taylor only, for the sum of R2 072 318.00, as well as seeking two prayers rectifying the first and second suretyships. That is the application now before me.

[5] What complicates the matter, from the perspective of the plaintiff, is that, when it pleads that the principal debtor "acknowledged liability to the plaintiff in the sum

of R2 072 318.00", it relies on an email, rather than a formal acknowledgement of liability, as evidence of this. The email purports to reflect the minutes of "the meeting", but it is not clear from the face of the email, or the pleadings, what type of meeting it was. The two people who apparently attended the meeting were Ms Mkele and "RB Spoon". Although there is nothing to identify RB Spoon anywhere in the particulars of claim, Robert Spoon is the deponent to the summary judgment affidavit filed on behalf of the plaintiff. He describes himself in that affidavit as a director of the plaintiff. Mr Taylor says in his affidavit opposing summary judgment that Mr Spoon is also a director of the principal debtor – this seems to be correct from a WinDeed printout annexed to the opposing affidavit.

[6] The difficulty in this application is that neither party has clearly and unambiguously pleaded its position. For instance, the principal debt on which the plaintiff relies arises from an alleged oral agreement but there is no allegation in the particulars of claim as to who represented the parties in concluding this agreement. More importantly, the information regarding the apparent acknowledgement of liability is, at least seen from the perspective of summary judgment proceedings, far from ideal. The plaintiff is, of course, entitled to plead that the principal debtor, duly represented, acknowledged liability, with a view to proving this at trial. It is probably not essential for the particulars of claim to plead the circumstances in which this acknowledgement was made. But, for the purposes of summary judgment, it is hard to determine the nature of the "meeting", the minutes of which are apparently reflected in the email, and who had the authority to bind the principal debtor to the acknowledgement on which the plaintiff now relies.

[7] Mr Taylor's response is not ideal either. He denies that the oral agreement was concluded in the first place, but does not explain that denial at all in his opposing affidavit. In fact, he implicitly undermines that denial by repeatedly alleging that the principal debt has prescribed because the plaintiff demanded payment in October 2019. Mr Taylor's general approach is to deny allegations in the passive voice, in a way which does not disclose a proper defence. For instance, in denying the acknowledgement of liability on the part of the principal debtor, Mr Taylor says that "[o]n the face of the email, there is no evidence I was aware of

the email's contents, nor is there any indication that I authorised [Ms Mkele] to represent me or act on my behalf". But Mr Taylor never says whether he actually received the email.

[8] Mr Taylor's affidavit has, with all due respect to whomever drafted it, the hallmarks of what has become the relatively common practice of legal broken telephone. This involves a situation in which a legal representative receives incoherent instructions (if any) from his or her client, forges those into some sort of version, and sends it to the client. The client is then left to his or her own devices to comment on it without any assistance of guidance, and then a final version is signed and filed, often without the client paying any regard to what is said there – presumably choosing to believe that, having been prepared by a lawyer, it must be safe to sign.

[9] When it comes to the present application, this is only speculation on my part. I have not, as is clear from the order I make in this matter, held this against Mr Taylor (although it may come back to haunt him, should rule 32(9)(b)[1] ever find application). But the inference which I suggest should be drawn is hard to resist. This is best demonstrated with reference to Mr Taylor's main defence to the reliance by the plaintiff on the email, which I address again below. Surely it would have been a simple matter, in a properly drafted affidavit, for Mr Taylor simply to say clearly whether he received the email. The other alternative, of course, is that Mr Taylor knows full well that he received the email, and cannot say otherwise expressly, under oath. But if that is the case, then the plaintiff must also bear some responsibility because, on its face, the email was not sent to Mr Taylor. If he was sent it at another time, then the plaintiff ought to have said so in its summary judgment application.

[10] In any event, in opposing this application, Mr Taylor says that, shortly after Ms Mkele sent her email purporting to reflect an agreement on the part of the principal debtor that the sum now claimed remained owing, Mr Taylor wrote to

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1 This rule provides that, if at the trial it emerges that summary judgment ought to have been granted because the defence raised by the defendant ultimately turned out to be unreasonable, the court may order costs to be taxed as between attorney and client.

Mr Spoon and Ms Mkele. Mr Taylor says that it is "clear from this email" that he disputed the "basis upon which the acknowledgement of liability was given".

[11] These allegations made by Mr Taylor in the opposing affidavit are based on a fundamental misconception of the basic facts:

a. Whomever drafted the opposing affidavit assumed that Ms Mkele's email acknowledgement was written on *3 June 2022*.

b. Proceeding from that premise, Mr Taylor's opposing affidavit says that, "just a couple of weeks after the alleged acknowledgement of liability email was sent", he disputed the basis of the acknowledgement of liability. The email on which he relies for this allegation is dated *23 June 2022*.

c. However, Ms Mkele's email was, in fact, sent on *3 July 2022*.

d. Unsurprisingly, the text of Mr Taylor's email does not corroborate the allegation in the opposing affidavit that Mr Taylor disputed Ms Mkele's recordal of the acknowledgement of liability. How could it, when it was sent before the acknowledgement was apparently made? Rather, what Mr Taylor's email seems to show is that, having been invited to a meeting with Mr Spoon and Ms Mkele (which, in all likelihood, was the meeting which is described in Ms Mkele's email), Mr Taylor asked for copies of various documents, which he wanted to "go through" before the meeting.

[12] In addition to Mr Taylor's fundamental misconception of the facts, my task has been made more difficult by the fact that Mr Taylor has advanced, both in his opposing affidavit and in the heads of argument filed on his behalf, a series of ill-conceived defences. For example, immense effort was devoted to an argument that the plaintiff's claim against the principal debtor has prescribed. However, it was based on a misunderstanding of the plaintiff's claim – if the principal debtor did indeed acknowledge that, as of 3 July 2022, it owed the plaintiff the roughly R2 million now claimed, then this would interrupt prescription unless the R2 million was already owing and immediately claimable as of 4 July 2019. Even on Mr Taylor's version, this was not the case. In both his plea and opposing affidavit, he alleges that prescription began to run in October 2019. That being so, if the

acknowledgement of liability was genuinely made by the principal debtor on 3 July 2022 in the amount now claimed, then that is the date on which prescription in respect of the plaintiff's claim would have begun to run. This is because it would have interrupted the prescription which, according to Mr Taylor, began to run in October 2019 (since it would have been made on a date before October 2022).

[13] This is not the only example of the scattergun approach adopted by Mr Taylor, who raised multiple defences to do with, for instance, the formalities in concluding the suretyship agreement, which do not take his defence anywhere concrete.

[14] Despite this, I have ultimately concluded that it would not be appropriate to grant summary judgment. This is for the following reasons.

[15] The particulars of claim allege, relying on Ms Mkele's email, that Ms Mkele duly represented the principal debtor, and acknowledged liability on its behalf. This is the crucial allegation, which is necessary to enable the plaintiff to claim that, as of 3 July 2022 when Ms Mkele sent her email, the principal debtor was unequivocally liable to the plaintiff in the amount (roughly R2 million) now claimed, which in turned triggered the plaintiff's entitlement to pursue the sureties. In other words, the reference to the email is the crucial allegation necessary to demonstrate that the plaintiff's claim is for a liquidated amount.

[16] In his plea, Mr Taylor denies that Ms Mkele acknowledged liability on behalf of the principal debtor. It is a simple denial (coupled with the endemic, and unnecessary, "putting the plaintiff to the proof"). But it is explained in slightly more detail in the opposing affidavit in the statement in the passive voice which I mentioned above. It might be helpful for me to quote Mr Taylor verbatim, because his way of expressing himself is consistent with my observations about the overall tenor of his defences:

> "On the face of the email, there is no evidence I was aware of the email's contents, nor is there any indication that I authorized the Second Defendant to represent or act on my behalf, or that the Principal Debtor authorized or resolved to allow the Second Defendant to represent or act on its behalf."

[17] Again, this response misses the point in some respects. It is not clear to me what relevance Mr Taylor wishes to attach to the notion that he had apparently not

authorised Ms Mkele (ie, the second defendant) to represent him or act on his behalf, when the email does not purport to speak for him in the first place. Furthermore, by using the passive voice – rather than saying, outright, that he was or was not aware of the email (either at the time it was sent or later) or whether he did indeed have any relevant dealings with Ms Mkele before this meeting – one is left with the impression that either (a) Mr Taylor is not able to make positive allegations, under oath, on these topics which advance his case or (b) the drafter of this affidavit, not being Mr Taylor, was left to speculate about the facts because he or she was unable to, or simply did not, take proper instructions.

[18] However, buried in this paragraph of the opposing affidavit is a point which, it seems to me, could (depending on the facts) have some merit. There is no evidence in any of the relevant pleadings or affidavits to explain how Ms Mkele could, on the plaintiff's pleaded version, be "duly authorised" to bind the principal debtor to an acknowledgement of debt. This is also not apparent from the email itself. The email purports to be a minute of a "meeting". What type of meeting is never stated. Nowhere in the email does it record any express acknowledgement of liability on the part of the principal debtor. Rather, under a section of the "minute" (ie, reflected in the email) entitled "Background", (again, in the passive voice) it is recorded that "[a]t year End 2021, the outstanding amount was R2 072 318." From the face of the email, there is no way to discern on what basis that part of the background was recorded.

[19] It seems to be common cause that Ms Mkele and Mr Spoon (the other person who attended the "meeting") were directors of the principal debtor. I would not be remotely surprised if the founding documents of the principal debtor allow two out of three directors to pass resolutions at directors' meeting (or, perhaps more likely, do not alter this default position, as reflected in section 73(5)(d) of the Companies Act, 2008, which provides that a majority of votes cast on a proposed resolution at a board meeting carry the day). But the email poses more questions than answers.

[20] What type of meeting was held? The common cause facts tell me that it was a meeting held by two out of the three directors of the principal debtor. But the

common cause facts also tell me that one of these directors, Mr Spoon, was a director of the plaintiff. So, again, what type of meeting was this? It could have been a board meeting of the principal debtor. But it could also have been a meeting between the plaintiff and the principal debtor. I simply do not know. And, if anything, the particulars of claim and the plaintiff's summary judgment affidavit would seem to suggest the latter. I say this because the way in which the acknowledgement of liability is pleaded by the plaintiff is that, on 3 July 2022, "the principal debtor, duly represented by the Second Defendant, acknowledged liability to the Plaintiff in the sum of R2 072 318.00".

[21] Had it not been for the way in which Ms Mkele's 3 July 2022 email has been pleaded by the plaintiff, my strong instinct would have been to assume that the meeting was a board meeting. There is nothing stopping a small company from circulating minutes from a personal Gmail address of one of the directors, despite Mr Taylor's suggestion to the contrary in his opposing affidavit. In many respects, the email reads as one would expect minutes to read. However, no decisions or resolutions are recorded, and the minute does not even explain what kind of meeting it was.

[22] By way of elaboration, it would perhaps be helpful for me to explain the subtle, but important, difference between a scenario in which the email reflects minutes of a board meeting of the principal debtor and the scenario in which the email purports to record an acknowledgement by Ms Mkele on behalf of the principal debtor. Let us assume, simply for the sake of illustrating my point, that the particulars of claim or affidavit supporting the summary judgment application included evidence that Ms Mkele and Ms Spoon were two out of the three directors of the principal debtor (the third being Mr Taylor) and that two out of three directors of the company were authorised to take decisions on its behalf (as would be the default position in terms of section 73(5) of the Companies Act, 2008). Then let us assume further that the email reflected minutes of a board meeting, at which a resolution was taken recording the principal debtor's acknowledgement of liability. In that scenario, as long as all of these premises were indisputable, there would not be a bona fide dispute as to whether the principal debtor acknowledged liability reflected in the email.

[23] Now, let us postulate a different scenario. That is where the principal debtor acknowledges liability to the creditor (ie, the plaintiff in this case) in writing. In that situation, the question would be whether the person who purported to acknowledge liability on behalf of the principal debtor (which, as a company, had to be represented by a human) had authority to represent it. But, so long as it was common cause that he or she did, the email could constitute evidence of an acknowledgement of liability of a liquidated amount of money (and thereby be covered by rule 32(1)(b) of this Court's rules).

[24] In principle, both scenarios described above could form the basis of a successful summary judgment application. But, as I have hopefully shown, the scenarios are different, and each rely on different types of evidence. The first scenario would require sufficient evidence that the document in question reflected genuine minutes of a board meeting of the principal debtor, and sufficient demonstration that the board was quorate when it resolved to acknowledge liability. The second scenario would require sufficient evidence that the person who purported to acknowledge liability on behalf of the principal debtor had authority to do so. In either scenario, the question whether there is a bona fide defence would depend on what was said by the party opposing summary judgment (whether principal debtor or surety is irrelevant for present purposes). On the one hand, one could imagine a range of far-fetched defences which a court would probably be content to reject out of hand without proper corroboration (for example, a bald statement that the minutes envisaged by the first scenario were forged or a bald allegation that the email or document envisaged by the second scenario was produced by an unidentified hacker). But, one can equally imagine situations in which, despite the superficial impression of written proof of indebtedness, a bona fide defence is disclosed.

[25] The problem for the plaintiff is that it is not clear from the pleadings and summary judgment affidavit which scenario the plaintiff says applies to this case. If the plaintiff's version is that Ms Mkele represented the principal debtor when the latter acknowledged liability – rather than pleading that the email reflects the minute of a decision taken by the principal debtor's board – Mr Taylor is entitled to dispute that Ms Mkele had the authority to bind the principal debtor to an

admitted liability in a finite amount. Since there is nothing at all in the papers to show me that she did, I cannot dismiss this as a far-fetched or ill-conceived defence. On the other hand, if the email purports to be a minute of the principal debtor's board, then Mr Taylor is entitled to dispute that the board was quorate or even that the email reflects an actual board resolution. Since there is nothing on the papers which casts light on these issues at all, I cannot come close to granting summary judgment on this basis.

[26] I aspire to adopt a robust approach to matters such as this. I would have been very reluctant to refuse summary judgment if I genuinely believed that Mr Taylor was simply kicking for touch. But my concerns about how the acknowledgement of liability was given are not simply technical, given the vagueness of the email and the plaintiff's version in respect of it, as captured in what I have said above. As I have mentioned, Mr Taylor raises a prescription point. I have already explained that it is misconceived in many respects. However, it touches on something real – which is that the underlying principal debt was never quantified finitely, by agreement. The pleaded agreement is an oral agreement. Leaving aside the defective failure to plead who represented the parties – something which, on its own, would not justify refusing summary judgment because Mr Taylor implicitly accepts that the agreement was concluded, despite his bald denial – on the plaintiff's own version, it was an agreement to advance loans from time to time, with no fixed repayment date. The plaintiff's version is that some of the loan was repaid (the total amount loaned is not pleaded) and that, as of 3 July 2022, the sum now claimed was still owing. But, if the purported acknowledgement of this remaining liability (in the form of Ms Mkele's email) has no legal effect, Mr Taylor is entitled to require the plaintiff to prove the sum actually owing. It would also potentially bring the issue of prescription back into play, if Mr Taylor could prove that, once one leaves the July 2022 acknowledgement out of account, the principal debtor was placed in mora more than three years before the trial action was instituted in June 2023.

[27] This case fits quite neatly within the category of cases envisaged by the remarks made by Corbett JA (as he then was) in *Maharaj*: "Responsibility for difficulties arising from lack of particularity in the summons cannot be laid at defendant's

door; and some account must be taken of this factor when adjudging [the] defendant's affidavit" in a summary judgment application.[2]

[28] At the end of the day, there is insufficient information to explain the basis for the apparent acknowledgement of liability. The plaintiff pleads that Ms Mkele represented the principal debtor in acknowledging liability. Mr Taylor denies this. Given the circumstances of this case, he is entitled to do so and to insist on the plaintiff proving its allegation at trial.

[29] But, even if I am wrong, the decision of the Supreme Court of Appeal ("SCA") in *Tesven CC*[3] is, in my view, a suitable tiebreaker. That case also concerned a continuing suretyship, such as the one binding Mr Taylor, except that the liability of the surety was capped. There are two reasons why the judgment is helpful in the context of the present case. First, relying on *Maharaj* (supra), the SCA held that, even if the opposing affidavit is "not a wholly satisfactory document", summary judgment should be refused if the opposing affidavit, viewed as a whole, discloses a plausible defence.[4] Secondly, the SCA pointed out that a court hearing a summary judgment application retains a discretion to refuse summary judgment "if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defence is a good one".[5]

[30] As the SCA did in *Tesven CC*, I am inclined to exercise my discretion against the plaintiff in this case. The trial may well reveal that Mr Taylor has no legal basis to dispute the quantum of the principal debtor's liability and that his requests for information and non-attendance at the meeting which apparently took place on 3 July 2022, were simply mechanisms to achieve delay. Mr Taylor makes much, in his opposing affidavit, of Mr Spoon's role as a director of both the plaintiff and the principal debtor. Some of what Mr Taylor says in his affidavit on this topic does not appear to disclose a legal basis to impugn the apparent acknowledgement of liability. But, in circumstances where he disputes Ms Mkele's entitlement to speak for the principal debtor, and in circumstances where

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2 See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 427G-H.

3 *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA).

4 *Tesven CC* above n 3 at para 23.

5 *Tesven CC* above n 3 at para 26.

Ms Mkele did not copy Mr Taylor in the 3 July 2022 email, I have too much doubt about the circumstances of the acknowledgement to be sure that the plaintiff's claim is unanswerable.

[31] It follows that I must dismiss the application for summary judgment.

[32] For completeness, I must address the prayers for rectification in the summary judgment application. At first, I thought that the rectification issue was simple. As I wrote out my reasons for saying so, I began to appreciate that it may not be as straightforward as I thought. I was not referred to any judgment in which summary judgment was refused, but rectification granted in the same order. Even if that is competent, it seems unlikely ever to be an appropriate course for a court to take (at least, where the rectification claim is in dispute). The issue of rectification is clearly something more appropriately addressed by the trial court in due course.

[33] The normal, but certainly not invariable, practice is that a court, when refusing summary judgment, also makes a costs order against the plaintiff. In this case, I am reluctant to do so. This is because of the multiple deficiencies in Mr Taylor's opposing affidavit and heads of argument. Ordinarily, I would be very reluctant to make the question of costs in this application the problem of another judge. However, this is one of those cases where I would not wish to pre-empt the possible costs orders which the trial court might wish to make. In particular, I would like to keep open the possibility that evidence led during the trial might, understood in the context of the affidavits exchanged in the summary judgment application, have a bearing on the costs of this application. In *Tesven CC* (supra), the SCA overturned the judgment in the court below which had granted summary judgment with costs, and replaced it with an order refusing summary judgment. But, in doing so, it ordered that the costs of the summary judgment application be left over for decision by the trial Court.[6] Since my basis for refusing summary judgment follows the lead of *Tesven CC*, this strikes me as an appropriate approach to adopt here.

[34] I accordingly make the following order:

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6 See *Tesven CC* above n 3 at para 30.

Order

(1) The plaintiff's application for summary judgment is dismissed.

(2) The first defendant is granted leave to defend the trial action instituted by the plaintiff under case number: 2023-060147.

(3) The costs of this summary judgment application are left over for determination by the trial court.

ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines and by release to SAFLII. The date for hand down is deemed to be 15 January 2025.

APPEARANCES:

Attorneys for the plaintiff:	Lindeque van Heerden Attorneys
Counsel for the plaintiff:	JG Dobie
Attorneys for the first defendant:	Du Plessis Mundt Attorneys
Counsel for the first defendant:	D Du Plessis (Attorney with right of appearance)

Date of hearing: 9 October 2024

Date of judgment: 15 January 2025