



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

CASE NO: 21244/2023

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

JONATHAN NICHOLAS FRIEDMAN

Respondent

Hearing: Wednesday 14 February 2024

Judgment: Tuesday 20 February 2024

JUDGMENT

KATZ AJ:

- [1] On **19 June 2023** Standard Bank of South Africa Limited made application for a monetary judgment against the respondent, Jonathan Nicholas Friedman ("*Friedman*"), in the amount of R110 000 000 (one hundred and ten million rand), plus interest and costs.
- [2] Standard Bank claims Friedman's indebtedness to it is in terms of a Guarantee, limited up to the amount of R110 million plus interests and costs, in terms of which Friedman guaranteed the obligations of Urban Lime Properties (South Africa) (Pty) Ltd¹ (registration no: 2006/023754/07) ("*Urban Lime*")² to Standard Bank in respect of a loan facility agreement granted by Standard Bank to it.
- [3] Friedman filed his answering affidavit on 31 August 2023. Standard Bank filed its replying affidavit on 31 October 2023.
- [4] Standard bank launched the application in the High Court, Gauteng Local Division, Johannesburg. Friedman applied in terms of section 27 of the Superior Courts Act 10 of 2013 for the application to be transferred to the Western Cape Division as a matter of convenience and cost-effectiveness because Standard Bank were also seeking an order of liquidation against Urban Lime in this Division.³
- [5] The Acting Judge President on 18 December 2023 set the application down for hearing on the semi-urgent roll to be heard simultaneously on 14 February 2024

¹ Urban Lime changed its name on 3 October 2023 to UL Prop SA.

² The respondent is a director and the chief executive officer of Urban Lime.

³ On 3 October 2023 the Johannesburg High Court ordered the removal of the application from that court to the Western Cape Division for hearing and determination

with the liquidation application brought by Standard Bank against Urban Lime under case no. 9696/2023 (*“the liquidation application”*). There was no consolidation in terms of Uniform Rule 11 and the two applications were and are not consolidated into one application.

[6] On Friday **9 February 2024** the respondent in the liquidation application (Urban Lime) provided me with a copy of an application issued out of the High Court, Kwazulu-Natal Local Division, Durban under case number D 1740/2024 in the matter of *Rivertown Central (Pty) Ltd v UL Prop SA (Pty) LTD*. The KZN application seeks to place Urban Lime under supervision to commence business rescue proceedings in terms of section 131(1) of the Companies Act 71 of 2008.

[7] Section 131(6) of the Companies Act effectively requires the liquidation application to be suspended subject to various conditions.⁴

[8] I thus only heard the monetary judgment application and removed the liquidation application from the roll. This judgment only deals with the monetary judgment application.

[9] In the monetary claim Friedman raised a number of defences, including what was described by Standard Bank as an eccentric interpretation of a particular clause of the Guarantee. Standard Bank dealt with the defences in its replying affidavit and in its heads of argument. As the case developed Friedman’s

⁴ Section 131 (6) states: “If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until- (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for.”

defence ultimately boiled down to a single point. His other defences had fallen away.

[10] It appears that Friedman's remaining single point was not completely covered by Standard Bank's heads of argument. So, when Mr *Woodland* SC (who appeared with Ms *Morgan*) on behalf of Standard Bank commenced oral argument he developed what I may call a fresh argument and handed in a bundle of authorities which included three cases not previously referred to, to deal with the single point. Mr Woodland's fresh argument seemed not to have arisen on the papers and it was not contained in the heads of argument. Mr *Goodman* (who appeared with Mr *Crookes*) for Friedman had been provided by Mr Woodland with the new cases on the previous day.

[11] Mr Goodman, quite correctly in my view, suggested that Friedman's defence to the monetary claim effectively turned on what could be regarded as the single point, which he described as a point *in limine*. He accepted that he would be hard pressed to argue that the monetary judgment claim should not be granted if the *in limine* point didn't succeed.

[12] The point *in limine* amounted to what may be described as a "pleading point." Standard Bank, so it was argued, had not pleaded a case in its founding affidavit that should lead to the relief being granted.

[13] The point was that on 19 June 2023, when the application was launched, Standard Bank in its founding affidavit could not – and did not – demonstrate that Friedman was indebted to Standard Bank in any amount. The reason for this was that at that date it was not proved that Urban Lime was indebted to

Standard Bank. Thus, if Urban Lime was not so indebted, Friedman was similarly not indebted.

[14] Friedman accepts the Guarantee was executed by him. He effectively accepted that were Urban Lime to have been indebted as at 19 June 2023 to Standard Bank under the loan facility agreement for the amount (some R 357 million) as claimed by Standard Bank he would be liable for the full amount of the Guarantee.

[15] I agree with Friedman's position.

[16] The material terms of the Guarantee are, *inter alia*:

16.1. As a principal and primary obligation, Friedman irrevocably and unconditionally guaranteed the due and full performance by the Borrower (Urban Lime) of the "Guaranteed Obligations".

16.2. The Guaranteed Obligations refer to all present and future indebtedness of whatsoever nature and howsoever arising which was or may become owing by Urban Lime to Standard Bank, up to the amount of R110 million, plus interest and certain costs, fees, charges and expenses.

16.3. The Guaranteed Obligations include all items which would be Guaranteed Obligations but for the winding-up or business rescue of Urban Lime.

16.4. Friedman undertook to pay Standard Bank, *inter alia*, whenever Urban Lime did not pay any amount or perform any obligation as

Borrower in terms of the Urban Lime Facility Agreement (“*the Facility Agreement*”).

16.5. A default on the facility agreement is defined as a default on the Guarantee.

[17] Standard Bank correctly states the Guarantee gives rise to a principal obligation.

[18] The nature of a guarantee is to be determined by its terms.

[19] The Guarantee is not a suretyship but a principal undertaking.⁵

[20] In this regard, a guarantor’s liability is independent of that of the principal debtor, (in this case Urban Lime), and wholly independent of the underlying loan agreement. Caney⁶ explains this as one of the differences between suretyship and guarantee:

“[T]he guarantor’s obligation, as an obligation independent of that of the debtor, is to indemnify the creditor in respect of losses suffered through the debtor’s non-performance, whereas the surety, as we have seen, is only liable for losses resulting from the debtor’s breach of contract. Thus if the creditor suffers grave losses when it turns out that the debtor’s contract is invalid, the guarantor’s obligation remains in force and he will have to pay those losses but the surety’s obligation falls away and he will not have to pay a penny.”

[21] It is apparent from the terms of the Guarantee, in particular clause 4.1, that the Guarantee is an agreement indemnifying Standard Bank from losses caused to

⁵ See *List v Jungers* 1979 (3) SA 106 (A).

⁶ Forsyth & Pretorius, *Caney’s The Law of Suretyship* 6th ed (2010) at 33.

it by Friedman whether those losses arise, *inter alia*, from Urban Lime not paying an amount owed in terms of the underlying loan agreement or whether any obligation in terms thereof becomes unenforceable, invalid or illegal.

[22] There is no accessory relationship between the Guarantee and the underlying loan agreement, and the rights and obligations of the parties are determined by having reference to the Guarantee, not the underlying loan agreement.⁷

[23] As stated above, Friedman denies that he is liable to Standard Bank under the Guarantee, other than for any amount due and payable by Urban Lime to Standard Bank **at the time** this application was made. Friedman says that on 19 June 2023, when this application was launched, his indebtedness didn't arise because Standard Bank had cancelled the contract with Urban Lime without having executed an acceleration clause (clause 21.19) contained in the Facility agreement.

[24] The point advanced is that in the face of the alleged breaches by Urban Lime, Standard Bank made an election not to uphold their contract (the loan facility agreement), but to cancel it. Friedman avers that when Standard Bank's founding affidavit was deposed to on 19 June 2023 all accrued amounts of interest that were subject to the Guarantee had been paid in full by Urban Lime.

[25] The facility agreement (clause 7 read with clause 2.1.24) between Urban Lime and Standard Bank required, *inter alia*, all amounts owing to be paid by 29 September 2023. On default by Urban Lime of any its obligations under the

⁷ *Lombard Insurance v Landmark Holdings (Pty) Ltd & Others* 2010 (2) SA 86 (SCA) at paras [19] and [20].

facility Standard Bank had the right to accelerate Urban lime's obligations.

[26] Standard Bank cancelled the facility agreement on 17 April 2023.

[27] Mr Woodland's fresh point seems to be that *when* Standard Bank cancelled its contract with Urban Lime the acceleration clause contained in the facility agreement had already accrued.

[28] Reliance was placed on *Nash v Golden Dumps*,⁸ with reference to *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk*⁹ and *Walker's Fruit Farms Ltd v Sumner*,¹⁰ where the following was stated:

“... the rule in the Walker case, *supra*, is confined to cases where, prior to the rescission of a contract by one party's acceptance of the other's repudiation, there exists a right which is accrued, due, and enforceable as a cause of action independent of any executory part of the contract “

[29] So, the argument followed that when Standard Bank cancelled the facility agreement (on 17 April 2023) its right to accelerate the date for payment had accrued. Standard Bank could even *after* cancellation accelerate the date for Urban Lime's performance and thus the R 357 million had become due and payable.

[30] Friedman did not take issue with Standard Bank's right to rely (as a matter of principle or on the facts)¹¹ on the acceleration clause in the facility agreement. His issue was *when* that right was exercised. He claimed that once the contract

⁸ [1985] ZASCA 6; [1985] 2 All SA 161 (A) (27 March 1985)

⁹ 1972 (2) SA 853 (A)

¹⁰ 1930 TPD 394

¹¹ Friedman appears to have acknowledged that Urban Lime was at 17 April 2023 in default and Standard Bank was entitled to accelerate in terms of clause 21.19 because Urban Lime had defaulted.

was cancelled by Standard Bank it was too late for it to rely on any provision (such as the acceleration clause) in what was now a non-extant contract.

[31] To quote from the heads of argument:

“17. Accepting as correct that ULPSA [Urban Lime] was in breach of the agreement, the remedy available to the applicant, as the innocent party, was to elect to uphold the agreement and claim specific performance and/or damages, or to cancel the agreement and claim restitution and damages.

13 Swart v Vosloo 1965 (1) SA 100 (A) at 104H-105A

18. The election is one that is taken once and takes effect upon communication of the election.

14 As was said by Nicholas AJA in Culverwell v Brown 1990 (1) SA 7 (A) at 17B:

“Having once made his election, the injured party was bound by it - the choice of one remedy necessarily involves the abandonment of the other inconsistent remedy. He cannot both approbate and reprobate. Quod semel placuit in electionibus amplius displicere non potest.

Plainly, where a party elects to terminate the contract, he cannot thereafter change his mind: the contract is gone. ”

19. According to the founding affidavit, in the face of the alleged breaches, the applicant made an election, not to uphold the contract, but to cancel the contract.”

[32] In the founding affidavit, Standard Bank’s deponent (at par 34) stated:

“Given Urban Lime’s continuing defaults, and its failure to remedy its breaches of the Agreement, the applicant exercised its rights in terms of clause 2.19 of the Facility Agreement and (i) cancelled the Agreement, and (ii) declared that the full amount together with accrued interest became immediately due and payable.”

[33] The exercise of Standard Bank’s rights was contained in a letter sent by its

attorneys to Friedman on **17 April 2023**.

Paragraph 8 of the letter states:

“We have been instructed by our client to notify you (as we hereby do) that in the exercise of our client’s rights in terms of clause 2.19 of the agreement, the Agreement is hereby and immediately cancelled, and the full amount of the Loan, in the amount of R 370, 296, 379.85 (three hundred and seventy million two hundred and ninety-six thousand three hundred and seventy nine rand and eighty-five cents is immediately due and payable.”

[34] Accepting the letter may not be a model of legal clarity, the question that strikes me, leaving aside the *Walker’s Fruit Farm* “accrued point,” that arises is whether Standard Bank’s “election” in the manner and timing of its cancellation precluded it from relying on the acceleration clause when it did so in the same letter.

[35] In other words, had Standard Bank executed the acceleration option at some point earlier than the exercise of the cancellation clause, there would have been no problem.

[36] But because acceleration and cancellation occurred simultaneously in the same letter of 17 April 2023 it was too late for acceleration. The agreement had been cancelled and in the words of *Culverwell* the contract “was gone.”

[37] In resolving this issue, I have had regard to the terms of the Facility agreement

as a whole,¹² and in particular the clause dealing with acceleration (21.19). Indeed, clause 21.19.1.1 provides that upon the occurrence of a default (which is what occurred in this case) Standard Bank as Lender may:

“Acceleration

21.19.1.1 ***cancel all or any part of the Facility whereupon it shall immediately be cancelled.***”

- [38] The acceleration clause itself contemplates cancellation.
- [39] Friedman argues in paragraph 23 of his heads of argument that: “It is clear that the remedy asserted against Urban Lime is one for an acceleration of benefits under the contract – a claim for the primary future obligations under the contract to be immediately performed. In law, that remedy is not available to the applicant after communication of its election to cancel the agreement (as opposed to the cancellation of the facility, which would have given rise to the election in clause 21.19 of the facility agreement).”
- [40] And he explains that the remedies in clause 21.19 are primary contractual remedies.
- [41] As I understand Friedman’s argument, he could not have complained if Standard Bank had accelerated on, say 16 April 2023, and cancelled on 17 April 2023. Or if the acceleration had occurred on the same day, but a few hours or even minutes earlier than the cancellation. But they occurred at the same

¹² In doing so I have had regard to the text, context and purpose of the facility agreement. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

time and were communicated in the same letter.

- [42] The interpretation contended for by Friedman is inconsistent with the principles governing the interpretation of contracts. Common sense and a business- like approach to the matter reveal the fault lines in Friedman’s argument.
- [43] For more than a century, the Courts have held that an interpretation that promotes an absurd result will not be given effect to.¹³ And relatedly, an interpretation that is sensible, will be preferred over one that is not.¹⁴
- [44] Of course, if an agreement is cancelled, a party may not **later** seek to invoke the rights that exist under the contract. The reason for this is that the contract is dead. But there is nothing in law that precludes parties from exercising their rights simultaneous with cancellation. Here, Standard Bank sought to invoke its right to acceleration **not after** cancellation, but at the same time as cancellation. It was entitled to do so in terms of clause 21.19 of the agreement which incorporates the right of cancellation under the heading “acceleration”.¹⁵
- [45] But quite apart from the fact that the agreement incorporates cancellation as a permissible election that may be made under the heading “acceleration”, it would also be placing form over substance to insist on acceleration taking place a minute before cancellation, but not simultaneously in the same letter.

¹³ See for example, *Venter v Rex* 1907 TS 910 at 914 – 5, cited with approval a majority of the Constitutional Court in *Smit v Minister of Justice and Correctional Services and Others* 2021 (1) SACR 482(CC). Although both cases deal with the interpretation of statutes, *Endumeni* makes it clear that all written documents are to be interpreted through the same iterative process.

¹⁴ *Endumeni* above n.12 at para [18].

¹⁵ Reliance on the heading of a clause is a permissible tool in the interpretation exercise. See *Nelson Mandela Foundation v AfriForum NPC and Others* 2019 (6) SA 327(EqC); [2019] 4 All SA 237 (EqC). This interpretation of the Equality Court was upheld by the Constitutional Court in *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) at [113].

[46] Friedman's approach requires this Court to conclude that Standard Bank would have been entitled to cancel in a separate letter sent hours or indeed minutes after exercising the right of acceleration, but not simultaneously. What purpose is served by this formality? In my view, there is none. It does not promote the purpose of the agreement, nor does it advance any of the policy considerations that underlie the law of contract.

[47] In some cases, there are tensions between various policy considerations that inform the law of contract under the Constitution. Cases such as *Beadica* 231¹⁶ and *Pridwin Preparatory School*¹⁷ illustrate the tension that can exist between legal certainty and predictability on the one hand (both values of the rule of law), and fairness, dignity, and equality on the other hand (also values of the rule of law). But unlike *Beadica* and *Pridwin*, this case does not give rise to the same difficulty because the formality insisted on by Friedman does not promote one or more of the traditional justifications associated with formality (i.e. certainty, predictability and clarity).

[48] Friedman does not complain there was anything unfair or prejudicial to him in Standard Bank simultaneously accelerating and cancelling its Urban Lime agreement. Indeed, how could he?

[49] Standard Bank acted within its rights in terms of the contract at all times, and accordingly, there can be and is nothing problematic about it executing acceleration and cancellation in the same letter.

¹⁶ 2020 (5) SA 247 (CC).

¹⁷ 2020 (5) SA 327 (CC).

[50] In conclusion, I am of the view that Standard Bank proved that at the date of the launch of this application that Friedman was indebted to it under the Guarantee in the amount claimed.

[51] I therefore make the following orders:

51.1. The respondent must pay the applicant the sum of R110,000,000.00 (one hundred and ten million rands), together with interest calculated at the prime rate of interest published by the applicant from time to time as being its prime rate plus 2% (per annum, compounded monthly in arrears and quoted on the basis of a 365-day year), from 9 May 2023 to date of payment, both days inclusive.

51.2. The respondent must pay applicant's costs of suit on the attorney and own client scale,¹⁸ including the costs of two counsel.

KATZ AJ

Appearances

For the applicant: Mr G Woodland SC

with Ms Claire Morgan

instructed by Mr A Harris of Bowman Gilfillan Inc

¹⁸ Clause 14 of the Guarantee provides for a costs order to this effect.

For the respondent: Mr R Goodman SC

with Mr T Crookes

instructed by Mr J Aukett of Aukett Attorneys