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

CASE NO: 2022-003646

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

In the matter between:

ABSA BANK (PTY) LTD

Plaintiff

And

SETOIL (PTY) LTD
(REG. NO. 2004/020592/07)

First Defendant

CASTRO: EDUARDO PEREGRINO
(ID NO: 5[...])

Second Defendant

DLAMINI: NONCEDO
(ID NO: 8[...])

Third Defendant

MAKHONGELA: HAPPY STEVEN
(ID NO. 7[...])

Fourth Defendant

NTOMBELA: ZONKE CHARITY
(ID NO. 7[...])

Fifth Defendant

THAELE: LERATO CONFIDENCE
(ID NO. 8[...])

Sixth Defendant

JUDGMENT

DREYER AJ:

[1] On or about 9 June 2022 the Plaintiff instituted action against the Defendants whereby seeking judgment for:

1.1 Payment of the amount of R2 147 348.94;

1.2 Interest on the said amount at the rate of 7.75% per annum, capitalized monthly from 31 May 2022 to date of payment, both days inclusive; and

1.3 Costs on the attorney client scale.

[2] The Third to Sixth Defendants served their Plea on or about 19 February 2024.

[3] On or about 1 March 2024 the Plaintiff launched an application for summary judgment against the Third to Sixth Defendants.

[4] The Fifth Defendant served an Opposing Affidavit on or about 14 May 2024. The Third, Fourth and Sixth Defendants did not deliver any Opposing Affidavit.

[5] The defences raised in the Plea by the Third to Sixth Defendants are the following:

5.1 The Plaintiff did not comply with clause 11 of Annexures “A9” and “A10” annexed to the Particulars of Claim, and the Plaintiff therefore issued Summons prematurely.

5.2 The Third to Sixth Defendants were pressured into signing as surety.

[6] These defences are also raised by the Fifth Defendant in her Opposing Affidavit.

[7] Annexures “A9” and “A10” to the Particulars of Claim is a Suretyship/Guarantee Agreement (“the suretyship”).

[8] The suretyship was signed by the Third to Sixth Defendants on the following dates:

8.1 Third Defendant – 14 August 2017;

8.2 Fourth Defendant – 15 November 2018;

8.3 Fifth Defendant – 15 June 2015; and

7.4 Sixth Defendant – 15 June 2015.

[9] Clause 11 of the suretyship provides, *inter alia*, the following:

“11.1 If I/we fail to pay any amount that I/we need to pay to the bank at the date at which this amount becomes payable, the bank may:

11.1.1 give me/us a written notice of this failure to pay and may propose that I/we refer this suretyship to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. The aim of this referral is that the bank and I/we resolve any dispute under this suretyship and develop and agree on a plan to bring any outstanding payments up to date;”

[10] Only the suretyship of the Fifth and Sixth Defendants contains clause 11. The suretyship of the Third and Fourth Defendants does not contain a similar clause and therefore the Third and Fourth Defendants cannot rely on clause 11 as a defence.

[11] The Third and Sixth Defendants seems to rely on duress as a defence.

[12] A party relying on duress must allege and prove the following elements:

12.1 a threat of considerable evil;

12.2 that the fear was reasonable;

12.3 that the threat was of an imminent or inevitable evil and induced fear;

12.4 that the threat was unlawful or *contra bonos mores*;

12.5 that the contract was concluded because of the duress.

(See *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at p. 306 and *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at par. 36)

[13] In terms of Rule 32(3)(b) of the Uniform Rules of Court the defendant may satisfy the court by affidavit that the defendant has a *bona fide* defence to the action; such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[14] The test as to what is required from a defendant in summary judgment proceedings is: has the defendant disclosed a *bona fide* (i.e. an apparently genuinely advanced, as distinct from sham) defence? (See *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at par. 13 and 24)

[15] The Court enquires into the following:

15.1 whether the plaintiff has a valid claim;

15.2 whether the defendant has fully disclosed the nature and grounds of his / her defence and the material facts relied upon which it is founded;

15.3 whether the ostensible defence that has been pleaded is *bona fide* or not (See *Tumileng Trading CC* above at par. 40).

[16] On a reading of clause 11 it is evident that the wording is discretionary and not peremptory. In terms of clause 11 the Plaintiff may give written notice of the failure to pay to the surety, but the Plaintiff is not obliged to do so. Had clause 11 provided that the Plaintiff shall give written notice of the failure to pay to the surety, the Plaintiff would have been obliged to do so.

[17] The elements of duress as set out in paragraphs 12.1 to 12.5 above is not alleged by the Third to Sixth Defendants in their Plea.

[18] The Opposing Affidavit of the Fifth Defendant also does not contain any of the said elements of duress, nor does it set out the material facts relied upon so as to establish a defence of duress.

[19] In the circumstances it cannot be said that the Third to Sixth Defendants disclosed a *bona fide* defence.

[20] The Plaintiff seeks costs on the attorney and client scale. At the hearing of the matter Counsel for the Plaintiff was requested to refer the Court to the specific clause in the suretyship which provides for costs to be awarded on the attorney and client scale. Counsel conceded that the suretyship does not provide for attorney and client costs. Counsel therefore requested costs to be party and party costs on scale B.

[21] I therefore make the following order:

1. Summary judgment is granted against the Third to Sixth Defendants jointly and severally for payment of the amount of R2 147 348.94, the one paying the other to be absolved.
2. Interest on the amount of R2 147 348.94 at the rate of 7.75% per annum, capitalized monthly from 31 May 2022 to date of payment, both days inclusive.
3. Costs of suit on the party and party scale, scale B.

E DREYER
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date for hand down is deemed to be 10 June 2025.

Appearances:

Appearance for Plaintiff:	Adv. JJ Durandt
Instructed by:	Jay Mothobi Incorporated
 Appearance for Defendant:	 Adv. CS Baloyi
Instructed by:	Ndzondo Kunene Mosea Inc.
 Date of hearing:	 4 June 2025
 Date of Judgment:	 10 June 2025