




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

CASE NO: 2022/1245

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
5/10/2023	
DATE	SIGNATURE

In the matter between:

AFRICA'S BEST FOODS (PTY) LTD

Applicant

and

ED FOOD S.R.L

First Respondent

CISA SPECIALITÀ ALIMENTARI S.R.L

Second Respondent

In re

ED FOOD S.R.L

Applicant

and

AFRICA'S BEST FOODS (PTY) LTD

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application by respondent to join a second respondent – Rule 10 - basis of application is an oral guarantee that could be construed as a non-compliant suretyship or an indemnity

Application brought without service on the party sought to be joined and seeking to join a peregrinus without attachment to find or confirm jurisdiction – application dilatory - punitive cost order justified

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the application on the scale as between attorney and own client.*

[2] The reasons for the order follow below.

Introduction

[3] This is a joinder application.¹ The applicant (“ABF”) seeks to join the second respondent (“CISA”) as a respondent in the main application between the first respondent

¹ I am indebted to both counsel for their useful and lucid argument in this matter.

("EDF") and ABF. EDF is the applicant in the main application and ABF is the respondent.

[4] In October 2017 EDF and ABF entered into an agreement whereby ABF was to sell and deliver produce to EDF. The total purchase price was €92,916 and EDF paid a deposit of €42,453 to ABF on 31 October 2017. ABF was unable to deliver the produce and EDF cancelled the agreement on 2 May 2018. Its demand for the return of the deposit fell on deaf ears and it issued summons out of the High Court in Johannesburg² for the repayment of the deposit.

[5] In August 2019 EDF and ABF entered into an oral settlement agreement in Italy whereby ABF undertook to pay €48,000 in settlement of the claim and EDF in turn agreed to withdraw the action and to abandon criminal charges laid against the directing minds of ABF.

[6] While the amount was not in dispute the parties differ on when payment was to be made. On EDF's version payment had to be made by the end of 2019 and on ABF's version there was no fixed date for payment and payment would be made when it was possible to do so and on terms still to be agreed by the parties. Perhaps in contradiction of the allegation that ABF was obligated to make payment only if and when it was possible to do so, it is also alleged that a third party, namely CISA, would "intervene" when necessary to make payment to EDF if ABF were unable to do so. In other words, when it was not possible for ABF to pay then CISA would step into its shoes and make the payment. There would be no need to wait because CISA "guaranteed" payment.

On this version there would be no reason to postpone payment indefinitely until ABF was able to pay as CISA would be as a guarantor and would pay if and when ABF could not. This apparent discrepancy however need not be decided upon in this application.

[7] It is common cause that €20,000 was paid towards the indebtedness in December 2019 and January 2020. No further payments were forthcoming. Two years later, in January 2022 EDF launched an application seeking payment of €28,000 together with interest from ABF. This joinder application was foreshadowed in the answering affidavit of February 2022. EDF filed a replying affidavit in March 2022.

² Case number 2018/28941.

ABF also filed copies of the papers in a separate application between CISA as applicant and ABF as respondent pending in the Gauteng Division, Johannesburg, under case number 2021/26828.

[8] In March 2022 ABF launched an application in terms of rule 30 and 30A, arguing that an affidavit by a commissioner of oaths setting out how EDF's affidavits were commissioned by video link as well as the founding affidavits ought to be struck out. The application was heard by Moultrie AJ and was dismissed with costs.

[9] In February 2023 ABF launched this application to join CISA as a second respondent in the main application where ABF is cited as the first respondent. The application was launched a year after it was foreshadowed in the answering affidavit.

Service of the joinder application

[10] CISA is an Italian company and it does not have a place of business in South Africa. ABF elected not to bring an application for edictal citation in terms of rule 5 of the uniform rules. The rule reads as follows:

“(1) Save by leave of the court no process or document whereby proceedings are instituted shall be served outside the Republic.

(2) Any person desiring to obtain such leave shall make application to the court setting forth concisely the nature and extent of his claim, the grounds upon which it is based and upon which the court has jurisdiction to entertain the claim and also the manner of service which the court is asked to authorize. If such manner be other than personal service, the application shall further set forth the last-known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts. Upon such application the court may make such order as to the manner of service as to it seems meet and shall further order the time within which notice of intention to defend is to be given or any other step that is to be taken by the person to be served. Where service by publication is ordered, it may be in a form as near as may be in accordance with Form 1 of the First Schedule, approved and signed by the registrar.

(3) Any person desiring to obtain leave to effect service outside the Republic of any document other than one whereby proceedings are instituted, may either make application for such leave in terms of subrule (2) or request such leave at any hearing at which the court is dealing with the matter, in which latter event no papers need be filed in support of such request, and the court may act upon such information as may be given from the bar or given in such other manner as it may require, and may make such order as to it seems meet.”

[11] An application for edictal citation may under appropriate circumstances be combined with an application for substituted service in terms of rule 4(2). The sub-rule provides that when it is not possible to effect service in accordance with rule 4(1) the court may be approached to give directions in regard thereto. This will be the case, for instance, where leave is sought to serve by email on a company in Italy or to permit service by a person in Italy other than the person designated by Italian law to effect service of process. A case will have to be made out for the relief sought.

[12] ABF chose not to bring an application for the edictal citation for leave to serve on CISA but instead served the application on a firm of attorneys in South Africa on the basis that this firm represents CISA in the other litigation between CISA and ABF and also because an officer of CISA deposed to a confirmatory affidavit in the main application. The attorneys did not consent to receive service on behalf of CISA. Service on an attorney who represents a party in other matters is not good service³ and the attorneys were under no obligation to accept service. They made it clear that they were not accepting service.

[13] Rule 27(3) provides for the condonation of any non-compliance with the rules on good cause shown. ABF did not attempt to show good cause for its failure to comply with rule 5 and rule 4 in respect of service on CISA. ABF does not deal with the reasons for not employing the existing provisions relating to service. On the facts no case is made out for condonation and I need not decide whether, and if so under what circumstances, an applicant can serve first and then seek condonation in terms of Rule 27(3).⁴

³ See also *Stefanutti Stocks Civils, A Division of Stefanutti Stocks (Pty) Limited v Trans Caledon Tunnel Authority* 2012 JDR 2073 (GNP) para 14.

⁴ See *Brumloop v Brumloop (2)* 1972 (1) SA 503 (O) 504G and *Chasen v Ritter* 1992 (4) SA 323 (SE) 329B.

[14] The application is therefore fatally defective and stands to be dismissed for this reason alone.

Jurisdiction over second respondent

[15] Jurisdiction must not be confused with service. CISA is a *peregrinus* and in the absence of attachment to found or confirm jurisdiction this Court does not have jurisdiction over CISA.⁵ Any order granted by a Court when it has no jurisdiction is a nullity.⁶

[16] The application must fail for this reason also.

The joinder

[17] Joinder of a party is intended to avoid a multiplicity of actions.⁷ The party sought to be joined must have a direct and substantial interest, i.e. a legal interest,⁸ in the litigation.

[18] ABF argues that CISA was a party to the settlement agreement and it relies on a “*guarantee*” given by CISA. The allegation is worded it as follows in the answering affidavit in the main application:

⁵ See van Loggerenberg *Erasmus: Superior Court Practice* D1-196 and section 21(1) and (2) of the Superior Courts Act.

⁶ *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO* 2012 (3) SA 325 (SCA) 331H – 333C

⁷ *Gross v Commercial Union Assurance Co Ltd* 1974 (1) SA 630 (A) 634E.

⁸ *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) 415E – 416A. See also *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) 176 I – 177A.

7.7 At the meeting, CISA, represented by Dr. De Paulis, guaranteed that it would intervene, where necessary, to make payment to the Applicant where required, where the Respondent was unable to. In this regard, the necessary joinder application concerning CISA will be delivered.

[19] The question that arises in my view is whether this guarantee is a suretyship or an indemnity.

[20] The authors of LAWSA defined a suretyship as follows:⁹

“Suretyship is a contract in terms of which one person (the surety) binds himself as a debtor to the creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal debtor if and to the extent that the principal debtor fails, without lawful excuse, do render the performance himself”

[21] The obligation of a surety is an accessory¹⁰ obligation and arises if and when the principal debtor is unable to pay. The obligation of the surety is to the creditor, not to the principal debtor and the principal debtor is not a party to the contract.¹¹ If is ABF's case that CISA became bound to EDF then the guarantee would be a suretyship.

[22] A contract of suretyship must be in writing and must be signed by or on behalf of the surety.¹² It is common cause that ABF relies on an oral agreement and insofar as it is alleging a suretyship, the agreement it relies on does not comply with the prescribed formalities in respect of writing and signature.

[23] If the guarantee were to be construed as a type of indemnity, it consists of an obligation by CISA to pay the debt of ABF if and when ADF is unable to pay. It is thus an obligation owed to ABF that arises when EDF demands payment.

⁹ Lotz 'Suretyship' *The Law of South Africa* vol 26, 1st reissue, 1997, para 190.

¹⁰ *Ibid* para 192.

¹¹ *Ibid* para 194.

¹² *Ibid* para 195; section 6 of the General Law Amendment Act, 50 of 1956. The date of commencement was 22 June 1956.

[24] EDF cannot rely on the indemnity – it is not a contract of suretyship – and the right (if any) to enforce it is a right that belongs to ABF. It must demand that CISA pay the debt, thus indemnifying ABF. This is likely to be a dispute before the Italian courts but the dispute will not involve EDF. EDF must stand or fall by its claim against ABF.

[25] On the construction of the guarantee in the paragraph from the affidavit quoted above, it is not the case for ABF that the question of liability is disputed. ABF admitted liability and if it is called upon to pay and finds itself unable to pay, all it has to do is to call upon CISA to pay. CISA has denied the existence of the guarantee.

[26] No case is made out for the joinder of CISA.

Costs

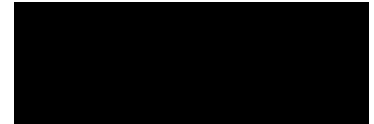
[27] EDF seeks costs on the attorney and own client scale. It argued that the application was not *bona fide* but was brought simply to delay the finalisation of the litigation. The application was not served on CISA and the court does not have jurisdiction over CISA, but this did not stop ABF from persisting with the application. The alleged guarantee is not a defence to the claim and insofar as the guarantee is a purported suretyship, it does not comply with the prescribed formalities.

[28] Awards of attorney and client costs are not easily granted but are justified when the conduct of the losing party justify such an order.¹³ For the reasons set out in this judgment I am of the view that an attorney and client cost order is justified.

¹³ *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597; *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (ZH) 143D–I, 144; *Ward v Sulzer* 1973 (3) SA 701 (A); *Buthelezi v Poorter* 1975 (4) SA 608 (W) 619.

Conclusion

[29] I therefore make the order as set out in paragraph 1 above.



**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **5 OCTOBER 2023**.

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DATE OF HEARING:	4 OCTOBER 2023
DATE OF JUDGMENT:	5 OCTOBER 2023