IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 4078/2012
Date delivered: 27 March 2018

In the matter between

ABSA BANK LIMITED — Plaintiff

And

FRANS ABRAHAM VAN EEDEN — First Defendant

F. A. VAN EEDEN N.O.
(A Trustee for the time being of the FRANS VAN EEDEN FAMILY TRUST) — Second Defendant

E. F. VAN EEDEN N.O.
(A Trustee for the time being of the FRANS VAN EEDEN FAMILY TRUST) — Third Defendant

W. G. MELVILLE N. O.
(A Trustee for the time being of the FRANS VAN EEDEN FAMILY TRUST) — Fourth Defendant

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JUDGMENT

GOOSEN, J.

[1] The plaintiff claims payment of the sum of R5 million together with interest and costs from the defendants. The claims are founded upon deeds of suretyship entered into by the defendants in favour of the plaintiff as security for amounts due to the plaintiff by Heneb Property Enterprises CC (hereinafter 'Heneb Properties') in terms of a loan agreement.

[2] It is appropriate to sketch the factual background which is common cause in order to understand the key *dramatis personae* before identifying the issues which now serve before this Court.

[3] The first defendant is a businessman and property developer. He is also a trustee, together with third and fourth defendants of the Frans van Eeden Family Trust (hereinafter "the Trust"). During the course of 2010 the first defendant developed a business association with Mr. Braam Lamprecht. Lamprecht was then the owner of Heneb Properties which was the registered owner of a property adjacent to a property owned by Edenbond. Edenbond was the company through which first defendant conducted his property development business. Heneb Properties was, at the time, developing a shopping mall at Kwanobuhle, Uitenhage. The shopping mall was owned by Evening Flame (Pty) Ltd (hereinafter "Evening Flame").

[4] Lamprecht requested the first defendant to loan money to Heneb Properties and /or Evening Flame to enable it to complete the property development in Uitenhage. The first defendant advanced certain funds. Subsequently further funds were required. As a result of this Lamprecht and first defendant approached the plaintiff to secure the additional funds. The plaintiff agreed to advance an amount of R5 million to Heneb

Properties by way of a Term Loan Agreement (hereinafter the "Term Loan") to enable it to provide the further funds to Evening Flame. The Term Loan was secured by registration of a mortgage bond, in favour of plaintiff, over the immovable property owned by Heneb Properties. The further security was in the form of suretyships executed by first defendant and the Trust in the amount of R5 million.

[5] It is common cause that both Heneb Properties and Evening Flame were placed in provisional and then final liquidation. I shall hereunder return to what is common cause between the parties. The plaintiff's claims arise from the suretyships executed by first defendant and the Trust.

[6] The litigation has run a course and it is necessary to briefly outline this course in order to appreciate the issues that now require determination.

[7] In its particulars of claim the plaintiff claimed payment of R 5 million together with interest in respect of limited sureties concluded by the defendants securing a Term Loan Agreement concluded between plaintiff and Heneb Properties on 10 December 2010. The particulars alleged that the outstanding balance in respect of the principal debt, being the loan agreement, was R 5 703 067.55 together with interest thereon.

[8] The defendants admitted that they signed the deeds of suretyships upon which the plaintiff relies. They pleaded however, that they were not liable to plaintiff on the basis:

(a) That at the time of execution of the deeds of suretyship Heneb Properties had already bound itself as surety for the indebtedness of another entity, Slipknot Investments (Pty) Ltd (hereinafter Slipknot) for an amount of R 15 million;

(b) That Heneb Properties had secured this by registration of a mortgage bond over the immovable property owned by Heneb Properties;

(c) The defendants were not aware of the existence of the aforementioned suretyship and mortgage bond;

(d) That the plaintiff had failed, in breach of a duty of care owed to the defendants, to disclose the aforementioned suretyship and bond and that such material non-disclosure constitutes a misrepresentation entitling the defendants to resile from the suretyships executed by them; and

(e) That the deeds of suretyship fall to be rectified inasmuch as the security was limited to the Term Loan Agreement and were not intended to secure all amounts owed by Heneb Properties to the plaintiff.

[9] The trial proceeded on this basis. The defendants commenced adducing evidence and presented the evidence of the first defendant. The plaintiff then presented the evidence of Mr Willem Prinsloo, an employee of the plaintiff. During the course of the plaintiff's case, information came to hand regarding the outcome of the liquidation of Heneb Properties and Evening Flame. This necessitated a postponement of the matter.

[10] The defendants gave notice of their intention to amend their plea and subsequently perfected the amendment. This amendment of the plea introduced what can usefully be described as "the payment defence". It is set out in the amended plea in the following terms:

> 4.1.1 The Defendants plead that the principal debtor (Heneb Property Enterprises CC) was placed in liquidation.
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> 4.1.2 The liquidators of the principal debtor have paid the full outstanding balance of the "loan agreement" including accrued interest thereon, a payment of R6 368 760.05 (Six Million Three Hundred and Sixty-Eight Thousand Seven Hundred and Sixty Rand and Five Cent) having been paid to the Plaintiff Bank, this being the claim proved by the Plaintiff Bank in respect of the aforesaid "loan agreement". The payment to the Plaintiff Bank was made on 8 September 2014.
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> 4.1.3 In the circumstances the accessory obligations of the Defendants (if any) have also been discharged.

[11] The plaintiff then filed a replication to which the defendants filed an exception. The plaintiff also filed a notice of its intention to amend its particulars of claim. The amendment sought to found the plaintiff's claim against the defendants on the allegation that the defendants had bound themselves as sureties for repayment of any and all sums that the principal debtor might owe to the plaintiff and that the plaintiff would be entitled to apply all proceeds of payments received from the debtor or its liquidator in reduction of amounts owed to it without diminishing the liability of the defendants. The amendment sought to introduce a claim against defendants on the basis of a suretyship given by Heneb Properties for the indebtedness arising out of a banking facility.

[12] The exception and the amendment application was argued before this Court and judgment was delivered on 31 January 2017. The exception to the replication was refused and the plaintiff was granted leave to amend its particulars of claim.

[13] When the matter re-commenced the parties advised that agreement had been reached in relation to certain facts and that the issues to be determined had been narrowed. The plaintiff elected to close its case without leading any further evidence.

The agreement reached by the parties was encapsulated in a statement which is reproduced hereunder.

AGREED FACTS AND ISSUES TO BE DETERMINED

1. The Defendants abandon the rectification sought in respect of interest in prayer 1 of the amended Plea (page 92 of the Index to Pleadings).

2. The plaintiff concedes the Defendants' entitlement to rectify the relevant Deeds of Suretyship as set out in prayer 2 of the amended Plea.

3. Neither party intends to lead any further evidence and to that end close their respective cases.

4. The following issues are to be separated and required (sic) determination, namely:

   4.1 The Defendants' defence of non-disclosure / misrepresentation.

   4.2 Whether the Plaintiff was entitled to appropriate the payments it received as set out more fully below.

   4.3 Whether the Deeds of Suretyship (Annexure "C" and "D" to the amended Particulars of Claim) provide cumulative liability or independent and separate liabilities up to their respective capital amounts of R 5 000 000.00 (Five Million Rand)

   4.4 The remaining quantum of the Plaintiff's claims (if any) to stand over for further determination is necessary.

5. The parties further agree as follows:

   5.1 Heneb Properties CC was placed into provisional and final liquidation.

5.2 The Plaintiff Bank proved three claims in the liquidation. The aforesaid claims were all secured by the same mortgage bonds.

5.3 Copies of the claim documents are to be found at pages 15 to 60 in the Exhibit "B".

5.4 Claim 2 is in respect of the Term Loan account no [...].

5.5 In respect of the plaintiff, the following awards were made in terms of the Final Liquidation and Distribution Account in Heneb Properties CC:

5.5.1 Award to Creditor 1 ABSA BANK R2,853.079.49

5.5.2 Award to Creditor 2 ABSA BANK R6,368,760.05

5.6 In the ensuing distribution, the liquidators of Heneb Properties CC paid the plaintiff as follows:

5.6.1 On 8 September 2014, a single amount of R9,000,000.00 in to Absa collateral account no. [...] (ref: 8064152178, being the reference for Heneb Properties CC's mortgage bond account number held with the plaintiff; and

5.6.2 On 6 February 2015, an amount of R221 859.54 to the aforesaid mortgage bond account, representing the balance of the awards less a contribution in respect of the plaintiff's Claim 3.

5.7 The plaintiff, without reference to the liquidators, did not allocate the aforesaid contributions to the Term Loan account no [...] but to the debts owed by Heneb Properties CC to the plaintiff in terms of the aforesaid mortgage bond account and suretyship obligations of Heneb Properties CC for Slipknot Investments.

5.8 Absa was the only proven creditor of Heneb Properties CC.

6. A copy of the relevant Final Liquidation and Distribution Account in Heneb Properties CC is to found in Exhibit "B" at page 61 to 68.

7. That account has been confirmed by the Master of the High Court.

8. Evening Flame Trading 499 (Pty) Ltd was placed into provisional and final liquidation.

9. The Plaintiff Bank proved, *inter alia*, a claim of R5 444 541.18 in respect of the Term Loan with Account no [...].

10. A copy of the relevant claim, together with supporting documents thereto is to be found in Bundle "B" at pages 140 to 160.

11. The liquidators of Evening Flame paid to the Plaintiff Bank the amounts of R2 050 805.63 (in April 2016 and R986 860.13 (in January 2017) in respect of the aforesaid Term Loan Account no [...]. See p 134 of Exhibit "B".

12. Copies of the First to Third and Final Liquidation and Distribution Accounts in Evening Flame are to be found at page 69 to 139 of Exhibit "B".

13. The aforesaid Liquidation and Distribution accounts have been confirmed by the Master of the High Court.

[14] The agreement resolved the question of the rectification of the deeds of suretyship. The prayer in the defendants' amended plea which was conceded reads as follows,

> An Order be granted rectifying the Deeds of Suretyship, being Annexures "C" and "D" to the Particulars of Claim so as to delete the general description of the principal debt contained in the relevant Deeds of Suretyship and the insertion of the following definition of the principal debt to be secured, in respect of both Deeds of Suretyship, namely "the Term Loan Agreement concluded with Heneb Property Enterprises CC on 10 December 2010".

[15] The effect is that the plaintiff conceded that the deeds of suretyship establish an accessory liability on the part of the sureties in respect only of the principal debtor's indebtedness relating to the Term Loan Agreement.

[16] I shall deal with the three issues to be determined, in so far as may be necessary, in turn hereunder.

The non-disclosure / misrepresentation defence

[17] It should at the outset be recorded that the effect of the agreement reached by the parties and the closure of the plaintiff's case without further evidence being led, is that the evidence of the first defendant is, in essence, uncontested. Although a contrary version of events, particularly those relating to discussions with bank officials, was foreshadowed in the cross-examination, no evidence relating thereto has been presented.

[18] The defence relating to non-disclosure is to be appraised on the basis of the evidence presented by the first defendant. I shall deal with that evidence hereunder. Before doing so, it is apposite to set out the applicable legal principles.

[19] Suretyship is an accessory liability. Its existence is dependent upon the existence of a valid principal debt as between the creditor and debtor. The surety, in executing a deed of suretyship, binds herself to perform the principal debtor's obligations in the event that he fails to do so, alternatively to indemnify the creditor in that event. [1] A contract of suretyship arises in accordance with the general principles applicable to the formation of contracts, save insofar as there are certain formalities prescribed.[2] A surety is equally entitled to resile from an agreement of suretyship if that agreement was induced by fraud, duress, undue influence or mistake, whether induced by misrepresentation or otherwise.[3]

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[1] Caney's *The Law of Suretyship* 5th ed p. 28-29

[2] S 6 of the General Law Amendment Act 50 of 1964 (as amended) requires that the terms of the agreement be embodied in a written document signed by or on behalf of the surety.

[3] See Caney (supra) at p.61

[20] In Tesoriero v Bhyjo Investments Share Block (Pty) Ltd [4] Wunsh J said,

> The general principle, where a person has signed a contract and wishes to escape liability of the ground of justified error as to the nature or contents of the document, is that he or she must show that he or she was misled as to the nature of the document or as to the terms which it contains by some act or omission (where there was a duty to inform) of the other contracting party. The misrepresentation need not have been fraudulent or negligent. The duty to inform would or could arise where the document departs from what was represented, said or agreed beforehand or where the other contracting party realises or should realise that the signatory is under a misapprehension or where the existence of the provision or the contract is hidden or not apparent by reason of the way in which it is incorporated in a document or where the provision, not clearly presented, is unusual or would not normally be found in the contract presented for signature.

[21] The defendants' case is that at the time of entering into the deed of suretyship they were not aware of the existence of a mortgage bond registered over the immovable property of Heneb Properties in favour of Slipknot Investments in an amount of R 15 million. They were only aware of a mortgage bond against the property in favour of the plaintiff in an amount of R 2.7 million. The plaintiff, so it was contented, was aware of the existence of the Slipknot bond or ought to have been aware of it and was under a duty to disclose it to the defendants since the plaintiff was aware that the defendants were only prepared to execute suretyships to secure the Term Loan Agreement because of the equity available in the immovable property of Heneb Properties.

[22] The first defendant's evidence was that he had advanced, over time, an amount of approximately R10 million to Evening Flame in order to enable the property development project to be completed. Further funds were however required at a stage

[4] 2000 (1) SA 167 (W) at 175 F- H; cf also Prins v Absa Bank Ltd 1998 (3) SA 904 (C) at 908D – 909D; Davids en Andere v Absa Bank Bpk 2005 (3) SA 361 (C) at par [14] – [15]

when the building was completed and further installations were required for business tenants to occupy the property. It was this that gave rise to the discussions with the plaintiff. He stated that Lamprecht and he held a meeting with senior bank officials of the Plaintiff on 7 October 2010. The first defendant stated that he had been advised by Lamprecht that in 2009 he had given an undertaking to the plaintiff. In terms of said agreement, he had assigned all claims that he had in and against Evening Flame to the plaintiff and that such was in the amount of R20 million. According to the first defendant it was decided to approach the plaintiff for further funding because the plaintiff had an interest in the project being concluded by Evening Flame.

[23] The first defendant stated that there were several discussions with representatives of the plaintiff, the purpose of which was to facilitate an advance to Heneb Properties so that Heneb Properties could make additional funds available to Evening Flame. He stated that he was prepared to provide a suretyship to secure a loan to Heneb Properties since the loan would be secured by a mortgage bond over the property of Heneb Properties. He stated that he was informed that there was an existing bond over the property in an amount of R2.7 million. He stated that he considered the Heneb Properties property to be worth approximately R12 million and therefore that there was more than sufficient equity in the property to cover the existing bond and the proposed R5 million Term Loan. It was on this basis that he was prepared to provide the suretyship.

[24] The first defendant stated that he was not aware of the existence of the further bond in favour of Slipknot Investments. He only found out about that bond at a stage when Heneb Properties was placed in business rescue. He immediately realised that the further bond liability would result in there being no equity in the property and that his position as surety was compromised thereby. He said that if he had been aware of or

had been made aware of the Slipknot bond he would not have agreed to provide surety for the Term Loan advanced by plaintiff to Heneb Properties.

[25] The first defendant was cross-examined at length about the limitation of the suretyship to the liability for the Term Loan Agreement. His evidence in this regard need not be addressed in the light of the concession regarding the necessity to rectify the agreement to reflect the true intention of the parties.

[26] Mr Buchanan, for the defendants, argued that although the first defendant was challenged in cross examination regarding his version of events giving rise to the execution of the suretyships, the plaintiff did not lead any evidence relating to the discussions. Accordingly the first defendant's evidence is uncontradicted and must, for purposes of determining the misrepresentation / non-disclosure defence, be accepted.

[27] Of course uncontradicted evidence need not, for that reason alone, be accepted. It will still be necessary to consider whether it is credible and reliable. It was not suggested by the plaintiff that the evidence of the first defendant was so inherently improbable that it could, on that basis, be rejected.

[28] The first defendant remained unmoved in his assertion that the plaintiff's officials were aware that he was concerned that there was sufficient equity available in the property to be mortgaged in order to secure the loan. He said that he was informed that there was an existing bond of R2.7 million. He was not informed of the existence of the Slipknot bond.

[29] When asked who, in his view, was obliged to inform him about the existence of the Slipknot bond he stated that he considered it the duty of the bank officials. In

challenging this evidence during cross-examination, plaintiff's counsel suggested that plaintiff's officials were bound by a banker-client privilege, since Lamprecht and Heneb Properties were clients of the plaintiff. Implicit in this is recognition that the Slipknot bod was relevant to the discussions. The version, however, was not addressed in any evidence presented by the plaintiff.

[30] In dealing with first respondent's evidence that the financial standing of Heneb Properties was central to the discussions held prior to the execution of the suretyship, plaintiff's counsel referred to certain handwritten notes made by a bank official which recorded what was discussed at the meetings. It was pointed out that the notes made no reference to a discussion about the financial position of Heneb Properties. The first defendant explained that he had not made the note, but that the very purpose of the meeting was to find a way in which the plaintiff could advance additional funds to Evening Flame. Once it was decided that the funds could be made available to Heneb Properties, the financial circumstances of Heneb Properties became central. It was in this context that he was informed of the existence of the R2.7 million bond. Plaintiff's counsel stated that the author of the note, the bank official, would testify that no such discussion had occurred. This version of course was unsupported by any evidence, since the plaintiff elected to close its case and present no further evidence.

[31] In the light of this, the question is whether the evidence of the first defendant as to what occurred in the course of the discussions is to be accepted. The answer, in my view, is that it must. There is nothing in his evidence which renders it so improbable that it may be disregarded. Indeed the opposite is true. In circumstances where the plaintiff was considering advancing money to Heneb Properties and in which it required the provision of security, it is improbable that the financial status of Heneb Properties would not be discussed. The bank officials involved knew that the first

defendant and his company (now the Trust) had indicated a preparedness to provide the plaintiff with security.

[32] It was not contended on behalf of the plaintiff that the bank officials were not aware of the existence of the Slipknot bond. The particulars of claim reflect that the Slipknot bond and the suretyship provided by Heneb Properties in favour of plaintiff pre-dated the discussions regarding the Term Loan Agreement. It was also not in dispute that they never advised the first defendant of the existence of this bond.

[33] It must be accepted, on the evidence, that had the first defendant been aware of the existence of the Slipknot bond then he would not have agreed to provide the required security for the Term Loan Agreement.

[34] Mr Amm, on behalf of the plaintiff, argued that the defendants' were precluded from asserting an alleged misrepresentation because of the existence of a "whole agreement" clause in the deeds of suretyship. This clause provides that the surety shall be bound by any undertakings, representations or warranties not included in the deed.

[35] The reliance upon this provision in the deeds of suretyship was not pleaded by the plaintiff and objection was made to the argument advanced on that basis. This elicited a belated informal request from the bar (during the argument in reply) that the replication be amended to include reference to whole agreement clauses precluding defendants' reliance on the alleged non-disclosure.

[36] The amendment was sought on the basis that counsel conceded that plaintiff could not otherwise rely upon it. It was not pursued with any vigour since it was recognised that substantial prejudice would flow therefrom since the defendants had no

opportunity to address the issue. In my view it is not necessary to address this belated reliance upon an un-pleaded defence.

[37] The plaintiff's argument was that the defendants had failed to establish that the non-disclosure was material and that it had induced the defendants to enter into the suretyship agreements.

[38] In suggesting that the non-disclosure was not material it was argued that the dire financial position of Lamprecht was known to the first defendant since he had already advanced substantial sums of money to Lamprecht and Evening Flame. It was known to first defendant that the plaintiff was reluctant to advance any further funds to Evening Flame. It was suggested that if there was substantial equity in Heneb Properties, then the plaintiff would not have been reluctant to advance money to Heneb Properties.

[39] This latter submission does not take cogniscance of the first defendant's evidence. The plaintiff was prepared to advance money to Heneb Properties so that it could advance the money to Evening Flame. It was prepared to provide a Term Loan if security was provided by the defendants. The first defendant said that he was concerned that there should be sufficient equity in the Heneb Properties property and was satisfied when informed that there was a bond registered against the property in the amount of R2.7 million.

[40] In my view the probabilities favour the defendants' version. The first defendant's uncontradicted evidence was also that the bank officials knew that he was concerned about the equity position of Heneb Properties. His unequivocal evidence was that he would not have agreed to provide a suretyship if he had known that there was a further bond registered against the property. The undisputed evidence was also that

the property was valued at approximately R12 million (the amount it was eventually sold for). It could hardly be suggested that non-disclosure of an additional potential liability of R15 million is not material.

[41] There was however an additional string to Mr Amm's bow. It was that the defendants had failed to establish a duty to speak and a negligent breach of the duty. He argued that even if it was accepted that there was a non-disclosure and that it was material, the defendants had failed to establish the requirements upon which they could resile from the agreements. It was argued that the defendants had failed to establish that the misrepresentation (or non-disclosure) was intended to induce the defendants to enter into the suretyship agreements.[5] It was argued that the evidence does not establish that the non-disclosure was either negligent or wrongful and accordingly, that the defence raised by the defendants has not been established.

[42] In Absa Bank Limited v Fouche [6] Conradie JA stated,

> It is by now settled law that the test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure (*Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568F – I and 570D – G). In each case one uses the legal convictions of the community as the touchstone (*Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) at 494E – F applying *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 317C – 318J).
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> The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesized into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (*Speight v Glass and Another* 1961 (1) SA 778 (D) at 781H – 783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful (*BOE bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46G – H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by

[5] Cf. Novick v Comair Holdings Ltd 1979 (2) SA 116 (W)
[6] 2003 (1) SA 176 (SCA) at par [4] –[5]

honest men in the circumstances' (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)* 1965 (3) SA 410 (W) at 418E – F).

[43] During cross-examination of the first defendant, he was challenged on the question as to whether the knowledge of the Slipknot bond was exclusive to the plaintiff. It was put to him that the information was readily ascertainable from Lamprecht, whom the first defendant was seeking to assist in securing finance from the plaintiff. It was also put to him that the information was readily available upon a deeds search being conducted. The first defendant testified that he did not undertake a deeds search. He accepted that there was a relationship of trust operative between himself and the plaintiff's officials and accordingly that he would have expected them to disclose to him the existence of the Slipknot bond.

[44] 'Exclusive knowledge', it was held in Absa Bank v Fouche[7], is 'knowledge which is inaccessible to the point where its inaccessibility produces an involuntary reliance on the party possessing the information. The argument, to the effect that knowledge of the existence of the Slipknot bond could not be described as 'exclusive knowledge' in the hands of the plaintiff's officials must, it seems to me, be accepted. The information was known to Lamprecht who was a party to the discussions with the bank.

[45] That the information was not 'exclusive knowledge' held by plaintiff's officials is not the end of the matter. As noted in McCann v Goodall Group Operations (Pty) Ltd [8] a duty to speak may arise if a party has knowledge of certain unusual characteristics relating to or surrounding the transaction. Policy considerations require that the other party be apprised of such facts. It may also arise in circumstances where there was a representation which was incomplete or vague and requires elucidation.

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[7] Supra at par [8]
[8] 1995 (2) SA 718 (C) at 726A - G

[46] The first defendant's evidence was that the plaintiff's officials were aware that he was prepared to execute a suretyship because of the equity in the Heneb property. The discussions covered the financial status of Heneb Properties. In the course of these discussions it was disclosed to him that there was a bond of R2.7 million over the property.

[47] The circumstances of the transaction may not be 'unusual'. However, the evidence establishes that a representation was made to the first defendant regarding the R2.7 million bond. That disclosure was, it is now common cause, incomplete. It was known to the plaintiff that there was an additional bond in favour of Slipknot Investments. On the evidence this fact was not known to the first defendant. In these circumstances, having made an incomplete disclosure to the first defendant, a duty arose requiring the plaintiff's officials to speak and to make a full and honest disclosure to the first defendant of the material facts in their knowledge. It must be emphasised that it was never the plaintiff's case that it was not aware of the Slipknot bond or that the officials who dealt with the matter had no knowledge thereof. To the contrary, a version which was put to the first defendant was that the plaintiff's ability to disclose was governed by a client-bank privilege.

[48] The failure to disclose constitutes a breach of duty owed to the defendants. I have already set out, hereinabove, that the failure to disclose was material. The first defendant's uncontradicted evidence was that he would not have executed the deeds of suretyship if he had known about the existence of the Slipknot bond. What persuaded him to execute the suretyships was the existence of sufficient equity in the Heneb Properties property. Had he been appraised of the Slipknot bond he would have concluded that there was insufficient equity in the property.

[49] I am therefore satisfied that the defendants' defence based on the material non-disclosure of facts entitles them to resile from the suretyship agreements. The plaintiff is accordingly not entitled to claim upon the suretyship agreements.

[50] Even if I am wrong in coming to this conclusion, then in any event the plaintiff's claim cannot succeed. That is so because, in my view, the further defence relating to the discharge of the accessory liability brought about by payment of the debt due to the plaintiff, for reasons to be set out hereunder, must also succeed.

The payment defence

[51] The agreed facts relevant to this defence are set out in paragraphs 5 to 13 of the statement of agreed facts quoted hereinabove. They need not be repeated.

[52] The defendant's contention is that the plaintiff proved three separate claims in the liquidation of Heneb Properties and a further claim against Evening Flame. One of those claims related to the claim in respect of the Term Loan Agreement. It is common cause that the liquidators made identified payments to the plaintiff of dividends then payable in respect of the Term Loan Agreement. The plaintiff did not object to the allocation of payments made by the liquidator. Based on these facts the defendants submit that the Term Loan Agreement debt has been paid in full and therefore, that the defendants have been discharged of their suretyship liability.

[53] The plaintiff however relies upon a contractual entitlement to allocate any payments received by it to any debts owed by Heneb Properties. This contractual right is, it was submitted, enshrined in both the Term Loan Agreement and the suretyship agreements.

[54] Clause 8 of the Term Loan Agreement provides that,

> The BANK may apply any amount paid to the BANK by the BORROWER in connection with the AGREEMENT to any debt owing, which may become owing to the BANK by the BORROWER from any cause whatsoever.

[55] Clause 8.1 of the first defendant's deed of suretyship provides, similarly, that,

> The Bank shall be entitled to apply any payment received or recovered in terms of this suretyship in respect of any obligation of the Debtor to the Bank, in such manner as the Bank may deem meet.

[56] Clause 9.1.2 provides that in the event that the estate of the debtor is liquidated then,

> 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 / our 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.

[57] It was submitted that these contractual terms entitled the plaintiff to appropriate the payments received from the liquidators to claims other than the claim in respect of the Term Loan Agreement. The fact that the liquidator specified that payment was made in respect of the claim proved in relation to the Term Loan Agreement did not preclude the plaintiff from applying the payment to another debt since it was entitled to do so in terms of the agreement.

[58] The reliance upon clauses 8.1 and 9.1.2 of the suretyship agreement is, in my view, misplaced. Clause 8.1 clearly relates to the allocation of payments received or recovered in terms of the suretyship. It accordingly finds no application in the present

circumstances. Clause 9.1.2 also finds no application. Firstly the clause must be read in the context of the now conceded rectification of the suretyship agreement. The effect of the rectification is that the accessory liability is specifically limited to the principal debt, namely the Term Loan Agreement. The clause accordingly cannot extend the liability beyond the Term Loan Agreement. In any event the language of the clause indicates that a payment made in reduction of the amount owed in terms of the principal debt does not affect the surety's liability for the amount owing after receipt of such proceeds. The clause does not address the entitlement of the creditor to allocate payments received pursuant to the Term Loan Agreement to any other debt owed by the debtor.

[59] The allocation of payments received by a creditor from a debtor who owes several debts to the creditor is a matter as between the debtor and the creditor. The contractual relationship between the surety and the creditor can have no bearing upon the regulation of the appropriation of payments received or recovered from the debtor.

[60] In Macrae v National Bank of SA Ltd [9] the principles governing the appropriation of payments are set out as follows:

> Now it is a principle of our law that when a debtor, who owes his creditor different sums of money upon different obligations, makes payment to his creditor he can appropriate the money to any debt he pleases, and if the creditor accepts the money he must allocate it to the selected debt. If, however, the debtor pays money to his creditor and says nothing then the creditor may then and there appropriate it to any particular debt he chooses and give an acquittance to that effect. But, if neither debtor nor creditor says a word about how the money is to be applied, the law steps in and allocates the money according to artificial rules to certain particular debts and, inter alia, it wipes out a debt earlier in time rather than a later one *caeteris paribus*. The debtor may, however, at any time before his debts become due give to the creditor the right to apply monies of the debtor which he should thereafter come into his hands to whichever debt he pleases. If he does so the creditor is at liberty to apportion the money as he pleases.

[9] 1927 AD 62 at 66

[61] In Wille's Principles of South African Law [10] the learned authors refer to Macrae and other authorities to reflect the principle in the following terms:

> Where a debtor owes her debtor various sums of money under different obligations and she makes payment to the creditor which is insufficient too discharge all the debts, the debtor, in the absence of any prior agreement to the contrary, may appropriate the money to any debt she pleases by notifying the creditor to that effect, except that she cannot allocate the money to part payment of a capital amount on which she also owes interest, for the creditor cannot be compelled to receive payment in installments, and accordingly the interest must first be discharged.
> (Emphasis added)

[62] The underlined portion reflects the proviso contained in the passage from Macrae, to the effect that a debtor may by agreement confer upon the creditor the right of allocation of payments. This proviso to the principle was central to determining of the issues in the Macrae matter. Reliance was placed in that matter upon a written pledge which conferred upon the bank the right to allocate payments made to it. Wessels JA found that the term of the pledge conferred upon the bank plenary power to apply the proceeds to any debt whatever. In these circumstances the court held that the technical rules of appropriation do not apply.

[63] The import of this authority is that a debtor may by prior agreement alter the rules relating to appropriation of payments, conferring upon the creditor the right to determine appropriation. In circumstances where the debtor has conferred upon the creditor the right to appropriate payments the debtor cannot elect to make payment in regard to a specific debt.

[64] Clause 8 of the Term Loan Agreement, concluded between plaintiff as creditor and Heneb Properties as debtor, confers upon plaintiff the right to allocate payments

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[10] 9th ed at 822

received from the debtor to any of the debtor's debts. However, the question that arises is whether this contractual provision entitles the creditor to appropriate payments received from a liquidator in respect of a specific claim or debt owed by the debtor.

[65] The functions of a liquidator are to control and administer the property and affairs of the company and to liquidate it. The liquidator is required to effect the liquidation in accordance with the law. In Commissioner of the South African Revenue Service v Stand Two Nine Naught Wynberg (Pty) Ltd and Others [11] it was found that an agreement between a liquidator and a debtor of the insolvent to pay a creditor directly, would enable parties to subvert the scheme of distribution laid down by the Insolvency Act, 1936. The court held :[12]

> In terms of section 391 read with section 342 of the Companies Act 61 of 1973 it is a liquidator's duty to recover and reduce into possession all the assets and property of the company, to realise them and apply the proceeds in satisfaction of the costs of winding-up; and, if there is a residue, to distribute it to the creditors entitled thereto in the order of preference and manner set out in sections 95–104 of the Insolvency Act.

[66] Section 94 of the Insolvency Act sets out the form in which a plan of distribution is to be framed. It requires that every claim is to be set out indicating whether it is secured or unsecured and whether it is preferent. The section further requires that the allocation of payments provided by the plan of distribution must be in accordance with sections 95 to 104 of the Act.

[67] Section 95 is relevant for present purposes. It provides in subsection (1) that:

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[11] [2006] 4 All SA 11 (SCA)
[12] Supra at par [9]

> (1) The proceeds of any property which was subject to a special mortgage, landlord's legal hypothec, pledge or right of retention, after deduction therefrom of the costs mentioned in subsection (1) of section *eighty-nine,* shall be applied in satisfying the claims secured by the said property, in their order of preference, with interest thereon calculated in manner provided in subsection (2) of section *one hundred and three* from the date of sequestration to the date of payment, but subject to the provisions of subsection (4) of section *ninety-six.*

[68] What these provisions point to is the statutory scheme of distribution which is to be applied by the liquidator. They also point to the obligations imposed upon the liquidator in the exercise of his or her functions.

[69] In Douglas Green Bellingham v Green t/a Greens Bottle Recyclers [13] the court was required to decide whether a creditor was entitled to appropriate a dividend received from a trustee in relation to a claim for fraud and apply it to other debts of the insolvent.

[70] In that matter an employee of the appellant had colluded with several suppliers of bottles, of which the respondent was one, to defraud the appellant. The appellant made certain payments to the respondent upon the face of invoices received, although it had received no bottles purchased on its behalf by the employee. The employee had been sequestrated and the appellant proved a claim in the estate which comprised the loss suffered in consequence of the fraud involving the respondent and that of another supplier. The claim was unsecured and accordingly the appellant's claim was dealt with by payment of a *pro rata* portion out of the free residue in the estate in terms of s 103 of the Act. The appellant appropriated the entire dividend received to the 'oldest' debt which was that relating to the other supplier. The dividend was insufficient to extinguish the debts. It proceeded to claim damages from the respondent as a joint wrongdoer.

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[13] 1998(1) SA 367 (SCA)

[71] In the court *a quo* the appellant's reliance on the right to appropriate the dividend to another debt owed by the insolvent, albeit not a debt of the respondent was rejected. The appellant's claim against the respondent was accordingly reduced by the amount allocated by the trustee in his *pro rata* distribution of the free residue.

[72] In upholding the trial court's treatment of the matter the Supreme Court of Appeal said the following:[14]

> The appellant was a concurrent creditor and his claims in respect of the frauds committed by Kotze were unsecured. The trustee therefore had to follow the provisions of the section in applying the balance of the free residue. According to the evidence an amount of 33, 93 cents in the Rand ("the dividend") was available. The trustee was accordingly bound in terms of this section to pay to the appellant a dividend of 33, 93 cents in the Rand in respect of each one of its claims. Although the appellant submitted one globular claim in respect of all the amounts owed to it by Kotze, the claim included both the debts of Worcester Bottle Exchange and the respondent's debts. In making payment the trustee in fact paid an amount of 33, 93 cent for each Rand owed by Kotze to the appellant in respect of the respondent's debts. Consequently there is no merit in the argument that the trustee made no appropriation and that the appellant was entitled to appropriate the total dividend to the oldest debts. Unlike the ordinary debtor, the trustee had no choice in the matter. He was not entitled to apply the whole dividend to only one of a number of admitted debts making up the total claim of a proved creditor. He had to follow the directions contained in the Act and he was obliged to apply the free residue pro rata to all the debts and did so in this case. <u>This might be described as a statutory appropriation and in my judgment any further appropriation by the appellant as creditor was not possible.</u>
> (Emphasis added)

[73] The facts of that matter differ from the present inasmuch as the claims were unsecured and were addressed by way of a payment out of the free residue in terms of s 103 of the Act. In this matter we are dealing with secured claims which were dealt with by the liquidator in terms of s 95 of the Act. In my view however, a proper reading of the judgment indicates that the finding is premised upon two principles. The first is that the payment of a dividend by a trustee or liquidator in relation to a claim proved by

[14] Supra at 372H - I

a creditor is an appropriation of payment in respect of that debt. The second is that it is not open to a creditor to allocate such payment to another debt by reason of the fact that the distribution is a statutory appropriation. The court found that the trustee was obliged to act in accordance with the plan of distribution for which the Insolvency Act provides.

[74] In the present matter the liquidator presented a liquidation and distribution account which dealt with each of the plaintiff's three claims. The plaintiff did not object to the account. The account reflects the application, *inter alia*, of s 95 of the Insolvency Act.

[75] Section 95 envisages the distribution of the proceeds of the liquidation of property in satisfying claims secured by the property in their order of preference. The section is peremptory. The liquidator is obliged to act in accordance with the section. He accordingly has no choice in appropriating payments made in relation to one of several debts owed by the insolvent company.

[76] These obligations are similar to those which were the subject of the judgment in Douglas Green Bellingham. The provisions of s 95 through to s104 provide a statutory scheme of appropriation. The liquidator, unlike the debtor, is not free to allocate a dividend by way of payment of one or more debts owed to a creditor as he chooses. Nor can a creditor determine the allocation or distribution of funds except by way of objection to the liquidation and distribution account.

[77] Thus, while accepting that the debtor is free to agree with a creditor that the creditor shall be entitled to allocate payments received, such agreement cannot bind a liquidator or trustee in an insolvent estate. Nor, in my view, is a creditor entitled to allocate the payment received other than in accordance with a plan of distribution in

respect of its separate claims proved against the insolvent estate. It follows that the plaintiff was not entitled to allocate the dividends received by it in relation to the Term Loan claim in the insolvent estates to the satisfaction of other debts owed by the debtor.

[78] It was common cause that a dividend payment of R 6 368 760.05 was made in respect of the plaintiff's claim in respect of the Term Loan Agreement. It appears from the Final Liquidation and Distribution Account[15] that the total of the claim in respect of the Term Loan Agreement was R 6 406 269.33 so that the dividend paid left a shortfall on the claim of an amount of R 37 509.28. However, the further agreed facts were that the plaintiff had proved a claim in the estate of Evening Flame in respect of the same Term Loan Agreement in an amount of R 5 444 541.18 and was paid a dividend in respect of that claim of R2 050 805.63 in April 2016 and an amount of R986 860.13 in January 2017. These payments satisfied the claim made for payment of the outstanding balance of the Term Loan Agreement.

[79] The payment of the principal debt necessarily expunges the debt. In the light of the payments made to the plaintiff in the liquidation of Heneb Properties and Evening Flame the principal debt has been discharged. Since the surety's liability is accessory, the discharge of the debt discharges the liability of the surety.

[80] It therefore follows that on this basis also the plaintiff's claims cannot succeed.

[81] In the light of the findings made above it is not necessary to consider whether the liability set out in the deeds of suretyship is cumulatively limited to the amount of R 5 million.

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[15] Exhibit B pp 61 - 67

[82] In the result I make the following order;

The plaintiff's claims are dismissed with costs.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff
Adv. G. W. Amm
Instructed by Greyvensteins

For the Defendants
Adv. R. G. Buchanan SC
Instructed by Pagdens Attorneys