

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 32870/2012

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
	<u>9/6/2021</u> DATE
	<u>[Signature]</u> SIGNATURE

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

CHAIM COHEN

Defendant

J U D G M E N T

This judgment was handed down remotely by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10.30am on 09 June 2021

MAHALELO, J:

[1] The plaintiff, Absa instituted action against the defendant, Mr Chaim Cohen for payment of the amount of R20 million plus interest on the aforesaid amount at prime plus 8%, alternatively, at the prescribed rate *a temporae mora* and costs on attorney and client scale based on a suretyship agreement signed by the defendant in favour of the plaintiff in terms of which the defendant agreed to stand as surety and co-principal debtor for the obligations owed to the plaintiff by a company, A Million Up Investments 105 (Pty) Ltd ("AMU").

[2] The defendant was the director of AMU and its holding company Quantum Property Group Limited ("QPG") for a number of years. AMU entered into a series of loan agreements over a period from 2006 through to 2011 with Absa in terms of which AMU applied and was granted loans to build a hotel. The hotel is named 15 On Orange in Cape Town.

[3] AMU was liquidated in August 2012 because it failed to repay its debts to the plaintiff. It is undisputed that at the time AMU owed the plaintiff the amount of approximately R576 million and after the second and final liquidation and distribution accounts issued by the liquidators of AMU, a shortfall of R380 million was still owed to Absa.

[4] After the liquidation of AMU, Absa sued the sureties including the defendant as they had agreed that they would put up security for Absa lending the money.

Preliminary issues

[5] At the commencement of the trial, the defendant abandoned reliance on the allegations pleaded in relation to the sale of the hotel property in 2013 which is contained in the so called Blacher document which allegations are set out in paragraphs 45A to 45I and 49A of its plea.

[6] The defendant does not dispute the underlying agreement on which Absa's claim is based or the existence of the underlying debt by AMU to Absa. He has however raised several defences. Firstly, he relies on section 31(2) of the Insolvency Act 24 of 1936 to assert that Absa should forfeit its claim against AMU because Absa was a party to a collusive disposition with AMU and Protea Hotel Group ("Protea") whereby AMU paid R25 million of its assets to Protea, preferring Protea over other creditors. On this basis, he argues that he should be released as a surety. Secondly, he alleges that he signed his suretyship on the understanding between himself and Absa, represented by Bertus Erasmus, Pieter Steyn, Peter Swart and Wessel de Jager, that his suretyship would lapse if he was no longer the controlling mind in AMU. He therefore alleges a tacit term in the suretyship agreement. Thirdly, he alleges "prejudice" which he contends permits a finding that the suretyship has been discharged. He alleges that he was prejudiced by the conduct of Absa towards AMU which burdened his suretyship.

The plaintiff's case

[7] AMU concluded a loan agreement with Absa in April 2008 in terms of which Absa advanced funds to AMU with a total facility limit of R370 million ("the 2008 Loan Agreement") for the development of its property in Cape

Town on which a hotel, 15 On Orange together with parking, retail space and penthouses were to be developed.

[8] A subsidiary of AMU, Darwo was to manage and operate the hotel for which purpose it entered into a management agreement with African Pride, a subsidiary of Protea. Protea and AMU each held 50% of the share capital in Darwo.

[9] In terms of the 2008 Loan Agreement:

- (a) The loan was repayable 34 months after the date of the first drawdown being May 2009.
- (b) Construction of the entire development was expected to be completed by June 2009 and the hotel was planned to open on 1 September 2009.
- (c) It was a suspensive condition to the distribution of funds that all penthouse units were sold in terms of unconditional sale agreements to arm's length purchasers (pre-sales). Further, AMU was expected to receive the full purchase price for each of the penthouse units by 31 August 2009.¹
- (d) In addition, the retail areas within the development were expected to have been fully leased so as to generate income from time of opening.²

¹ Addendum to the Loan Agreement, pleadings "POC 3".

² Listing Particulars

[10] On or about 9 January 2008 the defendant concluded a deed of suretyship in terms of which he bound himself as surety and co-principal debtor, jointly and severally with AMU for the debts of AMU in favour Absa. The suretyship was subject to a maximum of R20 million together with such further amounts in respect of interests and costs as accrued up to the date of payment.

[11] The relevant clauses of the suretyship agreement read:

"I ... the undersigned, CHAIM COHEN ... bind myself ... as surety ... and co-principal debtor ... jointly and severally together with A MILLION UP INVESTMENTS 105 (PROPRIETARY) LIMITED ('the Debtor') in favour of ABSA BANK LIMITED ... ('the Bank') for the repayment on demand of any sum or sums of money, which the Debtor owes or may hereafter owe to the Bank from whatever cause arising ...

6. ADMISSIONS BY THE DEBTOR

I ... agree that all admissions by or on behalf of the Debtor, including but not limited to the acceptance of the Bank's claim by a trustee or liquidator in the event of the insolvency or liquidation of the Debtor, as well as any judgment granted by a competent court against the Debtor in favour of the Bank, shall be binding on me ...

7. DISCRETION OF THE BANK

I ... acknowledge and agree that the Bank may, in its discretion, without reference to me ... and without prejudice to its rights in terms hereof:

7.1 *Determine the extent, nature and duration of any facility or other advance to the Debtor;*

...

7.3 *Enter into any arrangement, compromise or settlement or grant an extension to the Debtor or any surety; ...*

9. *INSOLVENCY, LIQUIDATION, ETC*

9.1 *If the estate of the Debtor or any other person who has bound himself as surety for that Debtor is sequestrated, liquidated, surrendered or placed under judicial management, administration, compromise or arrangement, either by way of statute or otherwise:*

...

9.1.1 *the Bank shall be entitled to apply all proceeds or payments which are received from the Debtor, curator, liquidator or from any other source in diminishing the amount owed, without affecting or diminishing my liability in terms hereof for payment of the amount which is owing to the Bank by the Debtor after receipt of such proceeds or payments.'*

In terms of clause 11 of the suretyship agreement the suretyship would be a continuing covering security. Clause 15 confirms that the defendant is *'liable for all costs which may be incurred in the enforcement of this suretyship, including collection costs and legal costs on the scale between attorney and his own client'*.

Clause 16 confirms that the written suretyship document comprised the entire agreement between the Bank and the defendant regarding the suretyship. It emphasised that *'the Bank shall not be bound by any undertakings, representations or warranties not expressly recorded'* in the suretyship.

Clause 21 confirms that the Bank's entitlement to recover from the defendant is *'limited to a maximum of R20 000 000,00 together with such further amounts in respect of interest and costs as have already accrued or which will accrue until date of payment of the amount'*.

[12] The construction of the hotel was not completed on time which negatively affected the cash flow of the hotel. The defendant set out various reasons for it being delayed by six months; i.e. fatal accident on site, a change of plan to keep and incorporate in the hotel the façade of historical building, heavy rains and issues regarding interior designing of the hotel.

[13] When the hotel was ultimately opened in December 2009 not all the hotel rooms were completed and the penthouses remained incomplete. Construction, particularly in relation to the penthouses continued during 2010.

[14] As a result of being over time and over budget, AMU needed more funding. It then approached Absa for an extension of the loan facility. This extension, which provided additional capital and an extension to the capitalised interest facility, was agreed to in November 2009. It was signed by the defendant on behalf of AMU ("the 2009 Addendum").

[15] In terms of the 2009 Addendum:

(a) An extra R45 million was allocated to AMU.

(b) The repayment date was extended to 31 March 2010.³

(c) AMU was again required to confirm that pre-sales were in place.⁴

[16] AMU battled with the repayment of the loan and by 31 March 2010 it was in breach of the agreement. Absa says that it would have been entitled to call up the loan and to liquidate AMU following non-payment of the loan after the default in March 2010 but, despite the default, there appeared to have

³ Addendum Agreement clause 3.1.1 and clause 3.1.18.

⁴ Addendum Agreement clause 3.1.10.

been a *bona fide* belief by AMU's management, including the defendant, the sureties and Absa that AMU could trade itself into a better position.

[17] On 23 November 2010, AMU and QPG signed a new "*Commitment Letter*" and "*Term Sheet*" for the restructuring of the loan to AMU ("the November 2010 Term Sheet"). The Term Sheet recorded the principles that would apply and the amendments to be made to restructure the facility and implement the turnaround strategy. At the time that the November 2010 Term Sheet was signed, the defendant was the executive chairman of QPG and he presided over the board meeting of 16 November 2010, where the November 2010 Term Sheet was discussed and approved.

[18] The November 2010 Term Sheet contemplated additional revenue being generated by AMU to pay the loan debt from receipt of 100% of the profits from operations. Absa stated that in order to achieve this, AMU needed to acquire 50% shareholding of Protea in the operating company Darwo because the November Term Sheet specifically recorded the intention of AMU to acquire Protea's shares in Darwo. It was recorded as a suspensive condition that:

*"The successful finalisation of all agreements and documentation relating to the restructuring arrangement, including but not limited to, purchase of shares of 15 On Orange from Protea Hotel Group (Pty) Ltd and each document is in a form and substance acceptable to the Bank."*⁵

[19] The November 2010 Term Sheet also reflected the need for an equity contribution of approximately R50 million (plus interest) towards paying off the

⁵ Paragraph 13.4 Bundle 027-942.

loan on or before 30 November 2011. Clause 7 of the November 2010 Term Sheet confirmed that the equity (and the interest on equity) was required to be paid by the equity providers in full by no later than 30 November 2011.⁶

[20] In their financial statements, AMU and QPG relied upon the November 2010 Term Sheet to notify shareholders in QPG that they had secured an extension to repay the loan amounts.

[21] The defendant signed off on the QPG Annual Report in which these representations were made. From December 2010 Absa and AMU, through their attorneys engaged in negotiations about the wording for the long-term agreement to capture the restructuring arrangements agreed upon in the November 2010 Term Sheet. The defendant was involved in the discussions and negotiations around the conclusion of those loan agreements. Eventually, the long-form agreements were concluded on 31 August 2011 in the form of the Amended and Restated Loan Agreement (“ARLA”).⁷

[22] The loan facilities provided in the ARLA followed the same form as the facilities reflected in the November 2010 Term Sheet, namely, a facility, senior bridging facility and the equity facility. The repayment date for the equity outstanding in the amount of R61 million was extended to 31 March 2012. As contemplated in the November 2010 Term Sheet, the bridging facility in respect of equity outstanding was not to be paid from cash flows generated

⁶ Clause 7 of the November 2010 Term Sheet.

⁷ Pleadings “POC 1”.

within AMU. AMU was required to source equity injections from sureties, QPG and/or Quantum Properties by shareholder loans, share issues etc.⁸

[23] By 31 March 2012 AMU had not paid the R61 million due for payment on that date. Following the breach, Absa made demands on AMU and also on the defendant as surety. The board of directors of AMU resolved to commence business rescue proceedings on or about 4 June 2012. On 18 June the Western Cape High Court issued an order setting aside the business rescue resolution following an application by Absa. On 29 June 2012 AMU was placed under provisional winding-up. That order was confirmed and made final on 14 August 2012.

[24] There is no dispute that AMU was indebted to Absa when AMU was placed in liquidation. Further, that Absa's claim was accepted by the liquidators of AMU and after all distributions, an amount of R380 million was still owing to Absa. It is not disputed that during the liquidation two amounts were paid out to Absa as distributions in respect of its secured claims being R184 561 473,57 and R3 580 590,61.⁹

[25] During the trial Absa presented the factual statement of Mr Prinsloo, one of its employees which was admitted by the defendant in the pre-trial conference held on 20 July 2020. Mr Prinsloo is the Manager of Interest Calculating Solutions at Absa. He was asked to review Absa's records of the accounts of AMU and to confirm the interest calculations in relation thereto and the balances outstanding at various dates. He confirmed *inter alia*:

⁸ Clause 7.1.2 of the ARLA.

⁹ Amended second liquidation and distribution account.

1. The loans granted to AMU by Absa,
2. The running balance on the AMU loan accounts with Absa,
3. The interest accrued each month (running at approximately R3 million per month in 2009 and 2010.
4. The amounts drawn down and the amounts paid in.
5. That as at June 2010, the amount owed by AMU to Absa was R412 230 088,29.
6. As at 20 August 2012, the amount owed by AMU to Absa was R576 991 787,69.

[26] He was also asked to calculate the amount owed on the defendant's suretyship. His evidence is that he carried out two calculations using different interest rates. In both calculations, the capital amount owed of R20 million is deemed owed on the date on which summons was issued against the defendant which is 1 September 2012. In annexure "WP5", he calculated the interest accrued over the period since 1 September 2012 and the aggregate as at 27 September 2019 using the prime rate. As reflected on annexure "WP5", the amount owing as at 27 September 2019 is R39 178 139.32. Annexure "WP5" also reflects the date on which the *in duplum* limit will be reached using the prime rate calculation. Mr Prinsloo's evidence is that the interest accrued equalled the capital on 1 December 2019. In annexure "WP6", he calculated the interest owed on the R20 million debt using the default interest rate of prime plus 8%. In this calculation, the accumulated interest was equal to the capital on 1 October 2016. According to him the

total amount owing by the defendant under the suretyship agreement therefore is R40 million.

The defendant's case

[27] At the commencement of the trial the defendant had abandoned the defence raised regarding the tacit term in the suretyship agreement. Only two defences remained. The defendant contends that he is entitled to rely on section 31(2) of the Insolvency Act to argue that Absa's claim against AMU should be forfeited and, as a consequence of the principal debt falling away, he should be released from his suretyship. Secondly, he alleges "prejudice" which he contends permits a finding that the suretyship has been discharged.

[28] The defendant contends that he is entitled to rely on the provisions of section 31(2) of the Insolvency Act because AMU colluded with Absa and Protea in disposing R25 million of its assets to Protea on 6 September 2011 by way of Sale of Shares Agreement. According to the defendant, the Sale of Shares Agreement between AMU, Darwo and Protea was to be approved by Absa as part of the Amended and Restatement Agreement of 31 August 2011. The amount of R25 million was paid to Protea from the assets of AMU by payment of R14 million to Protea and a transfer to it of a penthouse the value of which was agreed at R11 million. At the time of the disposition to Protea, the liabilities of AMU exceeded its assets. The defendant says that the disposition of R25 million to Protea was intended and had the effect of preferring Protea above other creditors of AMU. In the result, so the defendant pleaded, Absa's claim against AMU is forfeited and as a consequence the principal debt fell away and he is released from his

suretyship. The defendant counterclaimed for an order and a declarator that the principal debt no longer exist and the surety has been released.

[29] In addition, the defendant contended that Absa and AMU entered into the ARLA whereby AMU in collusion with Absa, disposed of substantial administration, management fees to itself at a time when AMU was commercially insolvent, in a manner which had the effect of preferring Absa over other creditors. According to the defendant, in terms of section 31(2) of the Insolvency Act, Absa, being a creditor of AMU, shall be liable to make good the loss which it had caused to the insolvent estate of AMU, by way of penalty, and Absa shall forfeit its claim against the insolvent estate of AMU. In the premises, so the defence goes, the principal debt no longer exists and the sureties have been discharged.

[30] As far as the defence of prejudice is concerned, the defendant alleged that his prejudice arises from the fact that Absa allowed Protea to interfere in contractual relationship between Absa and AMU. He says that he became unable to use his position as director to recuperate AMU financially, to prevent the replacement of the management contract and to prevent dissolution of the shareholders' agreement, which loss of control he alleged burdened his suretyship.

[31] According to the defendant when AMU battled with the repayments of the loan Absa threatened with foreclosures and claims against the sureties in early 2010. An impasse had developed between the defendant, in his capacities as developer and director of AMU and Arthur Gillis of Protea who was responsible for the operations of the hotel. According to the defendant,

Arthur Gillis was critical of his managerial style whilst he was of the view that Protea had failed on the operational side. The defendant says that he wanted to get rid of Protea as the operator and Protea wanted to get rid of him as director of AMU.

[32] The defendant referred to a meeting of 13 April 2010 at the offices of Protea, where he said Mr Gillis threatened him and other directors of AMU with foreclosure by Absa should they fail to agree to a transaction which he proposed which entailed the purchase of Protea's 50% shares in Darwo at R1,00 per share, the replacement of the Darwo management contract, which would be less onerous than the then existing one and AMU's undertaking to pay Protea an amount which it had allegedly invested whilst managing the hotel.

[33] The defendant says in evidence that it was at that meeting where he stated to Absa's representatives that he had an offer to raise finance of R300 million for AMU's development from a Chinese Construction Bank. He also stated that he wanted to replace Protea with another hotel group as the manager of the hotel. The defendant testified that Absa didn't allow him to introduce an investment offer of R100m made to AMU by Mvelaphanda and Radisson Hotel Group on the excuse that they will only support introduction of investments that include Protea (Gillis) involvement in the management of AMU hotel. It is the evidence of the defendant that when he mentioned these proposals to recuperate the business of AMU, Absa's representatives insisted that he be removed as a director and insisted on Protea's involvement in the management of the hotel, albeit on more onerous terms than before.

[34] According to the defendant, shortly before 28 February 2011 Peter Shaff, who was one of the directors in AMU purchased all the shares which Gary Itzikowitz's company, Compass Projects (Pty) Ltd had in QPG as well as its loan account in AMU for R21 million in order to entrench his position in AMU with 76% of the votes and ensure that the defendant does not return to the board of QPG and AMU. Peter Shaff made the first payment of R1,2 million. According to the defendant, Pieter Swart of Absa, despite being aware of Shaff's *mala fide* deal, neither him nor Erasmus had divulged this to Absa and they allowed AMU and Absa to enter into the Amendment and Restatement Agreement on 31 August 2011 with Gary Shaff representing AMU, as well as the disposition of R25 million by AMU to Protea despite the fact that nothing was owed by AMU to Protea.

[35] According to the defendant, Absa ignored the memorandum containing the suggested terms of the Term Sheet of November 2019 which he submitted despite its knowledge of Shaff's *mala fide* deal in acquiring control of AMU and continued with the preparation of the contract documentation for the ARLA.

[36] The defendant also says that on 19 June 2012 Absa had four of its own officials appointed as directors in AMU but were later removed through attorneys. According to the defendant Absa did its utmost to get rid of him and to gain control of AMU and this was done in unison with Protea.

[37] It is common cause that R25 million had been paid to Protea from the assets of AMU in terms of the Amended and Restatement Agreement incorporating the Sale of Shares Agreement. As at 31 August 2011 the

outstanding indebtedness of AMU to Absa stood at R426 million. The defendant says that the ARLA had the effect of increasing the debt to R581 420 062,42 on 26 June 2012 when Absa launched application to liquidate AMU.

[38] The defendant referred to Absa's valuation of the hotel being Amu's asset contained in the affidavit deposed to by Martin Charles Leigh, Absa's head of Restructuring Advisory Group of between R300-R350 million at that stage despite earlier valuations of R750 million and R560 million by external valuations. According to the defendant, there is nothing to suggest that the value of the hotel property was higher at 31 August 2011 than the value at which Absa itself had valued the property as stated in Leigh's affidavit. The defendant testified that because the property was sold by the liquidators of AMU for R205 million it means that even Leigh's valuation of between R300-R350 million was optimistic, which then follows that before and after, as well as at the time of the disposition of R25 million of AMU to Protea, the liability of AMU exceeded the value of its assets and in terms of the second liquidation and distribution account of AMU there was a huge shortfall which then clearly shows that Protea was preferred to other concurrent creditors in that it is the only creditor of AMU which received its total claim.

[39] According to the defendant, Absa did not claim the R25 million from Protea as it was entitled to do in terms of section 31(1) of the Insolvency Act because it would be met with a defence that it was a party to the collusion, same applies to the liquidators of AMU. The defendant testified that the collusion to prefer Protea over other creditors was made possible by Peter

Shaff's fraudulent purchase of Itzikowitz's shares and Absa closed its eye and played along to get the agreement signed on 31 August 2011. The defendant says that Absa was aware that payment of R25 million by AMU to Protea would have the effect of prejudicing AMU's other creditors and it also knew at the time of the disposition that AMU's financial position was hopeless.

[40] During cross examination the defendant acknowledged the trite principle that the corporation (AMU) and the individual director (himself) were separate legal entities and that the bank dealt with them separately, each in its own capacity. As such, where the defendant (in his personal capacity) gave a written suretyship to the bank as security for the debts owed by AMU, there is no basis to import a necessary connection between the defendant and AMU in order to sustain the enforceability of the suretyship.

[41] The defendant tendered the evidence of Gary Itzikowitz (*Mr Itzikowitz*) in support of his case. In relevant parts his evidence is that he was a director of AMU and QPG from 2004 until 2010. When the Development Loan Agreement of 2008 and the Addendum thereto were concluded in 2009 he was director of AMU. He resigned in 2010 as a result of tension between the directors of AMU and QPG and pressure from Absa and Protea. He is aware of the loan that was granted to AMU prior to him being appointed a director of AMU. He confirmed that Absa charged capitalised interest on the loan. He accepted that AMU was in breach of the loan agreement and that the addendum was concluded because AMU needed more funds and had to apply to restructure the loan. He accepted that during the restructuring of the loan, the repayment period of 34 months in the original loan was replaced with

the repayment date of 31 March 2010 and the total facility limit to be repaid was R370 million. Mr Itzikowitz testified that he was aware of the two undertakings which the defendant gave to Absa, one in his personal capacity and the other in his capacity as director of AMU for payment of R57 million to Absa by close of business day on 31 March 2010. He is aware that the undertakings were never honoured and is in agreement that Absa was entitled to call up the loan and demand payment from the sureties. With regards to "POC1" Mr Itzikowitz testified that Absa was aware that the defendant had not approved of the transaction embodied in ARLA. According to Mr Itzikowitz, Absa insisted on Mr Gillis being part of the contractual relationship between itself and AMU and insisted on the defendant's removal as director. It is his evidence that shortly before 28 February he concluded an agreement with Peter Shaff in terms of which Peter Shaff purchased 17.2% shareholding which Itzikowitz's company (Compass Projects) held in QPG for R21 665 004,00 as well as his loan account in AMU. Peter Shaff paid R1,2 million. This transaction would enable Peter Shaff and his co-directors to control AMU with 76% of the votes and to be able to get rid of the defendant as the director of AMU.

[42] Mr Itzikowitz says that Peter Shaff and his brother Garry were *mala fide* in the purported purchase of his shareholding and the loan account, and that the initial payment by Peter Shaff was made with the purpose of getting him and the defendant out of their way in order to fulfil Absa's wishes of getting rid of the defendant. According to Mr Itzikowitz, Peter Swart of Absa co-signed the ARLA on 31 August 2011 with the full knowledge that the board of AMU, who resolved in favour of the transaction had fraudulently been established by

Peter Shaff and his brother through the *mala fide* transaction in terms of which they purported to buy his shares in QPG, which was the holding company in AMU. According to Mr Itzikowitz, at all times and particularly on 31 August 2011 Absa through its representatives was aware that AMU had no contractual relationship with Protea and that AMU had not been indebted to Protea. Mr Itzikowitz says that having regard to the affidavit of Martin Leigh in the liquidation application of AMU by Absa, AMU's indebtedness to Absa exceeded the value of its assets immediately after the conclusion of the ARLA. With regard to the R25 million paid to Protea, Mr Itzikowitz testified that Absa colluded with AMU for the benefit of Protea and the disposition had the effect of preferring Protea over other creditors. He complained that part of the money used to make the payment was the R7 million cash deposit which was held as security by Absa in terms of the 2008 Loan Agreement. Under cross examination when he was asked to provide a date or refer to documents in support of his accusations of collusion, Mr Itzikowitz indicated that the particular event occurred after his time as director of AMU. When questioned about the failings of AMU/QPG to meet the deadlines he took no responsibility. He confirmed that the defendant failed to disclose the resale agreements with the sale of the penthouses and he conceded to the financial losses it caused.

[43] Peter Shaff also testified for the defendant. In relevant parts his evidence is that he served as an Executive Director of AMU from 6 December 2010 until its liquidation in 2012. He was also a Director of QPG from 24 June 2010 until 2016. QPG was the sole shareholder in AMU. AMU was used for the hotel project. AMU and Protea each held 50% of the shares in 15 On

Orange, which functioned as the operator of the hotel. Protea was obliged to invest some R11 million in the furniture, fittings and equipment for the hotel and to fund the first year's working capital and any losses of the hotel. Thereafter the hotel losses, if any, were to be funded on a 50/50 basis by AMU and Protea. In the course of the operation of the hotel the relationship between the defendant and Mr Gillis of Protea became fraught, to the knowledge of at least Lyndon Kan of Absa.

[44] As at 31 March 2010, AMU was in default in respect of its obligations to Absa under the loan agreement. The amount of the loan had risen from the original advance of R370 million to some R425 million on account of an additional advance of R45 million which the defendant secured in November 2009 in order to try to complete the hotel. Absa was therefore entitled to call up the loan, liquidate AMU and sell or take over the hotel. According to him, had Absa done so when the debt stood at R425 million, the loss to it would have been considerably less than that which it sustained when AMU was ultimately liquidated, by which time its liability to Absa had risen to some R580 million.

[45] On 13 April 2010 he attended a meeting with his brother, Gary Shaff, together with Mr Gillis, the defendant, Mr Itzikowitz and Shur. At that meeting the defendant stated that he could raise finances of R300 million for AMU's development from the Chinese Construction Bank. He also stated that he wanted to replace Protea with another hotel group as the manager of the hotel. Absa represented by Lyndon Kan, was not prepared to entertain outside finance, and ensured no other hotel operator would take over the

management. Mr Gillis told Absa, represented by Lyndon Kan, not to accept the defendant's deals.

[46] On 6 September 2011 a Sale of Shares Agreement was entered into by Protea, AMU and Darwo in terms of which Protea sold to AMU 50% of the issued share capital of Darwo (60 shares) for R1,00 each. AMU undertook to pay to Protea its claim of R25 825 569,14 (which included interest) against Darwo by way of a payment of R11 million, a payment of R3 million and transfer to Protea of a penthouse which the parties valued at R11 million. The Sale of Shares Agreement was subject to the fulfilment of conditions precedent, amongst others, that Absa approve of the conclusion thereof. The conditions precedent were fulfilled and AMU effected payment of R25 million to Protea, on the basis as agreed (including transfer of the penthouse). The said Sale of Shares Agreement constituted an integral part of the Amendment and Reinstatement Agreement. On 19 June 2012 Absa caused four of its employees to be appointed as directors of AMU. Mr Shaff and the others objected through their attorneys, as a result Absa abandoned the appointments.

[47] Prior to, and at the time of the conclusion of the said Sale of Shares Agreement, Absa, represented by Anneri Harley, Pieter Swart, Lyndon Kan, Wessel de Jager, Pieter Steyn and Bertus Erasmus, were aware that AMU had not been indebted to Protea. AMU's undertaking in the said Sale of Shares Agreement to pay the indebtedness of Darwo to Protea, created Protea as creditor of AMU and given the fact that AMU had been insolvent at

the time, the payment to Protea was intended to, and had the effect of preferring Protea above AMU's other creditors.

[48] Under cross examination, Mr Shaff testified that Absa had developed the base case model which was a variable five-year financial model wherein AMU tried to make repayments within five years. He indicated that the base case model also had debentures with it. He also stated that it included the sale of penthouses and that the model took into account the assumption that Protea would buy shares from Darwo. According to him, the model encouraged the Protea-Darwo deal and for Protea to sell its 50% shares to AMU. Mr Shaff testified under cross examination that Absa did not allow them a period of five years but instead called up the loans on 31 March 2012 despite an undertaking that the date will be deferred to September 2012. Mr Shaff confirmed that while he was director of AMU in 2010 the source of funding to pay AMU's creditors was Absa and that Absa wanted to pay other creditors of AMU to prevent liquidation and it was consistent throughout and only changed in December 2012. He accepted without resistance that the intention of Absa and AMU at the time that the ARLA and Darwo deal were concluded was to ensure that AMU's other creditors were paid. He added that when the August 2010 agreement was signed between Absa and AMU, Absa's intention was to support AMU to trade itself into a better position. He acknowledged that Absa had been incredibly supportive of the hotel. He maintained his stance that the auditors of QPG were provided with an oral assurance by Mr Steyn on behalf of Absa that the repayment of R61 million would be deferred to September 2012 and that the loan would not be called up but, when he was taken through the evidence and documents including his

recordings he admitted and conceded that the claims he made in his witness statement against Absa were baseless. Mr Shaff further testified that Absa and Protea colluded against AMU but could provide no evidence in support.

[49] In rebuttal Absa presented the evidence of Mr Pieter Willem Steyn (*Mr Steyn*). In his witness statement and oral testimony Mr Steyn indicated in relevant parts that he joined Absa in 2007 as a member of the Corporate Development Division, being Absa's internal corporate finance house. At the beginning of 2010, he took up the position of Head of Business Support and Recoveries in the Business Bank. In that position, he was involved in and was responsible for medium, large and certain corporate accounts which were distressed. These accounts included AMU 's account which was part of the Corporate Property Finance Division's distressed client portfolio.

[50] His involvement with AMU and QPG was primarily during 2010 and 2011 in his role as head of Business Support and Recoveries and to a much lesser extent, during 2012. Wessel de Jager reported to him. Other members of the Absa management team that were directly involved during 2010 included the then Head of Commercial Property Finance, Lyndon Kan and Absa legal advisor designated to the AMU matter, Annari Harley. The Business Support and Recovery Division was a support function within the bank and was required to work with "*the front line*" departments who engaged directly with the customers on a regular basis. The frontline sales personnel from the Absa Commercial Property Finance Division with whom they engaged on the AMU matters were, primarily, Bertus Erasmus and Diane Vaskys. At all the times that he dealt with AMU, the AMU and QPG boards

knew that changes to the loan facility amount and/or changes to the loan terms and conditions could only be approved by the AGCC (Absa's credit committee), individual managers dealing with the customer were not authorised to make decisions on behalf of Absa in this regard.

[52] When he became involved with the AMU account in early 2010, AMU had already been in default and an amendment to the 2008 Development Loan Agreement (*"the 2008 Agreement"*) had been concluded in November 2009 (*"the November 2009 Addendum"*), in order to provide AMU with additional funding and additional time to repay the loan. The hotel was supposed to have been open in mid-2009 and the penthouse units that formed part of the development were to have been sold. The 2008 Agreement anticipated that income from the sale of the penthouse units would have reduced the aggregate loan amount by approximately R110 million and the hotel revenue from mid-2009 was expected to service the remaining debt. Absa was intent on assisting AMU to trade its way into a better position but there were a number of factors which could negatively affect the achievement of that. At the same time Absa was concerned that there was infighting between the management of AMU and Protea and the directors and shareholders of AMU were not prioritising the company's obligation to repay the loan. As a result, Absa decided to deliver notices to the sureties which were designed to focus the minds of the sureties that they would be personally liable if the debt was not paid.

[53] According to Mr Steyn it was in the interest of all concerned not to liquidate AMU at that stage but to allow the hotel an opportunity to grow its

business, to grow its reputation and to attract guests. At the meeting held between Absa and AMU's management on 15 April 2010 to discuss scenarios which would work for Absa in order to reduce Absa's exposure to AMU, various options were presented and discussed. The defendant advised that he had received a letter from the China Construction Bank expressing interest. He did not share the letter or the details of the interest with Absa and he has never seen any letter from the China Construction Bank to that effect. The defendant also mentioned that there was an investor looking to invest more than R30 million. At that meeting the defendant also suggested that a restructuring might take place in terms of which a new operating company might be formed which would take over the management agreement with Protea.

[54] Mr Steyn says that the representations made by the defendant in relation to the alleged investors were deemed very loose by Absa and could not be taken seriously as no written undertakings had been received and no terms had been presented as to what those investors would require in return. Given Absa's experience with the defendant reneging on written undertakings to make payments, Absa was not persuaded that there were any real prospects of such investments materialising.

[55] AMU was still looking to Absa to provide additional funding in order to complete the construction and to assist in funding certain operating expenses. Absa indicated to the defendant that it was difficult for it to release funds for construction outside of any agreement. Following a meeting on 21 May 2010 Absa presented a new term sheet to AMU. The new term sheet proposed

additional security being given to Absa, the restructuring of the loan repayments and restructuring of the operating company. Wessel de Jager of Absa gave the AMU board until 30 June 2010 to comply with the requirements of the draft term sheet that had been sent. According to Mr Steyn, Absa never intended who the directors of AMU should be or how those directors should carry out their business, but that Absa could not be compelled to commit additional funding or incur additional risk unless it was happy with the strategy proposed by the directors and managers.

[56] In November 2011, he (Steyn) was told by Peter and Gary Shaff that the auditors of AMU, Grant Thornton, were concerned over AMU's ability to repay the Equity Outstanding (defined in clause 2 and Part 1 of Schedule 2 of the Amended and Restated Loan Agreement) as at 31 March 2012. They requested that he attend a meeting with Grant Thornton. He attended the meeting with David Ruben of Grant Thornton on 22 November 2011. At that meeting, he was asked about the loan commitment and what was anticipated by Absa. He confirmed to them that the written agreements recorded Absa's requirements and that Absa expected shareholders and sureties to make payment of the R61 million due on 31 March 2012. He pointed out to them that the agreements precluded AMU from paying the R61 million from its own revenue streams. He stated to the auditors that Absa wished to support AMU but he gave no assurances that Absa would not call up the loan facility on 31 March 2012 or any other undertakings of such a nature in the event of a default. He pointed out that he was not authorised to give such undertakings on behalf of Absa and that it would be irregular for auditors to rely on any oral statements in making their determinations. He categorically rejected the

suggestion by Mr Shaff that he gave assurances on behalf of Absa to the auditors that the loan would not be called up. Mr Steyn referred to his internal email of 23 November 2011 in which he reports on the content of a telephone conversation with Peter Shaff on 23 November 2011 the day after he had visited the auditors. He testified that Mr Shaff reported to him that the auditors had told him that they would not qualify the audit. He noted in that email that he was not sure that he understood how this "*swing*" had been achieved. He stated in this regard that Mr Shaff had told him that the liability in respect of the R61 million was to be shown as a short-term liability. This was confirmed in the financial statements when they were published. According to Mr Steyn, there was no suggestion that the debt repayable on 31 March was to be deferred. Mr Steyn testified that the terms of the original Shareholders Agreement and particularly clauses 15 and 20 thereof dealt with the termination of the management agreement and the sale of shares. According to him the disposal of the shares necessarily required that the loan accounts with Protea be settled at the same time. Mr Steyn's evidence was that, the turnaround strategy which had been agreed between AMU and Absa required them to ensure that the furniture and fittings of the hotel remained in place and that the booking system remained operational to continue generating revenue. According to Mr Steyn, because Protea held a notarial bond over the furniture and fittings in the hotel and controlled the booking system, if its loan accounts were not repaid or Protea walked out, Protea could lawfully exercise its rights under those notarial bonds and remove the furniture and fittings as well as the booking system, rendering the hotel inoperable. This, according to him, was a significant risk which both AMU and Absa sought to avoid. Mr

Steyn pointed out that the replacement of the hotel operator as proposed by the defendant would have taken time to implement and the defendant had not shown how this was to be achieved or what revenues would be generated to pay the cost incurred in the meantime (including the interest payable on the Absa loan which was running at over R3million per month at the time). Further, the turnaround strategy supported by the base case financial model required AMU to receive a “full cash sweep” of all of the profits generated by Darwo in the operation of the hotel, not just 50%. If the Darwo deal was not done, Protea would have retained 50% of the shares and therefore an entitlement to 50% of the dividends/profits. According to Mr Steyn given the above, it is absurd and certainly not business-like for the defendant to contend that Protea could have been required to sell its shares to AMU without having its loan account settled. It is Further Mr Steyn’s evidence that when the November 2010 term sheet was signed, AMU, QPG and the defendant personally recognised and expected that the purchase of Protea’s shares would necessarily include and required the settlement of the loan account. As such, it is spurious to suggest that the settlement of the loan accounts as part of the 2011 Sale of Shares agreement was somehow a collusive arrangement intended to prefer Protea and prejudice other creditors.

[57] At the commencement of closing argument, the defence raised by the defendant in relation to prejudice was abandoned and the only issue argued before me was the defence raised under section 31(2) of the Insolvency Act. Mr Turner on behalf of Absa filed comprehensive heads and addressed all the defences raised by the defendant. However, as I have indicated above the only question under consideration is whether the defendant, being a surety is

entitled to raise a defence under section 31(2) of the Insolvency Act without having successfully brought an application/action to set aside the alleged collusive disposition.

[58] The defendant relies on section 31(2) of the Insolvency Act for his defence that the disposition of R25 million to Protea was made through collusion between AMU and Absa to benefit Protea to the prejudice of other creditors. He contends that because of the collusive disposition Absa's claim should be forfeited and he be released from his obligation as surety.

[59] Absa contends that the defendant lacks *locus standi* to raise the defence based on section 31(2) of the Insolvency Act, because he had not prosecuted an application in terms of section 31(1) and that in the absence of such an application having been successfully made, the defendant has no defence. That in any event, the defendant would have been precluded from making such an application as he, being neither the liquidator nor the creditor of the insolvent estate as envisaged in section 32(1), lacks *locus standi* to do so. It asked for the dismissal of the defendant's defence and counterclaim.

[60] In argument Mr Arnoldi on behalf of the defendant argued that the *locus standi* requirements for section 31(1) were not relevant because the defendant does not seek to set aside any transaction (as contemplated in section 31(1) and section 31(2) but seeks only to rely on the forfeiture element available under section 31(2). He argued that the *locus standi* restrictions which apply to section 31(1) and section 32 are not applicable if reliance is only placed on the forfeiture element in section 31(2). Mr Arnoldi contended that a finding of collusion in this court would precipitate automatic forfeiture of

Absa's claim against AMU. This he contends would mean the extinction of the principal obligation of AMU to Absa, automatically extinguishing his debt as a surety.

[61] Mr Arnoldi argued that on a proper interpretation of section 31(2) the words "*such collusive disposition*" refer to a collusive disposition as described in section 31(1), and not to a disposition which has been set aside, as contended for by Absa; and the words "*he shall also forfeit his claim*" in section 31(2) refer to any creditor who was a party to a collusive disposition, irrespective of whether proceedings have been instituted to set aside the disposition. According to him, forfeiture flows from a collusive disposition and not from the setting aside thereof. The setting aside of a collusive disposition is not a prerequisite for forfeiture and the fact that a collusive transaction remains unchallenged by a trustee or creditor cannot detract from the fact that it is a collusive transaction. He added that if collusion is found, forfeiture of the creditor's claim results in terms of section 31(2) as a matter of law. Mr Arnoldi contended further that if the intention of the legislature had been that a creditor who is guilty of collusive dealing should forfeit its claim against the insolvent estate only if the trustee (or liquidator(s)) or a creditor successfully instituted proceedings to obtain an order of court declaring the colluding creditor's claim to be forfeited, then it would have been an easy matter for the lawmaker to have said so in section 31(2). But the lawmaker has not said so. Instead, section 31(2) states that the colluding creditor "*shall... forfeit his claim*". According to him the word "*shall*" is peremptory and if the lawmaker had intended the forfeiture of the colluding creditor's claim to be contingent upon the successful institution of legal proceedings to set aside the collusive

disposition and/or to recover compensation and/or a penalty, then one would have expected the lawmaker to have used the words “*may . . . forfeit his claim*” instead. Mr Arnoldi argued that section 32 does not make provision for proceedings for forfeiture, which according to him, supports the argument that collusion triggers forfeiture as a matter of law. He submitted that section 32 provides for the setting aside of a disposition of property under sections 26, 29, 30, 31, or the recovery of compensation or a penalty under section 31. He contended further that because the defendant seeks neither the setting aside of the disposition, nor payment of loss or compensation by way of penalty, it follows that section 32 does not apply to the question of *locus standi*.

[62] With regard to the interpretation of section 31 Mr Arnoldi submitted that legislation must be interpreted so as to give effect to the purpose for which it was enacted. He urged the court to prefer a sensible meaning to the one that leads to insensible or unbusinesslike results or that undermines the apparent purpose of the legislation. To this end, he referred to what was held in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁰ that:

*“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.”*¹¹

¹⁰ 2012 (4) SA 593 (SCA).

¹¹ At para 18.

[63] According to Mr Arnoldi, it is clear from section 31(2), in particular the provisions for the recovery of a penalty from a party to a collusive disposition and for the forfeiture by a colluding creditor of its claim against an insolvent estate (or company in liquidation) that one of the purposes of the Insolvency Act is to stamp out collusive pre-sequestration dispositions, which are a species of fraud or cognate to fraud. He argued that to interpret section 31 in the manner contended for by Absa (i.e. to deprive a person in the position of the defendant of the benefit of the provision that Absa, as colluding creditor, “*shall also forfeit [its] claim*”) would be to undermine the clear purpose of stamping out collusive dispositions and to fly in the face of the purpose to which sections 31 and 32 are directed.

Legal Principles and Analysis

[64] Section 31 and 32 of the Insolvency Act provide as follows:

“Section 31 Collusive dealings before sequestration

- (1) *After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.*
- (2) *Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.*
- (3) *Such compensation and penalty may be recovered in any action to set aside the transaction in question.”*

Section 32 Proceedings to set aside improper disposition

“(1)

(a) Proceedings to ... set aside any disposition of property under section 26, 29, 30, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee.

(b) If the trustee fails to take any such proceedings, they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.

(2) In any such proceedings the insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he may be called by the court to give evidence. When giving such evidence he may not refuse to answer any question on the ground that the answer may tend to incriminate him or on the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

(3) When the court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.”

[65] What distinguishes a disposition in terms of section 31(1) from voidable and undue preferences is the element of collusion, and that the trustee in the insolvent estate may in addition to setting aside the disposition, recover from any person who was a party to such collusive disposition any loss which the disposition caused to the insolvent estate, and a penalty in an amount determined by the court. The compensation and penalty may be recovered in the action to set aside the disposition.¹² To succeed with an action under section 31(1) the trustee must allege and prove the following:

(a) The insolvent made a disposition of his property;

(b) The disposition was made in a collusion with another person; and

¹² Section 31(3).

- (c) The disposition had the effect of prejudicing creditors or preferring one above another.

[66] In order to answer the question raised in this action, the interpretation of section 31 becomes necessary. I bear in mind what the Constitutional Court, confirming *Endumeni*, held in *Chisuse*¹³ that:

"[47] In interpreting statutory provisions, recourse is first had to the plain, ordinary grammatical meaning of the words in question. Poetry and philosophical discourses may point to the malleability of words and the nebulosity of meaning, but, in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation would result in an absurdity. As this court has previously noted in Cool Ideas, this principle has three broad riders, namely —

'(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

[48] Judges must hesitate 'to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation."

[67] Section 31 of the Insolvency Act is located within a series of provisions dealing with the trustee's powers while the estate is vested in the trustee.

¹³ *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC).

Section 25 of the Insolvency Act provides for the “*estate to remain vested in trustee until composition or rehabilitation*” and sections 26 – 34 deal with various scenarios in which the trustee might seek to recover assets that were disposed of prior to sequestration, which should fall within the estate. The trustee’s powers also include the power to recognise or reject creditors’ claims. The overriding purpose of these sections is to ensure that the property which has left the estate of the debtor in improper circumstances (as described in the Act), will be returned to the estate for a structured and equitable distribution amongst all the creditors whose claims have been accepted by the duly appointed trustee/liquidator.

[68] Section 31 deals with circumstances under which the court may set aside a transaction which was entered into before sequestration whereby, in collusion with another person, the debtor disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another. Section 31 does not stand on its own and does not provide any relief in and of itself. It operates together with section 32 of the Insolvency Act which expressly regulates the proceedings to set aside any disposition of property under sections 26, 29 and 30. Section 32 provides the procedure to be followed by an aggrieved person intending to challenge the disposition in terms of the substantive requirements of each of sections 26, 29, 30 and 31.

[69] The central purpose of all of these provisions is to empower the trustee/liquidator to collect the rightful assets in the estate for purposes of distributing them to the rightful creditors. The purpose for which the defendant

seeks to invoke section 31 is unrelated to this purpose as the relief he seeks will have no effect on the insolvent estate.

[70] The defendant seeks to rely on the last lines of section 31(2) which says “*and if he is a creditor he shall also forfeit his claim against the estate*” and argues that he can do so without reference to and without meeting the requirements of section 31(1) or any other requirements in section 31(2). On a proper interpretation of this section, it is my view that the defendant’s argument has no merit. The words “*and*” and “*also*” in my view emphasise that this clause must be read conjunctively with other parts of the clause and cannot be read alone. It is respectfully correct as counsel for Absa submitted, that the forfeiture relief is not available unless the creditor is also found liable to pay compensation and/or a penalty. In terms of the first part of section 31(2), the first remedy against a person who was party to “*such collusive disposition*” is that he must be found liable to make good any loss and to pay a penalty. It is perfectly correct that it is only if the person who has been found liable to make good a loss and pay a penalty is also a creditor of the estate, that the last line (regarding forfeiture) applies. Without the finding of a court that the person is liable to make good a loss and pay a penalty, the question of forfeiture does not in my view, arise.

[71] In order to make sense of the identity of the person/creditor to which section 31(2) relates, the reader must refer back to proceedings in terms of section 31(1). The reference to “*such collusive disposition*” in the first line of section 31(2) can only be a reference to a disposition in terms of a transaction which a court has set aside in terms of section 31(1). The reference cannot be

to any other “*collusive disposition*” or to persons who were involved in any transaction other than the one set aside in terms of section 31(1). It therefore follows that section 31(3) confirms that an action/application for payment of compensation and/or a penalty is linked to the action/application to set aside the transaction provided for in section 31(1). In other words, this relief (which is required before a creditor also forfeits a claim) is only available if proceedings are successfully brought to set aside the transaction.

[72] In terms of section 32(1) only the liquidator/trustee has *locus standi* to bring such proceedings.¹⁴ If a trustee/liquidator fails to bring the proceedings, a creditor may sue in the liquidator’s name, provided he indemnifies the liquidator against all costs.¹⁵ If the creditor who sues in the name of the trustee (giving indemnity) secures a recovery of an impeachable disposition, that recovery will be credited to the estate of the insolvent company and the proceeds will be distributed amongst the creditors. If the liquidator did not take steps to set aside the impugned disposition, the disposition stands and remains valid.¹⁶ Section 31(2) does not provide a surety in the position of the defendant with a defence where no positive (and successful) steps were taken to set aside the impugned transactions. The only relief that is available to a person relying on that clause is an order setting aside the transaction.

[73] The defendant did not at the time and cannot now challenge the liquidation and distribution accounts presented by AMU’s liquidators in 2014. The defendant in the suretyship agreement agreed to be bound by the

¹⁴ Section 32(1).

¹⁵ *Myburgh v Walters* NO 2001 (2) SA 127 (C) at 130; *Reynolds NNO v Standard Bank of SA* 2011 (3) SA 660 (W) at para 13.

¹⁶ *Galaxie Melodies (Pty) Ltd v Dally* NO 1975 (4) SA 736 (A) at 743.

admissions by the liquidators. I am in agreement with the plaintiff's counsel that the defendant's interpretation of the section ignores all of these necessary elements as well as the underlying purpose of the section and the Act as a whole. The defence raised by the defendant under section 31(2) of the Insolvency Act therefore stands to fail.

[74] While, generally, the surety may usually invoke defences available to the principal debtor against the creditor, this principle does not extend to give sureties the right to invoke statutory remedies that are only available to a liquidator. Section 31 provides a remedy to the liquidator only and where the liquidator did not set aside the transaction, there is no defence available to a surety. The alleged "*disposition*" to Protea occurred in August 2011, the liquidators were appointed in or about August 2012 and the summons in this matter relying on the ARLA was delivered in August 2012. The first liquidation and distribution account of AMU lay open for inspection at the office of the Master during June 2014 and the second liquidation and distribution account of AMU lay open for inspection at the office of the Master during May 2015. The defendant did not object to the liquidation and distribution account in the manner now pleaded or at all. The debt owed by AMU to Absa was admitted and accepted by the liquidators of AMU in the amount of R569,715,669.72. Absa's claim against AMU was proved in the insolvent state of AMU and has the effect of a binding judgment. The section 31 defence was introduced by amendment in February 2020, more than 7 years later. Any claim by the

liquidators (or by the defendant in the name of the liquidators) would have prescribed, at the latest, during 2015.¹⁷

[75] The defendant has counterclaimed conditionally in the event of the court finding in his favour on the defence raised under section 31(2). In the counterclaim he had prayed for a declarator that Absa's claim against him had been forfeited and he is released from his suretyship. For the reasons advanced above, the defendant's defence raised under section 31(2) and the counterclaim stands to fail. I find that the defendant does not have *locus standi* to raise such defence.

Conclusion

[76] In the premises it is held that the defendant is liable to pay the amount due and owing in terms of his suretyship agreement. The suretyship agreement is limited to the maximum of R20 million together with such further amounts in respect of interest and costs as accrued up to the date of payment. The underlying debt owed by AMU to Absa was proved by Mr Prinsloo and was not disputed by the defendant. The evidence of Mr Prinsloo as to the interest which has accrued on the R20 million suretyship debt is also not disputed. There is no dispute that the debt has reached *in diplum*.

[77] The suretyship agreement contains a clause that the defendant would pay attorney and client costs in the event of a breach of the agreement.

[78] In the result I make the following order:

¹⁷ *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 (SCA) at paras 27 and 28

1. The defendant is liable to pay the plaintiff an amount of R40 million;
2. The defendant is liable to pay interest on the above amount from date of judgment to date of payment at the prescribed applicable rate;
3. The defendant is liable to pay cost of suit on the scale as between attorney and client.
4. The defendant's counterclaim is dismissed with costs.


M B MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

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O Motlhasedi

Instructed by: Webber Wentzel Attorneys

Counsel for the defendant: Arnoldi SC

Instructed by: Ian Levitt Attorneys

Date of hearing: 20 November 2020