



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 14384/2024

REPORTABLE

In the matter between:

BKB LIMITED

Plaintiff

and

HENDRIK JOHANNES SWANEPOEL DE BOD

First Defendant

JOHANNES PETRUS DE BOIS N.O.

Second Defendant

HENDRIK JOHANNES SWANEPOEL DE BOD N.O

Third Defendant

DANIËL JACOBUS VAN STADEN N.O

Fourth Defendant

JUDGMENT

RK PARKER AJ

Introduction

[1] This is an application for summary judgment against the first through to fourth defendants (hereinafter referred to as the “defendants”), based on a suretyship

emanating from a credit agreement concluded between Plaintiff and first defendant and the Die Reben Trust. The plaintiff instituted action on 25 June 2024, against first to fourth defendants who as trustees are bound by the Die Reben Trust who stood as surety in terms of an agreement concluded with South African Assured Meat Group (Pty) Ltd, (“hereinafter referred to as SAFAM”).

[2] First defendant signed a written credit agreement with the plaintiff for a trade facility to be granted to SAFAM, to operate as a monthly account. This facility is repayable to the plaintiff within 30 days from the date of invoice, together with interest calculated at prime plus 5% payable on any portion of the facility that is not repaid within 30 days. The facility acted as a revolving credit facility that is annually renewable. Furthermore, there is a production facility for livestock, in terms of which SAFAM would utilize the monies so advanced for the purchasing of livestock. This facility would be repayable within 60 days. The production facility is a revolving credit facility that is annually renewable together with interest at prime plus 3% from the date on which any amount in terms of the production facility is advanced until payment of such amount is received. In addition, further interest was payable as per the agreement.

[3] SAFAM runs a sophisticated operation and derives its income in the meat production and processing industry having its own abattoirs in Robertson, Swellendam and Beaufort West. Beef and lamb of up to 10,000 animals per week are processed with its income from the sale of meat products sold locally and internationally. SAFAM relies on livestock agents to acquire the livestock from farmers and other suppliers. Some livestock agents are employed by SAFAM whilst other livestock agents are affiliated with or employed by the plaintiff or other businesses in the industry.

[4] The first defendant in his personal capacity and on behalf of Die Reben Trust bound himself as surety and co-principal debtor, jointly and severally together with SAFAM. The second to fourth defendants are sued in their capacity as trustees in favour of the plaintiff for the repayment of any sum or sums of money which SAFAM owes, in respect of the indebtedness to plaintiff.

[5] In terms of clause 11.3 of the suretyship agreement, the amount due and payable to the plaintiff may be determined and proven by a certificate issued by the plaintiff and signed on its behalf by any official of the plaintiff who is duly authorized and whose authority need not be proven. Such certificate shall be binding and shall be *prima facie* proof of the indebtedness of the defendants.

[6] The plaintiff duly complied with its obligation in terms of the agreement and advanced the amounts as agreed to at the special instant and request of SAFAM. The invoices were not met with payment, resulting in the indebtedness in the amount of R 29 746 376.27 owing to plaintiff.

Litigation history

[7] Summons was issued on 25 June 2024, following letters of demand served by the sheriff on 20 March 2024, on first defendant and the Die Reben Trust respectively, being the section 345(1) (a) notice in terms of the Companies Act 61 of 1973, for payment of the outstanding amount. On 13 May 2024 plaintiff issued an application and sought the provisional liquidation of SAFAM.

[8] Defendants duly filed their plea on 15 August 2024. Of importance, the defendants do not dispute the indebtedness of SAFAM to plaintiff, however, deny they

are liable to pay the amount as claimed as they have been released from the indebtedness, alleging bona fide defences to plaintiff's action to enforce the suretyship. The basis for nonpayment is that the sureties argue they were released from the obligations as a result of the prejudice caused to them by plaintiff's breach of its legal duties owed to SAFAM, which conduct fell outside the terms of the credit and surety agreements.

The defendant's defences

[9] In this regard the defendants argue that plaintiff deliberately and in bad faith in its dealings with SAFAM, conducted itself in such a manner, by blocking and or frustrating SAFAM's attempts to trade profitably. Such conduct restricted its cash flow to service its loan obligation in terms of the credit agreement. The defences raised by the defendants are that plaintiff unlawfully and intentionally interfered with SAFAM's contractual arrangements with suppliers such as farmers and livestock agents by instructing, inducing and or persuading them not to supply stock to SAFAM and or to breach supply agreements.

[10] The conduct of plaintiff was such that its the unlawful and intentional interference resulted in a significant increase in the risk of nonpayment of SAFAM's indebtedness to the plaintiff. Defendants provided confirmatory affidavits by a certain Daniel Jacobus Van Staden who is the director of Robertson Abattoir (Pty) Ltd that when SAFAM bought livestock from the Du Toit Boerdery, he was informed by a Mr. Ben Du Toit, that he is no longer willing to deliver the cattle to SAFAM as plaintiff had informed him that they will not get paid. This resulted in him cancelling the agreement with SAFAM and reselling the cattle to a third party. Identification of additional

“informants” could not be disclosed to protect their identity given plaintiff’s presence in the market, its influence, and control and market share.

[11] Further affidavits in support of defendants’ defences, were also provided by Mr. Nicholas Frederick Hodgson, the general manager of the Swellendam Abattoir who explained how he was contacted by a Mr. Dunn of Crodini Boerdery who informed him that he was advised by Plaintiff, that he will not receive payment for the livestock if it was delivered to SAFAM. As a result, Crodini Boerdery stopped supplying SAFAM in February 2024. Not being able to buy from Crodini Boerdery, had a negative impact on the capacity of SAFAM as they used to be one of SAFAM’s regular suppliers. In a further affidavit deposed to by a Mr. Daniel Smit Horn, a freelance livestock agent, who also confirmed the same version that SAFAM will not be able to pay for livestock. Similarly to what is stated above, the details of the informants were not disclosed as he was reluctant to name them in the affidavit, for fear of him not being able to earn a living if he disclosed too much detail.

[12] The above were the examples relied upon by the defendants, where the plaintiff instructed or persuaded the suppliers to breach the agreements with SAFAM. Thus, the defendants say that plaintiff’s conduct points to a commission of a delict and became an accessory to the wrongful act of breach of contract. This conduct caused SAFAM to suffer significant ultimately it caused prejudice to the defendant sureties.

[13] In addition, defendants claim that the plaintiff’s conduct was tantamount to defamation when plaintiff made defamatory statements to farmers and other suppliers of livestock during the period February, June and August 2024 that SAFAM will not be able to repay them if they did business with SAFAM.

[14] The defendants also contend that plaintiff's conduct was an abuse of process since plaintiff also brought a liquidation application, for the following reasons:

- 14.1 Plaintiff is an unsecured creditor whilst ABSA bank is the largest creditor of SAFAM
- 14.2 Absa bank does not support the plaintiff's liquidation application
- 14.3 It is plaintiff's real objective to procure suitable security for the facility provided to SAFAM and would consider withdrawing the liquidation application if this additional security is furnished.
- 14.4 Defendants contend that the plaintiff has abused the process of court as it's ulterior motive is one of putting pressure on SAFAM to provide the additional security to cover exposure which had not been provided for in the credit agreement.

Legal principles

[15] The first evaluation relates to the legal principles governing summary judgment which are well established. These principles had been consistently applied and endorsed across numerous decisions over the years. It is unnecessary to restate every specific aspect thereof. A substantial body of case law provides clarity on how to apply and evaluate the requirements for granting or refusing summary judgment. In *Tumileng Trading*,¹ the court reaffirmed the established principles laid down in earlier cases such as *Maharaj*² and *Joob Joob Investments*,³ specifically noting that despite the procedural amendments, the core principles when evaluating a summary judgment application remain intact.

¹ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC)

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 A

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)

[16] Given the drastic nature of a summary judgment, which, effectively shuts the door on a party, a helpful starting point when evaluating the request must always be whether the procedural requirements outlined in rule 32(1) (a - d) of the Uniform Rules of Court has been met.⁴

[17] Whilst an opposing party to a summary judgment application may have a remedy to resist the application, the defendant must present an affidavit disclosing fully the nature and grounds of the defence. The defence must be *bona fide* that is legally cognisable and factually supported, as underscored in *Breitenbach*⁵.

[18] However, even if a defendant's defence appears to not measure up to the requirements of Rule 32(3) (b), the court retains an overriding discretion to refuse summary judgment. This discretion allows the court to consider whether granting summary judgment might result in an injustice, particularly where there is a reasonable possibility that a fuller exploration of the issues at trial could reveal a valid defence.⁶

[19] In view of the extraordinary and stringent nature of the summary judgment process, the discretion may be exercised in defendants' favor if there is doubt as to whether the plaintiff's case is answerable and there is a reasonable possibility that the defendants' defence is good.⁷

⁴ which claim must therefore be based on a liquid document, or a liquidated amount of money, delivery of specified movable property or for ejectment, together with any claim for interest and costs.

⁵ *Breitenbach v Fiat SA (ENDMS) BPK 1976 (2) SA 226 (T)*

⁶ *Soil fumigation Services Lowveldt CC v Chemfit Technical Products (Pty) Ltd 2004 (6) SA 29 (SCA)* at -341-35 D

⁷ *supra* Maharaj at 425H; *Tesven CC and Another v South African Bank of Athens 2001 SA 268 (SCA)* ([1999] 4 ALL SA 396) at 277H-J SA

“The grant of the remedy is based upon the supposition that the plaintiffs claim is unimpeachable, and that the defendants defense is bogus or bad in law”⁸

[20] According to First National Bank of South Africa Ltd vs Myburgh and Another ⁹, the court has the discretion to refuse summary judgment if the court is of the opinion that there is sufficient evidentiary material to lead the court to believe that plaintiff's case may not be answerable. This discretion is based on the material before the court and if there appears to be an injustice if summary judgment is granted, the court should exercise its discretion in favour of the defendants.

Evaluation

[21]. There various defences raised by defendants that summary judgment be refused are complex. The first concern I have is that the principal debt is not denied by any of the defendants. Neither do they dispute the validity of the suretyship agreement.

[22] Secondly, defendants seek to rely on the alleged breach of legal duties owed by plaintiff to SAFAM, termed the unlawful interference, which include interference with SAFAM's contractual relationships with suppliers thereby frustrating SAFAM's trading operations. These defendants say, increased the risk of nonpayment by SAFAM and thereby causing prejudice to the sureties. For unlawful interference to succeed an action in delict for damages lies against any person (A) who intentionally

⁸ Supra Maharaj at 423G

⁹ 2002 (4) SA 176 (C) para 184G-H

and without justification induced or procured another (B) to breach a contract between (B) and a third person (C). Intention determines wrongfulness.¹⁰

[23] In this regard SAFAM has not demanded or claimed any amount from plaintiff or any of the suppliers who refused to supply, based on the breach of any duties which may result in a claim for damages or compensation by SAFAM. As such, defendants have failed to show that SAFAM has a claim against plaintiff based on this ground. Furthermore the alleged loss or prejudice is not quantified. No allegation is made that what was allegedly said by plaintiff's agents were false. Furthermore, the agent/s or persons are not identified by the deponents to support the defendants claim of unlawful interference. There is no basis pleaded or disclosed whereupon plaintiff could be held vicariously liable for the alleged actions of the agent/s.

[24] In any event, it appears that SAFAM was already as early as in February 2024 unable to pay its debts. In this regard first defendant stated that an application will be brought to place SAFAM under supervision and business rescue which could only be done if SAFAM was in financial distress. This is exacerbated by section 22 of the Companies Act, 2008 whereby a company may not trade in insolvent circumstances when the alleged statements complained of by defendants were made to suppliers.

[25] An alleged breach of delictual duty has no effect on the principal debt for which the defendants bound themselves jointly and severally to plaintiff. There is no authority presented for the proposition that the breach of delictual obligation or duty owed by creditors towards a principal debtor, could resultantly impact the sureties obligations, due to the effect of such a breach on the principal debtor. I therefore agree with the

¹⁰ Amler's Pleadings 10th edition "Interference with contractual relationships" page 224.

plaintiff, that in any event the indebtedness of the sureties could not have been increased or changed as the result of plaintiff's alleged breaches. Defendants have conflated the question of their release due to the alleged prejudicial conduct of plaintiff with the question of quantum of the principal debt, which are however two distinct inquiries. The sureties defence is about the extent of their liability¹¹ .

[26] Defendants also contend that plaintiff had a legal duty not to cause damage to SAFAM's trading reputation. Whilst it is so that the company has a common law right to its good name and reputation, and it enjoys protection under section 10 of the Constitution of the Republic of South Africa. In terms of section 9, a party may invoke the protection under the equality provisions, claim for general damages except, in the court's discretion, in cases of public discourse in public interest debates. Absent this qualification, a claim for general damages for defamation poses an unjustified limitation on freedom of expression. ¹²

[27] Where a litigant pursues actual patrimonial loss suffered because of defamation the cause of action is based on the *lex aquilia* being a claim for pure economic loss. The plaintiff bears the onus in respect of all the elements of that action. It does not follow, that because a defamatory publication is wrongful for the purposes of a defamatory action, policy considerations will automatically indicate the imposition of liability for pure economic loss resulting from that publication. ¹³ In this regard defendants do not provide any particulars of the alleged loss suffered by SAFAM as a result of an alleged defamation.

¹¹ Bock and Others v Duburoro Investments (Pty) Ltd [2003] 4 ALL SA 103 (SCA) at 22-25

¹² Amler's page 148

¹³ Amler's page 153.

[28] None of the defendants pleaded or provided any facts apart from generalized statements, to substantiate the nature and extent of the alleged damages that could, if accepted as true, constitute a claim.

[29] I also agree with the plaintiff that the defences personal to the debtor do not avail the sureties.¹⁴ Sureties can avail themselves of the debtor's *in rem* defences but not his *in personam* defences. The contrast between defences *in rem* and *in persona* were dealt with in *Standard Bank of South Africa Ltd v Fire Equipment Pty Ltd and another*¹⁵

“in rem attach to the claim or the cause of action or the obligation itself and arise from the invalidity, extinction or discharge of the application itself, whatever the data may be: those in personam arise from a personal immunity of the debtor from liability for an otherwise valid and existing civil or natural obligation. In the case of a defence in personam the obligation and the debt remain in existence.... but the debtor is personally immune from a claim. In the case of a defence in rem the law does not recognize the obligation or debt even as a natural obligation.”

[30] For a surety to be discharged of the accessory obligation between him and the creditor, even though the principal obligation remains in force, may be extinguished wholly or in part if the creditor in its dealings with the principal debtor acts in such a way as to prejudice the surety or increase his burden.¹⁶ However there is nothing to show that the creditor in his dealing with the principal debtor acted in such a way as to prejudice the sureties or increase the burden.

¹⁴ Caney's: The Law of Suretyship in South Africa 6th Ed chapter 13 paragraph 2(a) pages 188-189.

¹⁵ 1984 (2) SA 693 (C) at 696-C -E

¹⁶ LAWSA Vol 26 (2ND Ed) paragraph 307 and the authorities in note 3.

[31] Turning to the defendant's counterclaims- in general, an unliquidated counterclaim does constitute a bona fide defence to a plaintiff's claim and a defendant may rely upon it to avoid summary judgment.¹⁷ Based upon the principles formulated in Rule 22(4) and the desirability of avoiding a multiplicity of actions a surety may prior to set off becoming operative, rely on the principal debtor's unliquidated counterclaim to avoid summary judgment¹⁸.

[32] In applying this to the defendants claim, the defendant has not quantified their counterclaims in order to demonstrate that the quantum thereof is at least as much as or in any event, no smaller than the plaintiff's claim.

[33] SAFAM has not demanded payment pursuant to any alleged counterclaim they may have against plaintiff and has not instituted actions for the recovery of any damages based upon any of the grounds as alleged by the defendant sureties. Consequently rule 22 (4) does not apply.

[34] Plaintiff as an unsecured concurrent creditor, is entitled to bring a liquidation application on its admitted debt and is further entitled to an order of liquidation ex debito justitiae. In this regard SAFAM did not seek relief under this section in the answering affidavit nor mentioned any damage or loss caused by the liquidation application. Therefore, I cannot take this any further.

¹⁷ Van Niekerk et al : Summary judgement - A Practical Guide paragraph 9 .5.7

¹⁸ Supra SA Fire Equipment at 701A-E

[35] Lastly turning to the loss and prejudice, this is unspecified and unquantified. Any alleged loss suffered is not in any way linked to the result of the breach of any contractual duty or obligation owed by plaintiff to SAFAM or the sureties.

[36] The sureties bound themselves to pay the principal debt to plaintiff. This debt has not been affected and cannot be affected by any alleged loss. The sureties' liabilities has not increased or decreased. A claim by SAFAM could result in the reduction of the principal debt however no claim has been instituted since first defendant, in his capacity as sole director of SAFAM has chosen not to institute any proceedings against plaintiff for further recovery of any alleged loss and damages. This precludes the sureties from placing reliance on such loss and damages as the provisions of rule 22 (4) are not applicable.

[37] The defendants argument holds no water when it tries to rely on a defence that plaintiff was aware of the consequences that breach of the legal duties would have the effect of increasing the risk of nonpayment of SAFAM. I also agree with the plaintiff since there is no allegation of facts stated to support such submissions. Instead the sureties seek to rely on the defence *in personam* which is not available to sureties.

Conclusion

[38] Considering the foregoing, the defendants have not provided any legal or factual basis for their defence and therefore they have failed to show a bona fide defence to plaintiffs claim. The defences raised by the defendant do not comply with the provisions of rule 32 (3) (b) as they are not raised as bona fide and good in law and were raised solely for the purpose of delay. The defendants failed to prove the

prejudice on which they sought to place their defences on, as they bore the onus to prove the prejudice to be released.¹⁹


[39] For the reasons foreshadowed, the application for summary judgement is upheld.

Costs

[40] In terms of paragraph 12 of the credit and surety agreements respectively, plaintiff shall be entitled to recover legal costs in terms of the maximum legally allowed amounts. In particular, the indebtedness was not denied nor were the counterclaims of the interferences substantiated. The quantum is high and it is my view that defendants were delaying the ultimate outcome of a judgment. There are no reasons to depart from making a costs order in line with the clauses referred to above. Accordingly, costs on the attorney client scale is justified.

[41] In the circumstances I make the following order:

- a) the application for summary judgement is granted
- b) Costs are awarded in favour of the plaintiff on the attorney and client scale including the costs of counsel were so employed.



**Acting Judge of the High Court
Parker**

¹⁹ Khula Enterprise Ltd v Geldenhuys and another [2013] JOL 30641 (SCA) at [6]

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