

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. 9018/13
4325/13

In the matter between:

TIEFENTHALER ATTORNEYS

Plaintiff

and

PIETER KLEINHANS

Defendant

JUDGMENT

Delivered: 24 February 2015

BALTON J

[1] This is an application in which the plaintiff seeks summary judgment against the defendant in an amount of R1 034 750.81.

[2] On 23 December 2010 the plaintiff and Pieter Kleinhans CC, trading as Project and Development Management (PDM) represented by the defendant entered into an agreement in terms of which the plaintiff would render professional legal services to PDM against payment for such services.

[3] The defendant signed the agreement and bound himself as surety and co-principal debtor in favour of the plaintiff for and on behalf of PDM in respect of due performance by PDM of its obligations to make payment to the plaintiff.¹

[4] The defendant renounced the benefit excussion, division, *non-numerate pecuniae* and all other benefits to which he may according to law avail himself, the meaning of which benefits and consequences of which renunciation the defendant declared himself to be fully cognisant.²

[5] On 15 August 2013 the plaintiff instituted proceedings against PDM for payment of R1 034 750.81.

[6] The matter was undefended and on 26 February 2014 default judgment was granted against PDM in favour of the plaintiff.

[7] The plaintiff then instituted action against the defendant resulting in the application for summary judgment. In the opposing affidavit the defendant raised the following defences:

7.1 Non-compliance with rule 18(6) of the Uniform Rules of Court in that the summons is defective.

¹ Clause 7, page 21 of the pleadings

² Clause 8, page 21 of the pleadings

7.2 The plaintiff has failed to:

- (i) plead material terms of the quantum and attach the statement of account upon which it relies;
- (ii) make any formal written demand to the defendant; and
- (iii) comply with the various provisions of the National Credit Act 34 of 2005.

7.3 The claim has prescribed as it arose in September 2010 and the summons was issued on 8 April 2014.

[8] Ms Singh, who appeared on behalf of the defendant, was unable to substantiate any of the defences raised.

[9] The judgment was granted against PDM on 26 February 2014 and to date no application for rescission has been made against that judgment. The judgment confirmed the liability of PDM, the principal debtor in respect of the original agreement.

[10] In **JANS v NEDCOR BANK LIMITED**³ **Scott JA** held that:

Sureties do not assume the obligation of others against their wills, but with their free consent. Once having done so they cannot expect to

³ 2003(6) SA 646 (SCA) at 661 G to 662 B

be entitled simply to disabuse their minds of the fortunes of the principal debtor's liability and then require the law to protect them against their ignorance. If prescription in favour of the principal debtor is delayed or interrupted without their knowledge, the generally have themselves to blame.

...

The very existence of the debt is therefore dependent upon the existence of the suretyship while the object and function of the latter is, of course, to ensure proper payment to the former.

[11] In **MULLER & OTHERS v BOTSWANA DEVELOPMENT CORPORATION LTD**,⁴ **Mpati JA** held that:

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).

[12] The default judgment has not been rescinded and remains final. The defendant accordingly does not have a defence in rem against the principal debt of the principal debtor.

[13] Further, none of the defences raised by the defendant is available to the principal debtor and is accordingly without merit and unavailable to the defendant.

⁴ 2003(1) SA 651 (SCA) at 655 para 6

[14] The following order is made:-

Summary judgement is granted against the defendant in favour of the plaintiff for:

- a) Payment of the sum of R1 034 750.81;
- b) Interest on the aforesaid amount at the rate of 15.5% per annum *a tempore morae*; and
- c) Cost of the suit.

BALTON J

Appearances:

Date of Hearing : 13 November 2014

Date of Judgment : February 2015

Counsel for the Applicant : Van Tonder S.C.

Instructed by : Tiefenthaler Attorneys
C/o Mariam Cassim & Associates

Counsel for the Respondents : Adv. SJ Linscott

Instructed by : Schoerie Sewgoolam Inc