CASE NO.: I 1545/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NEDBANK NAMIBIA LIMITED **APPLICANT**

and

ANTONIO DI SAVINO **RESPONDENT**

CORAM: **NAMANDJE AJ**

Heard on: 20 September 2010

Delivered on: 24 September 2010

JUDGMENT: APPLICATION FOR SUMMARY JUDGMENT

NAMANDJE, AJ.: [1] The applicant is a duly registered bank which as part of its business *inter alia* lends money to its customers on agreed terms. It issued summons against the respondent and two other parties as more clearer later in this Judgment.

[2] During 2005 the respondent who was one of the two members of a Close Corporation called Tile and Sanitary Ware CC "*hereinafter called the Close Corporation*" together with one Barend van den Berg "*hereinafter van den Berg*" bound themselves in favour of the applicant as surety and co-principal debtor in *solidum* jointly and severally for the due payment to the applicant of all monies which the Close Corporation may from time to time owe the applicant from whatsoever cause and howsoever arising.

[3] The relevant deed of suretyship is signed by the two sureties at the first and the last of its four pages where provision is made for their signatures. The second and third

pages do not make provision for signatures by the sureties and are thus not signed.

[4] The Deed of Suretyship provides under clause 5 and 6 as follows:

> "*5. I/We renounce the benefits of excussion and division, error in calculation, cession of action, that no money was paid over and agree and declare that this suretyship is to be in addition to and without prejudice to any other security or suretyship (including any suretyship signed by the undersigned) now held or hereafter to be held from or on behalf of the Debtor and is to be a continuing security for the Indebtedness notwithstanding any intermediate settlement of account and notwithstanding the death or legal disability of one or more of the undersigned, until receipt by you of notice in writing determining same (accompanied by proof of delivery of a copy of such notice addressed to the Debtor by the determining surety/ies advising the Debtor of termination of such suretyship) and until the sum or sums due or to become due (whether contingently or otherwise) at the date of receipt of such notice shall have been paid. Notwithstanding termination as aforesaid as to one or more of the undersigned, this suretyship is to remain in force as continuing covering security as to the other or others.*
>
> *6. Upon termination of this suretyship by notice in writing by the undersigned as set out above you may in your entire discretion continue any then existing facility or open a new facility with the Debtor and any moneys paid in respect of such facility/ies by or on behalf of the Debtor shall not affect your right to recover from the undersigned the full indebtedness of the Debtor to you at the date of such termination, subject to the limitation in amount aforementioned.*
>
> *6.1 I/We acknowledge that I/We shall only be released from my/our obligations hereunder:*
>
> *6.1.1 upon written notice from me/us to the Bank or from my/our executors, trustees or other legal representatives, as the case may be, requesting the Bank to release me/us from this suretyship; and*

6.1.2 *the Bank acknowledge in writing receipt of my written request;*

6.1.3 *and the Bank in writing advised me of the amount then still outstanding and due by the principal Debtor, for which amount I acknowledge that I shall remain liable notwithstanding such notice of termination until same has been paid in full by either myself and/or the Debtor which shall only be terminated on written notice from the Bank to me/us acknowledging that such suretyship has been terminated, but such termination shall only come into effect when the sum or sums already due or accruing at the date of receipt of such notice together with interest and costs thereon have been paid*." (Own emphasis)

[5] About three years after the respondent and van den Berg bound themselves as surety and co-principal debtors in *solidum* for due payment of the Close Corporation's debts to the applicant, the Close Corporation and the applicant concluded terms of a banking overdraft facility.

[6] By August 2008 the applicant had availed funds to the Close Corporation through and in terms of the afore stated overdraft facility as well as further funds in terms of existing business loan agreements.[1]

[7] During April 2009 the applicant caused summons to be issued against the Close Corporation, van den Berg and the Respondent in which it claimed sums of money as per paragraphs 8, 9 and 10 hereof, under three claims, jointly and severally against the three afore stated defendants.

1 There were two loan agreements in respect of which, the Close Corporation at the time of the institution of the applicant's claim, owed the applicant some amounts of money – being the sum of money claimed in the second and third claims.

[8] Under the first claim the applicant claimed the sum of N$1,997,196.73 plus compound interest at the rate of 20.4% per annum. This amount was due and payable in respect of monies lent to the Close Corporation in terms of the overdraft facility.

[9] The applicant further, under the second claim, claimed the sum of N$929,613.75 plus compound interest at the rate of 20.4% per annum. This claim arises from money lent and advanced in terms of a business loan to the Close Corporation.

[10] A third claim related to an amount of N$1,934,302.96 plus compound interest at the rate of 20.4% per annum in terms of a further business loan agreement. The amounts claimed in the three claims are alleged, in the applicant's particulars of claim, to be due owing and payable as contemplated in terms of the terms of the banking facility and the two loan agreements.

[11] After service of the summons upon the three defendants, they all filed notices of intention to defend the applicant's action. However judgments have since been obtained against the Close Corporation and van den Berg. The proceedings between the applicant and the Close Corporation and van den Berg have therefore been concluded by the time this application was heard. The applicant is proceeding against the respondent who was cited in the summons as the third defendant on the ground that, in terms of the deed of suretyship the three defendants'[2] are liable jointly and severally, one paying the other to be absolved for the debts incurred by the Close Corporation in favour of the applicant. The amounts of money claimed are all alleged to have become payable, due and owing from April 2009.

[12] After the respondent filed a notice of intention to defend the applicant filed an application for a summary judgment in terms of the Rules of the High Court. The respondent did not opt for the procedure provided for in terms of Rule 32(3)(a).[3] Instead

2 The Close Corporation, van den Berg and the respondent.

3 Which is to give security to the applicant to the satisfaction of the Registrar for any judgment including costs which may be given.

he filed an opposing affidavit as provided for in terms of Rule 32(3)(b) which states as follows:

> "*32(3) Upon the hearing of an application for summary judgment the defendant may-*
>
> *(a) …*
>
> *(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or herself or of any other person who can swear positively to the fact that he or she has a bona fide defence to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.*" (Own emphasis)

[13] In terms of Rule 32(3)(b) a respondent filing an opposing affidavit in a summary judgment application is required to disclose fully (1) the nature and grounds of the defence and (2) the material facts relied upon therefor. In my opinion for facts alleged by a respondent in a summary judgment application to qualify as a *bona fide* defence as contemplated in terms of Rule 32(3)(b), the respondent is required not only to disclose the grounds and nature thereof but facts that if looked at against the plaintiff's claim would amount to a defence in law and he is not required to merely formulate the dispute between the parties.[4]

4 The respondent is not required to prove prospects of success but only facts that may disclose a *bona fide* defence capable of fending off the plaintiff's claim if proved at trial. Whether he will succeed at the trial or not, is not the Court's concern at this stage.

[14] The respondent filed an opposing affidavit. In his bid to address the requirements of Rule 32(3)(b), he stated, under paragraph 4 of his opposing affidavit in relation to the applicant's first claim, that:[5]

> "*I admit that I have signed pages 1 and page 4 of a Deed of Suretyship with Plaintiff on the 27th of May 2005 annexed to the Particulars of Claim of the Combined Summons marked as Annexure "A". However I have neither signed nor initialled pages 2 and 3 of Annexure "A" and therefore the document signed by me was INCOMPLETE when delivered to me. The witnesses also did not sign in my presence on page 4 thereof*." (Own emphasis)

[15] The respondent further alleges that he has since sold his membership to van den Berg. This does not, in any measure, amount to a disclosure of a nature and grounds of the respondent's defence. His liability as a surety and a co-principal debtor is not dependent on him continuing being a member of the Close Corporation. The respondent therefore did not make out an arguable and triable case in this respect at all. See *Mushimba v Autogas Namibia Pty Ltd.*

[16] While the respondent appears to express doubt as to whether pages 2 and 3 of the deed of suretyship[6] formed part of the deed suretyship at the time of signing or not, he does not make *bona fide* and positive averments that such pages did not form part of the deed of suretyship at the relevant time. In my opinion, he is simply implausibly implying that as the two middle pages do not bear his signature that they were not part

5 Indebtedness flowing from the banking facility given to the Close Corporation.

6 The pages that do not make provision for a signature and which pages the respondent implies may not have been part of the deed of suretyship..

of the deed of suretyship he signed. I find that there is no genuine and serious dispute that pages 2 and 3 formed part of the deed of suretyship the respondent signed. The deed of suretyship does not provide that its validity and the respondent's liability for due performance of the Close Corporation's obligation are subject to each page of the deal of suretyship being signed and initialled by the surety. It therefore follows that by affixing his signature at the first and last pages of the deed of suretyship, the respondent thereby unequivocally expressed his intention to be a surety and a co-principal debtor for the due performance by the Close Corporation of its obligations towards the applicant.

[17] See Christie The Law of Contract in South Africa 6 ed at page 103 where he stated-

> -"….*the function of a signature is to certify that the writing to which it pertains accords with the intention of the signatory. It conveys an attestation by the person signing of his approval and authority for what is contained in the documents and that it emanates from him."*

[18] See also Sneech v Hill Kaplan Scott and Partners, 1981 (3) SA 332 (A) where the Court stated that:

> **"***This Court referred to that case in Nelson v Hodgetts Timbers (East London) (Pty) Ltd 1973 (3) SA 37 (A) and said at 45:*
>
> > *"As the problem concerns the intention of the parties to be inferred from the words used in the deed of suretyship, it may be as well to mention the elementary principle expressed by an English Judge, quoted in Steenkamp v Webster 1955 (1) SA 524 (A) at 530, that*
> >
> > *'when the signature comes at the end you apply it to everything which*

occurs throughout the contract'."

(See MELLISH LJ in Gadd v Houghton 1 Ex D 357 at 360.) This elementary principle applies to the facts of the case under consideration.

By signing his name at the foot of annexure A the appellant entered into a second contract, the particulars of which are to be found in the entire document." (Own emphasis)

[19] The attempt by the respondent to escape liability on the basis of the fact that he did not sign the two middle pages is therefore rejected as it does not amount to a *bona fide* defence.

[20] In respect of the second claim the respondent simply alleged that the loan relating thereto "*has almost been repaid*". In my opinion such statement does not constitute a *bona fide* defence. Apart from such statement being content free, it is the respondent that bears the onus of proving the extent of the repayment he alleged.[7] Should the respondent have stated, how much of the amount claimed by the applicant has since been repaid and what amount remained outstanding, the Court may then have, in such circumstances if satisfied, entered judgment for the applicant only in the amount admitted as owing and grant leave to defend to the respondent in respect of the balance as contemplated in terms of Rule 32.(6)(b)(ii) of the High Court.

[21] The respondent's allegations meant to make out a defence in respect of the third claim is, according to his affidavit, the fact that he did not sign the relevant loan contracts between the applicant and the Close Corporation and that he has since transferred his membership in the Close Corporation to van den Berg. Notably, the respondent is not

7 See South-West African Building Society and Martin David Coetzee unreported judgment, full bench judgment, delivered by this Court on the 1st of October 1999 pages 13 – 14 thereof.

denying that the Close Corporation is not liable on account of him not having signed the relevant loan contracts or that the loan contracts are unforeseeable for want of his signature. The respondent in terms of the deed of suretyship, subject to clauses 5 and 6 thereof, is liable as a surety and a co-principal debtor in *solidum* as and when the Close Corporation is liable to pay its debts to the applicant. It is irrelevant how the debts were increased. Even if the respondent were to have properly terminated the suretyship, which I find he did not properly allege, he would still have been jointly and severally liable for all the accrued indebtedness of the Close Corporation to the applicant up to the date of termination of suretyship. The respondent does not allege that he complied with the terms of the deed of suretyship pertaining to termination. He bears the onus in this respect. See Amlers Precedents of Pleadings, Harms 6th Ed at p 328.

[22] The respondent further alleges under paragraph 6.1 of his opposing affidavit as follows:

> "*Plaintiff furthermore acted totally in conflict with the agreements – Annexures "B" (dated 29/8/08) and "D" (dated 22/12/08) to my prejudice without consulting me and having signed by me and therefore I am in addition released from liability under the "suretyship", which I cannot be held liable for anymore.*"

[22] Despite this Court, in the interest of justice and fairness, resorting to a meticulous scrutiny of the respondent's opposing affidavit vis-a-vis the applicant's case as stated in the particulars of claim it did not find the above statements to amount to a *bona fide* defence against the three claims in any degree of proximity. Firstly there are no allegations that termination terms of the deed of suretyship were complied with, secondly no content has been given to the statement that the applicant acted *"totally in conflict of the loan agreements"* and to the prejudice of the respondent. Because of the respondent's audacity of belief, it appears, that such sketchy and vague allegations could be sufficient to meet the requirements of the relevant Rule, he resultantly did not make any serious effort to address the requirements of the law on opposing summary judgment applications in our law.

[23] The first respondent's last attempt at complying with the requirement of Rule 32(3)(b) is the statement that he has caused his signing powers on the Close Corporation banking affairs to be cancelled. Surely that, notwithstanding he remains

liable. He did not set out any legal ground why he would be released from his surety obligations on account of cancellation of banking signing powers. A summary judgment application is limited to four certain claims in terms of rule 32(1). Not only is it aimed at achieving certain limited aims expeditiously – it is also aimed at achieving justice for a claimant who is confronted with a notice of intention to defend filed solely to delay the matter when in fact and law the defendant has no defence to the claim. In exercising its discretion whether to enter summary judgment for the applicant or not, the court must always be aware of the fact that a token opposition made with no *bona fide* intention to defend a claim and solely filed to cause delays bears all the hallmark of injustice as it has effect of prolonging, with attendant expensive implications, a trial. Summary Judgment application remains one of the most speedier procedure to assist a bona fide and honest creditor claiming relief against an illusive debtor. In commerce, it is thus an effective mode of obtaining relief in a less expensive and expeditious manner.

[24] This Court is alive to the fact that the respondent's opposing affidavit should not be assessed with the precision required in a plea. See Summary Judgment, A Practical Guide, van Niekerk *et al*, service issue no 8, par 9.5.11. Further, the Court should always adopt an accommodating approach seeing that entering a summary judgment against a respondent at this stage may prove to be harsh. However, where a defendant such as in this case only makes statements that in substance do not disclose the nature and grounds of his defence let alone facts relied upon the court is always likely to exercise its discretion against him.

[25] This Court being justified that the respondent has no bona fide defence and that his notice of intention to defend was solely filed for delaying purposes exercises its discretion in favour of entering a summary judgment against the respondent. Accordingly in the result, I make the following orders:

AD CLAIM 1:

i) Payment in the amount of N$1,997,196.73;

ii) Compound interest on the amount of N$1,997,196.73 at the rate of 20.4% per annum to be calculated from 1 May 2009 until date of payment;

AD CLAIM 2:

i) Payment of the amount of N$929,613.75;

ii) Compound interest on the amount of N$929,613.75 at the rate of 20.4% per annum to be calculated from 1 May 2009 until date of

payment;

AD CLAIM 3:

i) Payment of the amount of N$1,934,302.96;

ii) Compound interest on the amount of N$1,934,302.96 at the rate of 20.4% per annum to be calculated from 1 May 2009 until date of payment;

Cost of suit in respect of all claims;

NAMANDJE, AJ.

ON BEHALF OF THE APPLICANT: ADV MOUTON

INSTRUCTED BY: KOEP & PARTNERS

ON BEHALF OF THE RESPONDENT: MR C BRANDT

INSTRUCTED BY: CHRIST BRANDT