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

CASE NO: D1108/2020

In the matter between:

NEDBANK LIMITED **PLAINTIFF**

and

BRAVO PETROLEUM **FIRST DEFENDANT**
ADIEL HENDRICKS **SECOND DEFENDANT**

ORDER

Judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for the following:

(a) Payment of the amount of R893 144.15;

(b) Interest on the said sum at the rate of 9.75% from 28 January 2020 to date of final payment;

(c) Costs of suit on an attorney client scale, including such costs occasioned by the adjournment on 24 August 2021.

JUDGMENT

Chetty J

[1] This matter came before me on the expedited trial roll after an application for summary judgement had been refused in respect of an action in which the plaintiff sued for the amount of R1 967 481.77 arising from the breach by the first defendant of the terms and conditions of a transactional current account (No. […]) it had with the plaintiff in its capacity as a banking institution. The contention of the plaintiff, as pleaded in the particulars of claim and amplified in the affidavit in support of summary judgement, is that the first defendant concluded six instalment sale agreements and two operating rental agreements with the plaintiff. This is not disputed by the first defendant. It is the failure of the first defendant to honour the debit orders against the current account that forms the subject of the litigation.

[2] The current account, which was opened in the name of the first defendant in June 2019, was operated with an overdraft facility of R1 million authorised by the plaintiff. The plaintiff alleges that as at 1 February 2020 the account was overdrawn by an amount of R1 082 553.22. The basis for the account exceeding the limit imposed by the plaintiff arises from a series of transactions in which the plaintiff passed debit orders against the current account in respect of the instalment sale agreements and the two rental agreements in accordance with the written instructions of the first defendant. As a result of these debit orders not being honoured, the plaintiff gave notice to the first defendant to remedy its breach. As a result of a failure to rectify the excess on the overdraft facility and its failure to conduct its account in an acceptable manner, the plaintiff alleges that the first defendant breached the terms and conditions of the transactional current account resulting in the plaintiff claiming the immediate repayment of all amounts under the agreements.

[3] The terms and conditions of the transactional current account and the overdraft facility were agreed to by the first and second defendants, with the second defendant representing the first defendant at all material times. Included in the terms and conditions is the first defendant’s acceptance that it would be in default in the event of it failing to conduct the account in a manner acceptable to the plaintiff, as well as failing to rectify an excess on the account, on demand. The terms and conditions of the account were expressly set out in the plaintiff’s particulars of claim and were admitted

by the defendants in their plea. In respect of the second defendant, it was not disputed in his plea that he signed a suretyship agreement binding himself for the indebtedness of the first defendant.

[4] The defendants opposed the claim essentially contending that the plaintiff mismanaged its current account in processing or authorising the debit orders relating to the instalment sale agreements at the time when it did, resulting in the account exceeding the overdraft limit. The defendants also place in dispute the certificate of balance on which the plaintiff relies in respect of the amount due and payable.

[5] In light of the issues being clearly defined for determination, an order was granted on 7 May 2021 referring the matter to the expedited trial roll. On 23 August 2021 counsel who appeared for the defendants informed the court that he was unwell and was not in a position to proceed with the trial. Upon enquiry I was further advised that the defendants' attorney was also not present in court as he was engaged in a matter in Newcastle. The application for an adjournment was opposed by the plaintiff's counsel who pointed out that the plaintiff was ready to proceed and had secured the attendance of two witnesses from its head office in Johannesburg.

[6] In light of the concern regarding the health of the defendants' counsel, who indicated that he had already secured an urgent appointment with a doctor, I acceded to the request for an adjournment. However, as the plaintiff was clearly prejudiced by the matter being delayed, I directed that the defendants be liable for the wasted costs on an attorney-client scale, including those pertaining to the accommodation of the witnesses whose attendance had been secured by the plaintiff. I requested that the defendants' counsel furnish the court with a medical certificate indicating the nature of the illness or its severity. I further requested the details of the matter in which the defendants' attorney was engaged in at Newcastle, including the case number and the magistrate presiding in the matter.

[7] It has regrettably become common practice in this division that counsel appear without an instructing attorney in attendance. This is certainly a departure from the traditional practice, requiring the instructing attorney to be in attendance throughout. In

any event having granted the adjournment, I cautioned the second defendant, who was present court, that the matter would proceed on 24 August 2021 and that he was obliged to ensure that he was legally represented, failing which he would have to appear in person and conduct his defence.

[8] When the matter was called on 24 August 2021, neither the defendants' attorney nor counsel was present. Instead the second defendant informed the court that his counsel was ill and his attorney was engaged in a three-day matter in Newcastle. On that ground, the second defendant requested that the matter be adjourned to enable him to obtain legal representation. This application was opposed by the plaintiff, whose counsel indicated that the matter was placed on the expedited trial roll on the basis that it was capable of being resolved speedily, and that the plaintiff would be further prejudiced should the matter be adjourned once more. The approach as to the factors to be taken into account in determining whether a postponement should be granted were reiterated in *Magistrate Pangarker v Botha and Another* 2015 (1) SA 503 (SCA), paras 24-27, where the court referred to the following authorities on the subject:

'[24] Van Zyl J in *Thirion* said:[1]

"Of course no court would feel the urge to come to the assistance of a litigant who has been the author of his own misfortune and has suffered injustice by his own conduct. Cognisance must, therefore, be taken of all the relevant facts and circumstances giving rise to such misfortune and injustice. If he has been careless, dilatory or in bad faith (*mala fide*), he cannot expect the courts to come to his assistance."

[25] The legal principles governing the grant and refusal of postponements are well established. In *Carephone (Pty) Ltd* v *Marcus NO and Others*,[2] Froneman DJP held:

'In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice.'

[26] In *Take and Save Trading CC* v *Standard Bank of SA Ltd*,[3] Harms JA said:

'One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the

[1] *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C) para 34.
[2] *Carephone (Pty) Ltd v Marcus No And Others* 1999 (3) SA 304 (LAC), para 54.
[3] *Take and Save Trading CC* v *Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA), para 3.

practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.'

[27] The Constitutional Court held in *Lekolwane and another v Minister of Justice and Constitutional Development*:[4]

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest.'

[9] In considering an application for a postponement, the court is required to take into account the interests of both parties in determining whether the matter should be postponed. In this regard I took into account that the matter had already been postponed on the first day when it was scheduled for trial. In granting the postponement, I specifically brought to the attention of the second defendant, who was present in court, that should his attorney or counsel not be available, the matter would nonetheless proceed in their absence. As such, it was incumbent on the second defendant to have secured legal representation. He did not and accordingly must accept responsibility the consequences of that decision.

[10] In the result, the application for a postponement was refused and the second defendant was thereafter advised of his rights to participate in the trial, to put questions to witnesses and to remain in attendance to give evidence. Mr Hendricks, the second defendant, was present at court and informed me that he was at a disadvantage as he was not suitably trained to address the court, and that he would ultimately prejudice his

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[4] *Lekolwane and Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC), para 17.

rights by participating in the trial. He was advised of his right to cross-examine any of the witnesses called by the plaintiff and to testify in support of his defence. He elected to do neither. I refused a request for a further adjournment and the matter proceeded on the basis of the plaintiff's witnesses testifying without any cross-examination.

[11] The first witness for the plaintiff was Mr Marius Kuger, a regional manager in the plaintiff's 'recoveries team', which I assume deals with outstanding debts owing to the bank. He testified that as at 2 February 2021 the total outstanding balance due to the plaintiff was the amount of R893 144,15.[5] He confirmed that this is consistent with the certificate of balance which is annexed to the application to place the matter on the expedited trial roll, which document has been signed by the witness. The second defendant was afforded the opportunity of cross-examining the witness. He declined to do so on the basis that it would potentially prejudice his rights.

[12] The second witness for the plaintiff was Ms Rodrigues, who is the national head of Credit Risk (Retail Relationship Banking) and based at the plaintiff's head office in Sandown. With reference to the statement of the first defendant's bank account as at 1 February 2020, and which was annexed as 'POC4' to the particulars of claim, the witness testified that this document related to the first defendant's current account statement for the period 31 December 2019 to 1 February 2020. It was apparent from the document that the overdraft limit granted to the first defendant on the account was R1 million. The statement of account further reflects that the account was overdrawn by an amount of R1 082 553,22. In other words, according to the witness, the account was overdrawn by the total amount of R2 082 553.22. She went on to explain that as a result of certain debit orders processed against the account on 7 January 2020, the balance of the account increased from R871,375.20 to R1 938 820.27. These debit orders pertained to instalment sale agreements concluded with the plaintiff in terms of which the plaintiff had financed the purchase of certain vehicles and equipment for the first defendant, as well as two rental agreements. According to Ms Rodrigues the current account had been similarly debited since its inception in 2019 and on that basis, it must

[5] At the time of issuing summons the amount claimed by the plaintiff was R1 967 481.77. As set out in paragraph 11 of the application to refer to the matter to the expedited trial roll, certain payments were made by the defendant reducing the plaintiff's claim as at 1 February 2021 to R893 144.15.

be inferred, that the transactions authorised on 7 January 2020 were not the first to be debited against the first defendant's account.

[13] With regard to the contention advanced by the first defendant that the cause of the alleged breach on the transactional account was as a result of the plaintiff's repetitive conduct in debiting the first defendant's current account with the various payments pertaining to the instalment sale agreements, Ms Rodrigues testified that the first defendant had entered into various contracts and signed a debit order authorisation, which permitted the plaintiff to debit the first defendant's current account on the seventh day of each month, or on a date as agreed between the parties. In this regard the witness referred to a copy of the instalment sale agreement which was attached to the affidavit in support of summary judgement.[6] The agreement is between the plaintiff and the first defendant, represented by the second defendant, who signed the agreement. The agreement specifically provides for a debit order authorisation, with the first instalment payable on 7 October 2019, and subsequent instalments on each succeeding instalment date being claimable by the plaintiff on the basis that the first defendant would ensure that funds would be available in its account for the account to be debited. The agreement further provides that in the event of a payment not being made, for whatever reason, the first defendant would have no claim against the bank and further absolves the plaintiff from any responsibility or liability in that regard. The debit order authorisation was signed by the second defendant on 17 September 2019.

[14] The witness further testified that a similar debit order authorisation had been signed by the second defendant in respect of each instalment sale contract entered into between the plaintiff and the first defendant. In relation to the transactional current account of the first defendant, prior to the debit orders being processed, the account was being operated within the limits of the overdraft afforded to the first defendant. As set out earlier, as a result of the debit orders being processed, the overdraft limit was exceeded by R938 820.27 in light of there being insufficient funds in the account to cater for the debit orders. Ms Rodrigues denied that the plaintiff was in anyway responsible for the account falling into excess on the basis that the first defendant specifically

[6] In light of the bundle not having been received prior to the hearing of the trial, the court instructed the plaintiff's counsel to only have regard to those exhibits which were already annexed to the pleadings, in order to avoid the unnecessary handling of documentation and adherence to Covid-19 protocols.

authorised a deduction against the current account, on the due dates, in respect of the instalment sale agreements.

[15] Ms Rodrigues testified that upon the debit orders being processed and the account exceeding the overdraft limit, the plaintiff's business relationship manager would then contact the first defendant requesting that sufficient funds be placed in the account in order to rectify the shortfall in the account. This process is managed by the plaintiff's business relationship manager and his or her 'risk team'. Once a shortfall is detected in an account, an automated message is then sent to the client and to the business manager, in which the client is requested to rectify the account.

[16] The statement of the first defendant's current account reflects that the debit orders were resubmitted by the plaintiff against the account on 13 January 2020 and this was ostensibly done on the basis of an undertaking received from the first defendant that sufficient funds would be placed into the account in order to meet the debit orders. The witness testified that she was aware of certain undertakings having been given to the business relationship manager, Mr Musa Myeza, but she had no personal knowledge of those undertakings. She was aware that this included an undertaking by the second defendant that he was attempting to raise funds on a property which was bonded through First National Bank. She understood that whatever funds were advanced by First National Bank to the second defendant, these would be paid into the current account in order to offset the excess occasioned by the debit orders. Despite this undertaking, no monies were received from the first defendant. A perusal of the account reflects that despite the re-submission of the debit orders, the account still did not have sufficient funds to honour the debit orders, resulting in them being returned. They were subsequently re-submitted on 14 January 2020, with the result that the balance on the account rose to minus R2 001 404,76.

[17] As a result of the default on the part of the first defendant, the plaintiff issued a notice of default and suspension of credit facility in respect of the transactional current account, which as at 15 January 2020 had an outstanding balance of R2 060 5776.62. The notice, which the first defendant denies having received, gave the first defendant ten business days in order to rectify its account. The witness stated that these notices of default are automatically generated and dispatched to the clients, together with an

electronic message service directing the client to immediately pay the amounts outstanding on the notice. On receipt of such a notice a client can either enter into an arrangement to make such payments, or telephonically contact the bank. In the case of the first defendant, there was no response. Ms Rodrigues further stated that the notice of default, referred to as annexure 'POC6' to the particulars of claim was also sent by registered mail to the first defendant. Proof of posting was evident in the track and trace receipt which was attached to the particulars of claim.

[18] On 31 January 2020 the second defendant contacted Ms Rodrigues and escalated a complaint to her that he had not received the notice of the first defendant's account having been in default, or the reasons therefore. She confirmed having spent approximately an hour on the telephone with the second defendant in which she explained what had transpired in the account. She subsequently sent an email to the business relationship manager, Mr Myeza, advising of the concerns expressed by the second defendant and enquired of what steps could be taken to assist him. She was subsequently advised that Mr Myeza had met with the second defendant and handed him a copy of the default notice and that the second defendant had undertaken to make certain arrangements to ensure that the shortfall on the account was rectified. Ms Rodrigues testified that the plaintiff was concerned at the excess on the first defendant's current account, particularly as the plaintiff's total exposure in respect of the first defendant was in the region of R15 million. In light of the first defendant not honouring its undertaking to rectify the account, necessary instructions were issued for legal proceedings to be initiated against the first and second defendants. The second defendant was again granted an opportunity to cross-examine the witness but declined.

[19] The last witness for the plaintiff was Mr Musawakhe Myeza who is employed as a business manager in the retail banking division of the plaintiff. He testified that he has been involved with the first defendant's transactional account since 2019 and was responsible for the initiation of all the instalment sale agreements, which formed the subject matter giving rise to the present litigation. His role in the conclusion of the agreements was to conduct affordability assessments in respect of each agreement after which the application for credit would then be assessed by the bank's credit department. Once the credit application was approved, the first defendant would be

granted the necessary documentation enabling it to take delivery of the equipment or vehicles which were the subject matter of the instalment sale agreements.

[20] Mr Myeza further testified that he had personally engaged with the second defendant in which he had discussed the state of affairs of the current account and the second defendant had mentioned to him that he was in the process of receiving a funding grant from the Department of Trade and Industry ('DTI') in an amount of approximately R 800 000, which funds would be deposited into the current account. On requesting confirmation of this proposal, all that the witness received was an application for funding rather than an approval from the DTI. Similarly, in respect of the second defendant's undertaking to raise funds on an immovable property bonded through First National Bank, no further documents were received. The second defendant was given the opportunity to cross-examine the witness, but declined. This concluded the evidence for the plaintiff. The first defendant elected not to give evidence in the matter.

[21] The undisputed evidence of the plaintiff's witnesses, who testified in a clear and coherent manner, set out in detail the nature of the transactional account of the first defendant and the steps that the plaintiff took in accordance with the terms and conditions of the agreement, to encourage the first defendant to rectify its account. Only once those attempts had failed did the plaintiff proceed with the litigation. Counsel for the plaintiff submitted that the evidence of the witnesses, together with the documentary evidence, proved that the first defendant's current account had been debited in accordance with the first defendant's express instructions. At no stage did the plaintiff or its employees engage in any conduct which may have attributed to the first defendant's current account having been debited without the necessary authorisation. Once the account had fallen into arrears, the plaintiff, in accordance with the terms and conditions of its agreement with the first defendant, duly gave notice to the first defendant to rectify the arrears on the account. Once no further funds had been received from the first defendant, an instruction was given by the plaintiff for legal proceedings to be instituted. It was submitted that the first defendant breached the agreement with the plaintiff, in terms of clause 19.1.3, by allowing his account to fall into arrears, and failing on demand, to rectify the account. In terms of the agreement, the bank was entitled, after demand, to claim immediate payment of all amounts owing under the agreement.

[22] Accordingly it was submitted that the defences raised by the first defendant are without any merit and fall to be dismissed. I agree that the evidence by the plaintiff's witnesses has proven, on a balance of probabilities, that the defendants were solely responsible for payment of the instalments debited to the current account, and a failure to remedy the arrears on the account, justified the plaintiff in issuing a notice of default, and in instituting the present action.[7] There was no misconduct or any form of mismanagement by the plaintiff which resulted in the first defendant's account exceeding its permitted overdraft limit. In any event, it bears repeating that the second defendant was present in court while the plaintiff's witnesses testified. He was afforded an opportunity to cross-examine these witnesses but elected not to do so in protection of his 'rights'. Accordingly, and in the absence of such evidence being wholly unsatisfactory, the version of the plaintiff remains undisputed. I accordingly would have no reason for not granting judgment in favour of the plaintiff as against the first defendant.

[23] In so far as the second defendant is concerned, he bound himself as a surety on 25 April 2019 for the indebtedness of the first defendant, and on that basis there is no reason why the second defendant should not be held jointly and severally liable together with the first defendant for all amounts owing to the plaintiff.

[24] In so far as costs are concerned, the plaintiff seeks costs on an attorney-client scale in terms of its particulars of claim. Such costs are provided for in the agreement

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[7] It is trite that a party who bears the onus of proof has to discharge the onus. The approach to be adopted when dealing with the question of onus has been succinctly stated by Eksteen AJP in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G:
'It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if *he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true.* If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.' (emphasis added)

(clause 9.5). It is trite that an award of costs lies in the discretion of the court. Apart from the contract providing that costs on an attorney-client scale should be awarded, the decision to award costs on this scale is fortified by the approach adopted by the defendants and their representatives in the conduct in this trial.

[25] I accordingly make the following order:

Judgement is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for the following:

(a) Payment of the amount of R893 144.15;
(b) Interest on the said sum at the rate of 9.75% from 28 January 2020 to date of final payment;
(c) Costs of suit on an attorney client scale, including such costs occasioned by the adjournment on 24 August 2021. .

CHETTY J

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Date delivered:	15 September 2021