IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION : DURBAN

CASE NO: 2115/2016

In the matter between:

NEDBANK LIMITED	**PLAINTIFF / APPLICANT**
(Registration No. 1951/000009/06)	

and

ROY SOODHOO N.O.	**FIRST DEFENDANT / FIRST RESPONDENT**
AARON GANESH N.O.	**SECOND DEFENDANT / SECOND RESPONDENT**
NEVILLE NAGURAN N.O.	**THIRD DEFENDANT / THIRD RESPONDENT**
ROY SOODHOO	**FOURTH DEFENDANT / FOURTH RESPONDENT**
ROMILA DEVI SOODHOO	**FIFTH DEFENDANT / FIFTH RESPONDENT**

ORDER

Delivered on: Friday, 12 March 2021

Judgment is granted in favour of the plaintiff against the R Soodhoo Family Trust (Master's reference IT1551/2008/PMB), represented by the first, second and third defendants in their capacities as Trustees, and against the fourth defendant, the liability of the said Trust and of the fourth defendant being joint and several, the one paying, the other to be absolved, for

(a) payment of the sum of R12,3 million;

(b) interest thereon at the rate of 9.5% per annum from 2 March 2016 to date of payment;

(c) costs of suit.

JUDGMENT

Delivered on: Friday, 12 March 2021

OLSEN J

[1] The plaintiff in this action is Nedbank Limited, which I will refer to as the "bank". It sued the first three defendants in their capacities as trustees of the R Soodhoo Family Trust. One of those defendants (the first) is Mr Roy Soodhoo. The fourth defendant is Mr Roy Soodhoo in his personal capacity, and the fifth his wife, Mrs Romila Devi Soodhoo. I will refer to the first three defendants collectively as the "Trust", the fourth defendant as Mr Soodhoo and the fifth defendant as Mrs Soodhoo. The latter two are married to each other in community of property.

[2] In broad outline the bank's claims are pleaded as follows.

(a) The bank lent money in terms of four loan agreements to a close corporation known as Hourglass Trading 51 CC ("Hourglass").

(b) Two of the agreements were concluded on 5 August 2009, and the principal sum lent in terms of each of those was R3,4 million. The other two agreements were concluded in September 2009 and in terms of those the principal sum lent was R2,75 million.

(c) Hourglass was wound-up as a result of which the full balance outstanding under each of the loan agreements became due and payable.

(d) The Trust executed deeds of suretyship guaranteeing the performance by Hourglass of its obligations under each of the four loan agreements, as did each of Mr and Mrs Soodhoo. In terms of each of the deeds the surety's liability was limited to the amount of capital advanced (ie R3,4 million in the case of each of the first two loan agreements, and R2,75 million in the case of each of the second two loan agreements) plus "interest, discount, commission, legal costs on the attorney and client scale, and all other necessary and usual charges and expenses".

(e) The sureties were sued because they had not discharged the balance owing following the winding-up of Hourglass.

[3] Although it was not necessary for the bank to plead it specifically, there is no dispute about the fact that the documentation generated in respect of these transactions reflects that each of the loans:

(a) was granted to facilitate the purchase by Hourglass from a close corporation known as Hope Fountain Investments 30 CC ("Hope Fountain") of a sectional title unit in a sectional title scheme known as Sante Fe, Blythedale Beach for a price of R4,25 million; and

(b) was to be supported (and in fact was supported) by a mortgage bond registered over the unit in question in favour of the bank for the amount of the loan on usual mortgage terms.

[4] The defendants pleaded collectively to the bank's claims. Concerning the loans to Hourglass, the defendants denied the conclusion of each loan agreement but contended:

(a) that if the bank could prove conclusion of each loan agreement, the written express terms would be those set out in the copy of the agreement in question annexed to the particulars of claim; and

(b) that each such loan agreement "would further have been subject to a suspensive condition that the market value of the property would be at least R4.25 million".

As to this latter contention that there was an unwritten suspensive condition, it is difficult to discern what the pleader had in mind in the light of the fact that it is undisputed that the loan agreements were duly implemented, the money lent to Hourglass, and the bonds registered over the unit to which each loan related. None of the evidence led at trial elucidated this, although there is a relationship between this allegation and other defences pleaded, to which I have still to come. There is no doubt on the evidence that the loan agreements between the bank and Hourglass were concluded. (It was drawn to my attention during argument that an admission in that regard had been made at the Rule 37 conference.)

[5] The defendants then denied both the conclusion and the validity of all of the suretyships relied upon by the bank. However they accepted that if the bank proved the validity and execution of each of the deeds, its terms were those set out in the copy of each deed annexed to the particulars of claim. At the rule 37 conference the defendants' position was clarified. It was admitted that Mr Soodhoo signed the deeds under which the Trust was sought to be bound, but denied that he was authorised to do so. The execution of the deeds by Mr Soodhoo in his personal capacity was admitted, but it was denied that he did so with the consent of his wife. It was denied that the signatures to the deeds relied upon by the bank in claiming against Mrs Soodhoo were in fact hers. At the commencement of the trial it was anticipated that evidence of handwriting experts would be called on this latter issue. That did not happen as the bank later recorded that it no longer contended that the signatures were those of Mrs Soodhoo.

[6] A plea that the provisions of the National Credit Act 34 of 2005 governed the transactions was not pursued at trial and no more need be said about it.

[7] I have thus far dealt only with the defendants' responses to the contents of the particulars of claim. The joint plea of the defendants went on to raise a defence that the loan agreements and suretyships could in any event be avoided by the defendants on the basis that they were induced by deliberate (ie fraudulent) or negligent misrepresentations made by the bank to the effect that the units were each worth the price at which it had been bought. Mistake and rectification were also pleaded.

[8] The bank called two of its employees or officials who were involved in the transactions with which this action is concerned. A Mr Hurrienarain was the one more directly involved in the transactions. His senior, a Mr Haselau, was also called as he and Mr Hurrienarain worked quite closely together.

[9] In 2009 Mr Haselau was a team leader and consulted in the division of the bank known as BOE Private Bank. Mr Hurrienarain held a position as a private banker. In general terms each of these witnesses conveyed that what they were dealing with was a series of transactions which was not abnormal, and which was capable of being dealt with and processed following the bank's ordinary rules and procedures.

[10] Mr Soodhoo was not an existing client of Nedbank. He was introduced to the bank (through Mr Hurrienarain) by a Mr Hemanth Singh who was an existing client of the bank. Mr Singh contacted Mr Hurrienarain over the telephone to tell him that Hope Fountain had sold two of the Sante Fe units to Mr Soodhoo, and that Mr Singh would like the bank to assist Mr Soodhoo with finance. Mr Hurrienarain subsequently went to meet Mr Soodhoo at the latter's offices in Durban to discuss his requirements and to obtain an understanding of Mr Soodhoo's business, his income and wealth, all of which was required for the purposes of considering whether it would be appropriate for the bank to finance the purchase by Mr Soodhoo himself of two units in the Sante Fe development. The price of each of them was R4,25 million. Agreements of Sale had been concluded between Mr Soodhoo and Hope Fountain. Mr Singh's interest in the matter lay in the fact that he was the sole member of Hope Fountain.

[11] The bank was at one stage going to finance the Sante Fe development, but as it turned out it did not. It had however lent money to Hope Fountain against mortgage bonds registered over four units in the development.

[12] Mr Haselau described the process for an approval of a loan. The information concerning the client (referred to above) was obtained and an application for approval of the loan was drawn up and signed by the client. The bank would usually (as in this case) obtain a valuation of the property concerned from an external valuer. The use to which the properties was proposed to be put is of importance, as if one is dealing with residential property, the bank would at that time advance a higher percentage of the price of the property for a primary residence than it would for a property bought for letting or investment. In this case, according to the officials, Mr Soodhoo said that the two units he was buying would be for use as a primary residence for him and his family. The bank's credit department is in Cape Town. The credit application (and the valuation of the property) is considered in Cape Town where it is granted or refused. The bank's department dealing with loans on residential property is in Johannesburg. That department instructs attorneys who, it appears, deal with the loan documents as well as the conveyancing.

[13] Mr Soodhoo's financial position was found to be good enough to justify the two loans of R3,4 million each. However, a lot of his income and worth resided in the Trust, and he was accordingly advised, when the loans were approved in principle, that they were subject to conditions which were recorded in an email from Mr Hurrienarain to Mr Soodhoo as follows.

> 'Conditions
>
> - Surety of the R Soodhoo Family Trust
> - Valuation of no less than R4 250 000.'

[14] On or about the day that Mr Soodhoo was informed of the approval in principle of his loan applications he requested that the same loans be granted to a close corporation which would substitute for him as purchaser. The close corporation in question was

Hourglass. It was a shelf close corporation owned at the time by Mr Singh, but Mr Soodhoo would become the sole member of it. It appears that the grant of that application was a mere formality on the footing that Mr Soodhoo would, in the circumstances, also be a surety for the due performance of the obligations of Hourglass.

[15] The evidence of the two bank officials then went on to describe how, subsequently, Mr Soodhoo applied on behalf of Hourglass for finance for the acquisition of two further units, this time for investment purposes. For that reason, although the price of the units was the same as the first two, the amount to be advanced on each unit was R2,75 million.

[16] On this occasion the condition of the grant of the loan in principle relating to the valuation of the property read as follows.

'Receipt of a valuation from the bank's approved valuer, in form and substance to the satisfaction of the bank, in respect of R4 250 000 for which valuation is required.'

[17] Although in the relevant emails the condition with regard to having the property valued were rendered differently, in the light of the evidence of the bank officials, there is no reason to interpret them differently. In each case the bank would not lend the amount requested unless an independent valuer valued the properties for and at the request of the bank as being at least the amount of the price at which they were being purchased. A Mr EJ Pike, a registered professional associated valuer, was engaged to value each of the properties. Mr Pike was included in a panel of independent valuers used by the bank. He submitted valuation reports in respect of each of the units valuing them at R4,25 million. The bank (through its Cape Town credit office) found the valuations in order and, the other conditions as to the provision of suretyships being apparently satisfied, the loans were made, the units transferred to Hourglass, and mortgage bonds passed over the units in favour of the bank.

[18] There was to be expert evidence to establish what the true value of each unit was at the material time, they having realised nothing like the values attributed to them by Mr Pike when sold upon the liquidation of Hourglass. The plaintiff called no such evidence prior to closing its case. Just before the defendants' case was closed it was recorded that the plaintiff admits that over the period 2009 to 2012 the four units had a value of no more than R500 000 each. As neither Mr Pike nor any other valuers were called, the reason for the gross disparity between the admitted value and the one produced by Mr Pike has not been revealed. But presumably another admission for which the defendants' pressed, and the plaintiff granted, must have made a substantial contribution to the disparity. It was to the effect that there were no occupational certificates for the relevant units in the Sante Fe scheme from 19 March 2009 to 16 October 2020.

[19] It is convenient, before moving on to the evidence of other witnesses called by the bank, to deal with a few matters which have a bearing on some of the issues which have to be decided. The first of these arose out of the evidence in chief of Mr Haselau, who was asked to have regard to emails to which he was not party in the bundle of documents, but which in their text create the impression that payments to the bank on account of the loans in issue in this case were emanating from others besides Mr Soodhoo. In particular, there is a schedule which was forwarded by Mr Soodhoo to Mr Singh on 3 December 2010, the contents of which were not in dispute. That schedule is one of payments made to Hourglass in order to service the bank loans. It runs from 2 September 2009 through to 22 November 2010. The schedule shows that an entity known as ICT paid R200 000 to Hourglass for that purpose on 2 September 2009 and one known as VP paid R342 000 to Hourglass on 9 March 2010. (The schedule shows also that Mr Singh paid R372 132 to Hourglass during the period in question, and Mr Soodhoo R721 768.60.) Mr Haselau confirmed that ICT was a company which was developing a large shopping complex known as the Ballito Bay Mall. He believed that it was owned by Mr Singh, Mr Soodhoo, a Mr Ouderajh and a Mr Jackson. He believed also that VP was a company known as Victory Parade, which was developing a hotel near the Ballito hospital. He understood Mr Singh and Mr Soodhoo to be shareholders in

that company, and perhaps Mr Ouderajh as well. Both the mall and the hotel were under construction at the material time.

[20] The following emerged during the course of cross-examination of Mr Haselau.

(a) He did not believe that he met Mr Soodhoo at the time that the applications for the loans in question were received and being processed.

(b) He was unable to comment on Mr Soodhoo's contention that he did not say that he intended the first two units to be the primary residence of him and his family.

(c) He confirmed, when it was put to him, that the bank wanted to do a proper valuation of the units. (The question had to do with the condition that the bank should receive such a valuation before the loan could be advanced.)

(d) He confirmed that the bank had funded three units in February 2009 for Hope Fountain. As I understand the evidence these were the penthouses upon the security of each of which the bank lent Hope Fountain R4 182 100 (ie over R12 million in all).

(e) On being referred to the deeds of suretyship signed by Mr Soodhoo and apparently also by Mrs Soodhoo, the witness said that he did not know why she had been asked to sign instead of merely consenting to her husband's execution of the documents. (It was not an expressed condition for the grant of the loans that Mrs Soodhoo should execute a deed of suretyship.)

(f) Mr Haselau did not know the reason why there was a multiplicity of payers into Hourglass's account. He knew no more than he could derive from the papers before the court.

(g) It did not come to the attention of the bank at the time that these loans were being negotiated and granted that there were no occupation certificates for the units in question.

[21] The following emerged from cross-examination of Mr Hurrienarain.

(a) The income of the Trust was used to support the serviceability of the loans sought by Hope Fountain. The Trust was not a mere surety.

(b) In filling in the application information for the first two loans, Mr Hurrienarain recorded that the units in question would be Mr Soodhoo's primary residence and that of his children. His evidence was that Mr Soodhoo must have told him that. He denied that Mr Singh told him that. It was put to him that all Mr Soodhoo had said was that the two units would serve as occasional holiday apartments for him and his family. Mr Hurrienarain did not agree with that.

(c) It was put to Mr Hurrienarain that he knew that the question of the value of the units that Mr Soodhoo had bought was of importance to him (Mr Soodhoo) and not just to the bank. That was not how Mr Hurrienarain recalled the matter.

(d) Mr Hurrienarain stressed that the documentation for the transaction was administered by the bank from Johannesburg, by what he called the "Home Loans Division". This included the suretyships, which as presented required the signature of Mrs Soodhoo.

(e) Concerning the valuations from Mr Pike, Mr Hurrienarain said that he would presumably have read them, but could make no assessment of them. He just looks for the figure to see whether it meets the bank's requirements. He accepted that he formed no opinion about whether the valuation was sensible. He had never been to the Sante Fe development.

[22] A Mr G V Usher, an attorney, was one of the co-liquidators of Hourglass. He was called to give evidence primarily to deal with the issue as to the authority of Mr Soodhoo to sign deeds of suretyship on behalf of the Trust. The four units in question in this case

were unit numbers 17 to 20 inclusive. At the outset of the trial the authority of Mr Soodhoo to sign any of the Trust deeds of suretyships was denied.

[23] A little earlier in the trial it was placed on record that only the resolutions of the Trustees giving the requisite authority in respect of units 19 and 20 were in dispute. The position changed during the course of Mr Usher's evidence. It was placed on record that the resolutions authorising the Trust's suretyships in respect of units 18 and 19 were authorised.

[24] Mr Usher's evidence was to the effect that an enquiry was convened in respect of Hourglass at the request of the bank. It was conducted by a well-known attorney, Mr Geyser. Mr Soodhoo was subpoenaed to appear but did not. Ms Ramdayal, the conveyancer who attended to all of the transactions, did appear with her files. These were handed in formally on the record. Mr Usher was requested in advance of his evidence to attend upon Mr Geyser to obtain the necessary copies of the documents which were submitted at the enquiry, and he recovered and made copies of three of the resolutions by the Trustees authorising Mr Soodhoo to execute the deeds of suretyship. He produced them in evidence without any objection as to the secondary nature of the evidence. Two of the three which he found related to units 17 and 20.

[25] The Trustees were not called to deny their signatures. (The question as to whether Mr Soodhoo's signatures on the Trust's resolutions were denied was not really canvassed in evidence. It was irrelevant because he signed the deeds of suretyship, a fact which became common cause.)

[26] In addition Mr Soodhoo confirmed that the other Trustees were well aware of the fact that he was to execute deeds of suretyship in respect of units 17 and 20. It was not argued that the authorising resolutions of the Trust had to be reduced to writing.

[27] There is no need to go further into the evidence of Mr Usher. In my view the authority of Mr Soodhoo to sign the deeds of suretyship on behalf of the Trust is proved

on a balance of probability. Ms Ramdayal was not called to give evidence. Mr Usher said that she no longer practised and that he did not know where she could be found. It is worth mentioning that she sent letters to the bank after the registration of each of the mortgage bonds enclosing what she called "registration documents". Each of these letters enclosed not only the so-called "registration documents", but also the suretyships of the Trust and those admittedly signed by Mr Soodhoo in his personal capacity, and thought by the bank to have been signed also by Mrs Soodhoo. At the lower right hand corner of the deeds one sees the same imprint on the suretyships as is found on the mortgage bonds. It is "GHOSTCONVEY 11.4.2.11". I mention this because, given the presentation of especially the deed of suretyship prepared for signature by both Mr and Mrs Soodhoo, and the fact that those documents were transmitted by the conveyancer to the bank, the bank's concession that the apparent signature of Mrs Soodhoo is not hers does not appear to reflect upon the bank's integrity. It was not a requirement stipulated by the bank that Mrs Soodhoo should sign any deed of suretyship. It should also be observed that in terms of the agreements of sale of the units, conveyance of any unit, and the registration of any mortgage bond over any unit, had to be attended to by Ms Ramdayal. She was the nominee of Hope Fountain.

[28] The final witness called by the bank was Mr Hemanth Singh who is an attorney and businessman. His evidence was to the following effect.

(a) In June 2009 Mr Soodhoo and Mr Singh secured a 30% interest in ICT at a cost of R15 million. Mr Soodhoo paid in R7 million and Mr Singh the balance.

(b) Each of them were shareholders and directors of ICT and Victory Parade. Both of these investments required funding.

(c) There was a promise (at some or other level) of funding for the Ballito Bay Mall from Rand Merchant Bank. (There was a prior promise by Nedbank, but that was revoked.) Money was required on a short term basis in order to complete the construction works necessary to enable shops to be handed over to Checkers and

Game on 1 October 2009, in order to allow them two months to fit out their premises to open in December. None of the other shareholders had any money.

(d) It appears that Mr Singh's ability personally to fund further borrowings was already used up. The bank finance for the mall would collapse if Checkers and Game did not open on time.

(e) Mr Singh did not have sight of the financial information relating to Mr Soodhoo and the Trust which had been submitted to the bank in support of the loan applications. He accepted Mr Soodhoo's statement that he could not without more simply finance the immediate requirements of ICT and Victory Parade.

(f) Mr Singh was the sole member of Hope Fountain, and he and Mr Soodhoo devised a plan which would involve Mr Soodhoo buying the first two units and Hope Fountain using the money to assist ICT with bridging finance.

(g) He subsequently advised Mr Soodhoo that it would be better to use a close corporation (Hourglass) to buy the units as the idea was that the bridging finance would only be required for 60 to 90 days, after which ICT's bank finance should come through, and the bridging finance provided to ICT repaid. The bank's loans on the two units would be repaid and transferring the member's interests in Hourglass from Mr Soodhoo back to either Hope Fountain or Mr Singh in order to return the two units would be cheaper and easier than transferring the two units from Mr Soodhoo to Hope Fountain (or Mr Singh). That was agreed.

(h) The conveyancers attending to registration of the bonds over the two units was instructed to issue her guarantees in favour of a company known as Gearwise, which was attending to the work on the mall necessary to accommodate Checkers and Game. The monies were in fact paid directly to ICT, and not to Hope Fountain.

(i) The balances of the two purchase prices (ie what would ordinarily be the deposits paid by a purchaser to a seller) were never paid to Hope Fountain and were never intended to be paid. (The agreements in respect of all four units are silent on the arrangements for payment of the balance of the price in each case.)

(j) Subsequently he and Mr Soodhoo decided to follow the same arrangement in respect of another two units in Sante Fe in order to raise money necessary for Victory Parade. Victory Parade was in the throes of building its hotel and was in need of finance. The proceeds of the second two loans went to Victory Parade.

(k) Insofar as the purchase price of R4,25 million per unit was concerned, Mr Singh's evidence was that he determined the price which he believed to be the market value of the units. Again the difference between the loans granted by the bank and the price in each case was not paid by Hourglass.

[29] Mr Roy Soodhoo was the only witness called for the defendants. He said that he first became involved with Mr Singh early in 2009 when there was a suggestion that Mr Singh could help or involve him in investments. He was led to believe that Mr Singh was worth a very considerable sum of money. He claims to have been impressed by Mr Singh both as a man of substance and as a lawyer, and said that on the latter account he trusted him even more.

[30] He had meetings with Mr Singh on the subject of investments and eventually he was taken to see the Ballito Bay Mall which was then under construction. He was impressed. His attitude was that one makes money, or at least gets out what you put in, when you are involved in property investment. Following that Mr Soodhoo started to invest in ICT. The company known as Gearwise was at that time a contractor on site and was not being paid. That appears to have been the motive (perhaps on Mr Singh's part) for soliciting further investment.

[31] Thereafter Mr Singh invited him to invest in the hotel through the company known as Victory Parade. He agreed to do that.

[32] Later he was once again approached by Mr Singh who said he needed money and had flats which were worth R4,25 million each. Mr Soodhoo took the opportunity to state more than once that Mr Hemanth Singh represented to him that the bank would value those flats at R4,25 million.

[33] After he had signed the sale agreements he was contacted by Mr Hurrienarain to arrange finance. That was done. He was asked whether he discussed how much loan finance was being sought and his answer was that he never asked Mr Hurrienarain that question. He said his concern was the valuation.

[34] Mr Soodhoo said that Hourglass became the purchaser under the transaction because Mr Singh had said to him that it would be better to put the flats into the ownership of a close corporation so that if he sells them it would make it easier. Mr Singh offered him the shelf corporation.

[35] Mr Soodhoo said that he did not ever see Mr Pike's valuation. Nor could he remember having been told specifically about it. As I understood his evidence, he knew that the grant in principle of the loan was dependent upon the bank receiving a satisfactory valuation of the property, and assumed that the bank had received such because he was advised ultimately that the loan was granted.

[36] According to Mr Soodhoo various documents which were required to be signed in respect of the first two units were brought to him at his office. He thinks Mr Hurrienarain brought them but cannot be certain. (Mr Hurrienarain did not accept that he took documents to Mr Soodhoo to be signed by him.) Mr Soodhoo denied that the persons who witnessed his signature were actually present.

[37] In his evidence in chief Mr Soodhoo was referred to the copy of the trustees' resolution authorising him to sign a deed of suretyship in respect of Unit 18 (one of the first two) for an amount of R3,4 million, and confirmed the signatures of his Trustees to that document. Without any explanation he also confirmed the signatures of the

Trustees to a resolution for the provision of a suretyship for R3,4 million, a document produced by the defendants in their bundle. That resolution purports to stipulate a proviso to the authority it conveys, that “a valuation of not less than R4 250 000 per unit be confirmed by the bank”. It was never suggested that the content of that resolution had been shown to any of the bank’s officials. Mr Soodhoo offered no explanation as to the duplication of authorities and the conflict between them. His explanation of the circumstances in which he signed the documents relating to the first two loans does not explain how the Trustees resolutions came to be executed and delivered to the bank. No more need be said about this as I am satisfied that Mr Soodhoo was indeed authorised by the Trust to sign all of the suretyships in question.

[38] When asked why Hourglass came to buy the second pair of units Mr Soodhoo’s answer was that Mr Singh had told him that the value of the units was going up and so he decided to take another two.

[39] On the subject of the parting of the ways between Mr Singh and him, Mr Soodhoo said that he had kept up his end of the bargain in connection with the development of the Ballito Bay Mall (ICT), but Mr Singh did not. Concerning the affairs of ICT, he claimed that a lot of fraud was going on which he had picked up later. In about August 2012 he took a decision to sell the units that Hourglass had bought but an estate agent said he would never get the price he had paid. He employed a valuer who told him that, as is, the units were worth about R500 000 each and would be worth about R900 000 in good condition. Apparently this valuer informed Mr Soodhoo of the problem with occupation certificates. Concerning these revelations, he said that he was shocked and that he had been taken in by someone he had trusted (ie Mr Singh). He claimed that with hindsight he came to believe that there was a relationship between the bank and Mr Singh. (By that I understood him to convey a suspicion that the bank had combined with Mr Singh in order to put Mr Soodhoo in the position in which he found himself with regard to the units.)

[40] Under cross-examination the following emerged concerning Mr Soodhoo's property investments.

(a) He had invested R17,5 million in the Ballito Bay Mall project (ICT).

(b) He had invested R7,5 million in Victory Parade (the hotel development).

(c) He accepted that these expenditures were part of his investment business.

(d) He accepted that the Sante Fe units were the third business venture made available to him.

[41] Mr Soodhoo accepted that he was impressed by Mr Singh, that he placed reliance on what Mr Singh told him about the Sante Fe units, and that it was Mr Singh's representation which informed his decision to buy the units. That was on both occasions. Nevertheless, he took more than one opportunity to reiterate that what Mr Singh had said to him was that the bank would find the requisite value (R4,25 million) in each of the units.

[42] Mr Soodhoo reiterated his denial of the fact that he informed the bank officials that the first two units would comprise his primary residence. But he added that he could not recall whether he had told the bank officials that he proposed to use the first two units for what he called "holidays and weekends". His evidence was that after two years he decided that the units had better be rented out. At that time he had only stayed at one of the units for a night on two occasions. His evidence was that one unit had some furnishings installed – that is to say a lounge chair, a lounge suite and a small bar fridge. When asked to explain why the loans granted on the security of the second pair of units were lower than those granted on the first pair, Mr Soodhoo claimed not to know, and suggested that it was perhaps based on his income that the bank reduced the quantum of the loans on the second pair.

[43] Mr Soodhoo endorsed the proposition that the loans to Hourglass had been granted upon the footing that they would be serviced and repaid out of the income of the sureties. Once the loans were repaid the units would either be kept or sold. He said that the investments in the units were long term, as in his experience "building is a long term investment".

[44] Mr Soodhoo's denial of Mr Singh's version of events raised the question as to the "deposits" on the four units (ie the difference between the purchase price and the amount of the loan in each case). Mr Singh had said in evidence that nothing had been paid in that regard, and that bank statements could be examined to establish that. Under cross-examination Mr Soodhoo's evidence was that he had indeed paid the deposits. He said that he had given the money in cash to Mr Singh – "paper money" – over a period of time, and not in one hit. He said that he had no proof that the payments had been made. This allegation that these monies had been paid in cash was not put to Mr Singh when he was cross-examined. A little arithmetic reveals that the amount in question was R4,7 million.

[45] Mr Soodhoo was referred to another schedule of payments into the account of Hourglass (for onward payment to the bank) which went beyond the time period of the schedule referred to earlier in this judgment. This schedule ran up to March 2012. No further payments had been received from either ICT or Victory Parade after March 2010. By March 2012 Mr Soodhoo had paid (in round figures) R1 518 000 to Hourglass and Mr Singh R922 000. When pressed on the apparent contradiction between these figures, and especially Mr Singh's contribution to the instalments Hourglass had to pay to the bank, and Mr Soodhoo's version that the transactions with regard to the four units comprised ordinary arms-length investments, Mr Soodhoo's explanation was that Mr Singh was making these payments to Hourglass as set-offs against the shortfall in his contribution to the ICT investment (ie the shortfall when measured against Mr Soodhoo's contribution). No details at all that matter regarding these transactions were given. When challenged as to why there is no accounting with the regard to the ICT investment, and Mr Singh's contribution to Hourglass, Mr Soodhoo gave the answer that it was

unnecessary because Mr Singh was well aware of the shortfall and why he was making contributions to Hourglass.

[46] Mr Soodhoo was shown two emails which are of some significance in this matter.

(a) On 29 December 2011 he sent an email to the bank asking for the debits in respect of two of the Hourglass loans to be raised against ICT, and furnishing the ICT bank account as the source of such payments. His explanation, as far as it went, was that Mr Singh had asked him to send that email.

(b) The second email of some significance was one he sent to Mr Singh in May 2012. The relevant portion reads as follows.

> "Hemanth, you need to get confirmation if ICT will pay the H/Glass loan otherwise the burden will fall on us. I trust you know how best to deal with it. You still need to see how you are going to arrange the arrears which I am sure it will not be long before the bank acts'.

(c) Mr Soodhoo had no explanation for these emails, which would reconcile them with his denial of Mr Singh's version of events.

[47] Counsel have argued that it is necessary in this case to resolve the dispute of fact between Mr Singh and Mr Soodhoo concerning the underlying cause of the decision made by Mr Soodhoo (and accordingly Hourglass) to buy the units and ask for and accept loan finance from the bank. I have no hesitation in concluding that in its essential features Mr Singh's account must prevail.

[48] The correspondence which post-dates the transactions at issue in this case supports and renders probable Mr Singh's explanation for how it came about that, with the creditworthy support of Mr Soodhoo and the Trust, Hourglass bought the units in Santa Fe. When one looks at the sale agreements in the light of Mr Singh's evidence, one sees that they look more like documents drawn up between the parties thereto for

the purposes of generating the finance which Mr Singh says was the purpose of the transactions. The clauses which would ordinarily be all important in the case of a normal purchase of residential units are not filled in.

[49] Mr Soodhoo was a peculiarly unsatisfactory witness. In areas that matter his answers appeared to me to be glib and as vague as he felt he could get away with. The issue of the payment of the difference between the price of each unit and the amount lent by the bank on each unit, and how that was dealt with, not only supports Mr Singh's description of the transactions, but dealt a heavy blow to any argument that Mr Soodhoo should be regarded as a credible witness. Mr Soodhoo's evidence that he paid some R4.7 million to Mr Singh in cash over a period of time clearly took his own counsel by surprise. Mr Singh's evidence that the amounts making up the sum had not been paid, and were not intended to be paid, was not challenged with an assertion that payment had been made; let alone in the fashion contended by Mr Soodhoo in his evidence.

SECTION 15 OF THE MATRIMONIAL PROPERTY ACT.

[50] No evidence was led to explain the presence of the apparently forged signatures of Mrs Soodhoo on the deeds of suretyship which were supposed to be signed by her and her husband. In the case of the bank this might be explained by the fact that it was late in the day, as far as could be judged from the bench, that the bank's lawyers realised that they could not prove the authenticity of Mrs Soodhoo's apparent signature through the intended evidence of the bank's handwriting expert.

[51] It has been argued on behalf of Mr Soodhoo that, for want of written consent on the part of Mrs Soodhoo, his liability (and consequently the liability of the joint estate created by his marriage to Mrs Soodhoo) is not established. For that proposition Mr Soodhoo relies on the provisions of s 15 of the Matrimonial Property Act 88 of 1984 (the "Act").

[52] The position is that all of the provisions of s 15 of the Act which may have a bearing on the question as to whether Mr Soodhoo is liable on the deeds of suretyship, as his signature to the document suggests, must be considered. In *Vukeya v Ntshane and Others* [2020] ZASCA 167 (11 December 2020) the court decided an appeal in a matter similar to the present one applying the provisions of s 15(9)(a) of the Act (which I will come to) despite the fact that the applicability of that provision had not been raised in the case. The following appears in paragraph 20 of the judgment.

"The High Court erred by not considering s 15(9)(a) in its enquiry. Despite the fact that the appellant did not refer expressly to s 15(9)(a) in his answering affidavit, as counsel for the first respondent contended, as a trier of facts, the High Court was bound to consider s 15 in its entirety and not cherry pick certain sections. The interpretation of any document including legislation must be approached, as this court has indicated in numerous judgments, contextually and holistically, taking into account the purpose of the legislation under discussion. In this case, the purpose of the provision was to strike a balance between the interests of a non-consenting spouse, on the one hand, and a third-party purchaser, on the other. As aptly noted in *Marais*, "[w]hile the consent requirement is designed to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, the "deemed consent" provision in s 15(9)(a) is intended to protect the interests of a *bona fide* third-party who contracts with that spouse"."

(The reference is to *Marais and Another NNO vs Maposa and Others* 2020 (5) SA 111 (SCA) para 26.)

[53] The principal purpose of s 15 of the Act was the clarification of the powers of spouses married in community of property following upon the abolition of the marital power and the granting of equal powers to spouses married in community of property provided for in ss 11,12 and 14 of the Act. To a substantial extent s 15 is a balancing exercise. For the protection of the community estate the section provides that notwithstanding the general rule that either spouse may perform any juristic act with regard to the joint estate without the consent of the other spouse, there are exceptions or restrictions, the non-observance of which will put innocent third parties at risk. For that reason, s 15 also provides for the protection of a third-party who may do business with

an errant spouse, and unfairly become the victim of the invalidity of a transaction with that errant spouse who acts without the required consent of the innocent spouse. In that sense s 15 constitutes a single package of measures designed to regulate the matters mentioned in the section. If I were not bound by the decision in the *Vukeya*, I would nevertheless be inclined to the view expressed therein that a finding that a transaction is invalid for want of consent of a spouse cannot be made without considering all of the provisions s15 of the Act relevant to the transaction under consideration.

[54] The provisions of s 15 relevant to the current inquiry are the following.

'15. **Powers of Spouses.**

(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse-

…

(h) bind himself as surety.

…

(5) The consent required for the performance of the acts contemplated in paragraphs … and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.

(6) The provisions of paragraphs … and (h) of sub-section (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.

…

(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under s 16(2), and-

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3) or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.'

[55] In the present case the following questions arise under s 15 of the Act.

(a) Did Mrs Soodhoo provide written consent as required by ss 15(2) and (5) of the Act?

(b) If the answer is in the negative, did Mr Soodhoo provide the suretyships in the ordinary course of his profession, trade or business as contemplated by subsection 6?

(c) If the answer to the second question is in the negative, is Mrs Soodhoo's consent deemed to have been given as required by ss 15(2) and (5) because the bank could not reasonably have known that the transactions had been entered into contrary to those provisions?

[56] If Mrs Soodhoo had signed the deeds of suretyship as the bank first set out to prove, then s 15 of the Act would not have been engaged at all. The community estate would have been rendered liable under the signature of both spouses.

[57] If Mrs Soodhoo did not sign the deeds of suretyship (as is now conceded), one is left with Mr Soodhoo's assertion that his wife did not consent in writing to the deeds of suretyship, and with the failure of the bank to tender any other evidence of the existence of such written consent. Notwithstanding my not insubstantial misgivings about Mr Soodhoo's evidence, the conclusion, for the purposes of this case, must be that the required written consent was not given.

[58] In *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA) para [13] it was held that

'…it does not suffice for a person seeking to rely on s 15(2)(*h*) to say that they were married in community of property and that their spouse did not consent to the transaction in order to bring themselves within the ambit of the section. That is because the section only operates in certain limited circumstances. If they wish to rely upon it they must bring themselves within the full range of operation.'

Properly construed, according to the majority judgment in *Strydom*, the provisions of s 15 of the Act requiring written consent to a spouse binding herself or himself as surety do not apply to the provision of a suretyship in the ordinary course of the profession, trade or business of the spouse executing the deed. It was accordingly for Mr Soodhoo to establish that he did not bind himself as surety in the ordinary course of his business.

[59] Counsel for Mr Soodhoo has argued that what emerges from his evidence is that the first two units were bought as holiday homes, and the second two as property investments. As to the first two, they were not used as holiday homes in the years following their purchase, and I reject Mr Soodhoo's evidence that he intended to use them as holiday homes. Mr Soodhoo mentioned on a number of occasions that he regarded investment in immovable property as good as you seldom lost money on such transactions. I think it fair to say that his version is that all four units were bought as investments.

[60] Counsel for Mr Soodhoo developed his argument, with reference to paragraph 10 of the judgment in *Strydom*, along the lines that the words "ordinary course of his profession, trade or business" are intended to refer only to whatever business constitutes or generates the principal income of the spouse. As I understand the argument it seeks support in the final sentence of paragraph 10 of the judgment. However, that sentence must be read in the context of the paragraph, which in relevant part reads as follows.

'Where a business is carried on through an incorporated vehicle such as a company or close corporation, or even an unincorporated vehicle, such as a partnership or trust, the question to be answered is whether the surety's involvement in that business is his or her business and whether the execution of the suretyship was in the ordinary course of the surety's business, not the business of the company, close corporation, partnership or trust. It may not be the surety's business if they are a mere salaried employee, having no commercial interest in the business' success or failure. However, a person who holds a number of non-executive directorships that are the principal source of their income may well when executing a deed of suretyship for one of those companies be acting in the ordinary course of their business.'

Quite obviously the last sentence in the passage quoted above merely furnishes an example of a connection between a spouse and a company (ie non-executive directorship), unaccompanied by a share in the company, which may justify a suretyship in favour of such company without the consent of the surety's spouse when the surety's principal income flows from that and other non-executive directorships. The learned Judge had no intention of restricting the ambit of the operation of s 15(6) of the Act to the "principal" profession, trade or business of the spouse in question.

[61] *Strydom's* case, *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* 1997 (4) SA 66 (SCA) and the unreported judgment of Hurt J in this division in *Investec Bank Ltd and another v Naidoo and others* (D&CLD Case No 9640/98, referred to in paragraph 12 of the judgment in *Strydom*) all endorsed the proposition that the investment a party makes in a corporate vehicle justifies a conclusion that standing surety for the corporate body may be regarded as an act in the ordinary course of the surety's business when the purpose is, as it will almost inevitably be, the advancement of the success of the investment.

[62] Accordingly, on Mr Soodhoo's version the suretyship he signed did not require his wife's consent under s 15 of the Act. But Mr Soodhoo's version has been rejected.

[63] Counsel for Mr Soodhoo has argued that on Mr Singh's version the transaction with the bank which generated the need for the suretyships was a "scam", and that this took Mr Soodhoo's guarantees outside the scope of the "ordinary course" of business.

[64] Counsel for the bank has argued that Mr Singh's version established that the purpose of the transactions with the bank was to generate the capital required:

(a) in the case of the first two transactions, to save the investments in ICT (ie Ballito Bay Mall); and

(b) in the case of the second two transactions, to save the investments in Victory Parade.

[65] As I understand *De Goede's* case (at 77 – 78) there is a perhaps distant relationship between the "ordinary course of business" dealt with in s 29 of the Insolvency Act, 24 of 1936, and s 15(6) of the Act. With reference to, *inter alia*, *Ensor NO v Rensco Motors (Pty) Limited* 1981 (1) SA 815 (A) the court in *De Goede* held that whereas the objective test under the Insolvency Act examined the ordinary course of business of solvent practitioners, the enquiry in the present context is simply into the ordinary conduct of business persons. In *Ensor's* case (at 825A) the court held that to determine whether an alienation was "in the ordinary course" of a business one must have regard "to what is done or would be done in other similar businesses in similar circumstances". The circumstances in the present case were characterised by a problem which required to be addressed urgently.

[66] In order not only to save but also to advance the investment of some R15 million which Mr Singh and Mr Soodhoo had already made in ICT, it was necessary to address the cash flow problems with which ICT was confronted, and which could break the investment already made in the construction of the shopping mall. It appears clear that Mr Singh's credit had been exhausted. However, he had the units in Santa Fe which were available to secure borrowings from the bank if the bank was satisfied with the creditworthiness of the person whose obligation it would be to service the mortgage finance. It is not disputed that Mr Soodhoo was very much such a person. (Judging from the undisputed statement of assets and liabilities and income enjoyed by him and the Trust, which was presented to the bank, Mr Soodhoo may very well have found it possible to provide the finance needed for ICT directly from his own resources. One can only assume that, perhaps wisely, he felt it better to use borrowed funds.) As between

Mr Singh and Mr Soodhoo it was agreed that the sales of the units would be undone as soon as ICT's finance came through and the bank was consequently repaid. From the bank's perspective, its essential requirements would be met in the sense that:

(a) the properties would be transferred to Hourglass;

(b) Hourglass would pass mortgage bonds over the properties in favour of the bank; and

(c) Mr Soodhoo and the Trust would be liable under their suretyships if anything should go wrong.

It was not argued, nor could it have been, that it was outside the ordinary course of business for a bank to require a member of a close corporation like Hourglass to stand surety for its borrowings.

[67] What Hope Fountain, as the seller of the units, proposed to do with the proceeds of the sale was not a concern of the bank. It was not put to the bank witnesses that it ought to have been.

[68) Notionally the same outcome could have been achieved if Hope Fountain had mortgaged the properties in favour of the bank and Mr Soodhoo and the Trust had stood surety for the discharge of those mortgage obligations. However, the requirement as between Messrs Singh and Soodhoo that the properties actually be transferred to a close corporation of which Mr Soodhoo would be the sole owner gave a measure of security to Mr Soodhoo which, on an overview of the transaction, was fair and reasonable.

[69] The predicament in which Mr Singh and Mr Soodhoo found themselves with regard to their investments in ICT and Victory Parade required some lateral thinking. In my view one cannot say that ordinary persons of business would not have financed the investment in ICT and Victory Parade in the fashion in which Mr Singh and Mr Soodhoo sought to do. What is normal and ordinary surely turns on the circumstances to be addressed.

[70] On this analysis, the reason why counsel for Mr Soodhoo argued that the transactions with the bank were "a scam" really lies in the fact that Mr Soodhoo said that he intended the first two units to become his primary residence. Mr Soodhoo denies that he said that and Mr Singh said he was not aware that Mr Soodhoo had said that. The purpose of the representation was, on the evidence before me, to solicit a larger loan than would be granted if it was disclosed to the bank that the purpose of the transaction was investment (as it was in the case of second two units). For the rest there is no evidence before me to suggest that the bank would not have gone along with the transactions if it had been disclosed to them that

(a) Hope Fountain intended to disburse the funds in support of the investments of Mr Singh and Mr Soodhoo in ICT and Victory Parade;

(b) it was the intention of the parties to unravel the transactions as soon as finance was available from ICT and Victory Parade, respectively.

[71] Making misrepresentations to a bank in order to secure finance from it cannot in our law be regarded as the ordinary course of business. I say this notwithstanding the widespread experience of lawyers and bankers that statements of assets and liabilities, and of expectations of income, provided by bankers' clients in pursuit of finance, are often more optimistic than is justified, and unreliable. If such misstatements are made in order to secure a credit grantor's acceptance of the quality of a surety, is the surety entitled to escape liability under s 15 of the Act on the basis that the misrepresentation made as to the creditworthiness of the surety means that the suretyship was not executed in the ordinary course of business, notwithstanding the fact that the transaction otherwise, objectively speaking, has all the hallmarks of one executed by both parties in the ordinary course of business? It seems to me that the question need not be answered in this case.

[72] It is not disputed that the statements of assets and liabilities, and income, relating to Mr Soodhoo and the Trust were a fair and proper exposition of their financial positions. Neither is it disputed, for that matter, that those disclosures justified the bank's belief that, between them, Mr Soodhoo and the Trust were good for the guarantees they gave.

[73] Mr Soodhoo's misrepresentation regarding his and Hourglass's intentions for the first two units meant that the loan agreements between Hourglass and the bank for the first two units were in each case for a higher amount than the bank would have granted but for the misrepresentation. But as between Hourglass and the bank, the latter was the wronged party. If any remedy lay in consequence of the misrepresentation, it would be at the instance of the bank against Hourglass. Objectively speaking the suretyships provided by Mr Soodhoo were to protect and advance his property investments in ICT and Victory Parade, via Hourglass. The fact that Hourglass received what, in the greater scheme of things, was a little more by way of finance than it would otherwise have got but for the misrepresentation, does not affect an overall objective evaluation of the circumstances of business which brought Mr Soodhoo to execute the deeds of suretyship.

[74] I conclude that also on Mr Singh's version of the transactions, that is to say the accepted one, the suretyships were provided by Mr Soodhoo in the ordinary course of his business as a property investor.

[75] Given the conclusion I have reached that the deeds of suretyship signed by Mr Soodhoo, but not by his wife, were executed in the ordinary course of his business, there is no need to make a decision on the impact of s 15(9) of the Act.

[76] Nevertheless, in case I am wrong concerning the impact of s 15(6) on this case, I make the observation that on the evidence before me it is established that the bank did not know and could not reasonably have known that the suretyships were provided without the written consent of Mrs Soodhoo. Accordingly the transactions are deemed to have taken place with the written consent of Mrs Soodhoo.

[77] It will be recalled that each of the deeds of suretyship had been sent by the conveyancer (after transfer and the registration of mortgage bonds in favour of the bank) to the branch of the bank with which Mr Soodhoo had negotiated the loan finance. It is

not clear whether it was the Johannesburg branch of the bank (which dealt with residential mortgage finance, and instructed the conveyancer) or the conveyancer that decided that the easiest way of securing Mrs Soodhoo's written consent was by requiring her also to sign the deeds of suretyship.

[78] Mr Soodhoo offered no explanation at all for what he was thinking when, according to him, he signed the deeds of suretyship and returned them without his wife's signature, when clearly the bank required his wife's signature. From what little emerges of the relationship between Mr and Mrs Soodhoo, it seems most unlikely that Mr Soodhoo would have left it to the bank to make arrangements with his wife to sign the suretyships.

[79] The position is that the suretyships handed to the bank were on the face of it in compliance with the Act. I am not sure what a reasonable banker could have done in these circumstances in order to achieve certainty that it was Mrs Soodhoo who had signed, short of implying that either Mr Soodhoo, or the conveyancers who sent the signed deeds to the bank, were not necessarily to be trusted. It is not without significance that right to the trial the bank pursued its contention that Mrs Soodhoo had signed the deeds of suretyship. I was informed by counsel for the bank that the contention that she had signed was abandoned because the authenticity of the specimen signatures which the bank's handwriting expert had relied upon could not be established. Indeed, a supplementary report from the defendants' handwriting expert, presented to me in the bundle of expert summaries, recorded the differences between the specimens relied upon by the bank's expert, and the known genuine and authentic signatures available to the defendants' handwriting expert. It appears that the bank had been misled by other forged versions of Mrs Soodhoo's signature.

COMMON MISTAKE

[80] The defendants argue that the bank, Hourglass, the Trust and Mr Soodhoo laboured under a common mistake concerning the value of the units when they

contracted with each other. Relying on *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A) at 450 it is argued that the Trust and Mr Soodhoo are entitled to avoid any liability as surety, and that indeed, Hourglass would be entitled to avoid any liability under the loan agreements.

[81] This argument is flawed in many respects, and I see no need to enter into a discussion of all of them. I propose to traverse what is necessary without becoming immersed in matters of legal principle.

[82] Firstly the argument is founded upon the proposition that Mr Soodhoo's version of the transactions, and not Mr Singh's version, is found to be true. On Mr Singh's version the whole purpose of the transaction was to secure as much finance from the bank as could be got. Mr Soodhoo's evidence that it was absolutely crucial from his perspective that the property should be worth the prices he had already agreed to pay before he saw the bank can safely be rejected. In any event there is no evidence that he took any steps whatsoever to establish that each unit he was buying was worth R4,25 million before signing the sale agreements with Hope Fountain. He did not disclose to the representatives of the bank with whom he dealt that he was uncertain that he was getting value for money at the prices he had agreed to pay. I have no doubt that had he done so the bank would have told him that they could not either guarantee the value, nor conclude a contract upon the basis that it was conditional upon such value existing.

[83] Even assuming, for the purposes of argument, that Mr Soodhoo was genuinely mistaken in the sense that he concluded the contracts in the firm and honestly held belief that each unit was worth the price, the bank did not make the same mistake: ie there was no common error.

[84] The condition laid down by the bank when granting the loans in principle, upon which its ultimate decision to grant or refuse the loans would depend, was that a valuer should value the properties at least at the purchase price of each of them. That condition was fulfilled. On that footing the bank entered into the contracts, placing their

trust not in the fact that each unit was worth the price, but in the fact that a sworn valuer had expressed the opinion that each was worth the price. There is a difference between the two. The bank would have realised, even if Mr Soodhoo claims that he did not, that it would have been entirely unbusinesslike to enter into transactions of this nature (loan agreements and suretyships) upon the footing that either party could resile if it could establish subsequently that the property with respect to which the finance had been granted was worth something less than the price paid for it.

[85] Expanding on this argument, the Trust and Mr Soodhoo contend that the suretyships fall to be rectified, because, whereas there was a common intention that the transactions were subject to the condition that the market value of each of the units must be at least R4,25 million, that condition was erroneously omitted from the deeds of suretyship.

[86] In my view what I have already said is the answer to this argument. However, it is worth noting that clause 4 of each of the deeds of suretyship contains a provision which reads as follows.

> 'This suretyship is unconditional and there are no conditions precedent suspending its operation.'

The wording sought to be added by rectification in the amended plea is not perfectly clear. What is contemplated is a proviso to clause 4, and I think that it is intended to read as follows.

> '… provided that any property bonded in favour of Nedbank by the principal debtor in respect of its indebtedness has a market value of not less than R4 250 000.'

The proposition that the bank intended that, or would have agreed to that, verges on the preposterous. That proposition was certainly not put to the bank's witnesses.

<u>MISREPRESENTATION</u>

[87] The defendants' plea goes so far as to assert that the bank (presumably represented by Messrs Haselau and Hurrienarain) fraudulently represented to Mr

Soodhoo that the properties were worth R4,25 million each when the bank knew that to be false. In argument counsel for the defendants confined the argument to the proposition that the misrepresentation would suffice for the purposes of the defence even if it was innocent. Counsel had no alternative, given that there was no evidence at all to support the claim that the bank knew of the true lower value of the property, or of the value which became the subject of an admission during the course of the trial. There can be no suggestion that the bank was negligent. It engaged the services of a sworn valuer.

[88] It is apparent that Mr Soodhoo's instructions to his attorney and counsel at the stage of pleadings were very different to his evidence. Counsel was left arguing that

(a) the bank communicated a condition to Mr Soodhoo, when the loan finance was approved in principle, that whether there would be a loan was conditional upon the unit being worth at least R4,25 million; and that

(b) by proceeding with the transactions it effectively represented to Mr Soodhoo (and thereby to Hourglass and the Trust) that each unit was worth that money.

The first of these propositions, (a), is false. The condition, as I have already said, was that a valuer should express the opinion that the properties were worth what had been paid for them. The bank gave no warranty and expressed no view that the valuer was right.

[89] In any event what was contended for contradicts clause 8 of each of the loan agreements. In its material parts the clause reads as follows.

'8. PROPERTY ASSESSMENT AND INSPECTIONS

8.1 It is recorded that Nedbank may have appointed a person, not necessarily a valuer or construction expert, to assess the property to determine whether it is has sufficient value as security for the loan. The value, if any, placed on the property by Nedbank is for Nedbank's internal use only and need not be disclosed to the client. Any assessment is not necessarily intended to determine the market value of the property or the replacement cost of any improvements and does not involve an inspection of materials, finishes and workmanship. In addition, any value placed on the property by Nedbank does not have to be equal to or higher than the loan or the purchase price of the property, and no reliance whatsoever should be placed thereon by the client or any other person.

8.2. The client warrants that the client is satisfied as to the market value of the property, the replacement cost of the improvements for insurance and other purposes as well as the general quality and condition of all improvements, materials and workmanship, whether or not the loan is a building loan. …

8.3. The client acknowledges further that Nedbank does not act as the client's agent in this regard and that Nedbank has no responsibility whatsoever to the client arising from any assessment of the property or value placed thereon by Nedbank, or from any failure by Nedbank to undertake an inspection, regardless of whether or not the loan is a building loan, and the client has no claim of whatsoever nature against Nedbank arising from the foregoing considerations.'

ONE SURETYSHIP OR FOUR?

[90] Finally, counsel for the defendants has argued that it is not possible upon a reading of any one of the four suretyships signed by Mr Soodhoo, and any one of the four signed by him on behalf of the Trust, to discern that they speak to a multiplicity of debts, as opposed to a single one; with the result that Mr Soodhoo and the Trust should only be held liable for R3,4 million.

[91] There is no merit in this argument. No authority is needed for the proposition that documents, that is to say even ones which must by law be in writing, must be interpreted in accordance with their context. Between the defendants there are eight original deeds of suretyship. Mr Soodhoo, who signed all of them, acknowledges all of them. The relationship between each of them and the purchase by Hourglass of a particular unit is common cause. In the case of the Trust, the resolutions authorising Mr Soodhoo to sign each of the deeds actually refer to the particular unit number.

[92] In addition to all that, in its relevant part clause 16 of each of the deeds reads as follows.

'I agree that this suretyship is in addition and without prejudice to any other securities, including other suretyships, now or in the future held from or on behalf of the principal debtor and that it shall remain in force as a continuing covering security for all and any sum or sums of money which may now or in the future be owing to or claimable by Nedbank from any cause aforementioned and any other cause of whatever nature…'

CONCLUSION

[93] The transactions which gave rise to this litigation were concluded a long time ago. It would have been difficult to unravel the state of the account now if the parties had not reached agreement on that. The judgment I propose to give in favour of the plaintiff is the one which the parties agreed to in the event of my finding, as I do, in favour of the bank.

[94] The defendants argue that there should be judgment in favour of Mrs Soodhoo with costs. I do not propose to make that order for a number of reasons.

(a) First of all, the proposition is somewhat artificial as, from the bank's perspective, a judgment against Mr Soodhoo is one against the joint estate, and a judgment also against Mrs Soodhoo would have made no difference, one way or the other, to the liability of the parties.

(b) The costs occasioned in this action by the dispute between the parties as to the authenticity of Mrs Soodhoo's signature would be a small fraction of the overall expense of the litigation. Given my finding that Mr Soodhoo has given false evidence, and also that he made false allegations of fraud against the bank (without tendering any evidence in support of them), I am reluctant to allow him even the small discount of a costs order in favour of Mrs Soodhoo.

(c) The authenticity of the signatures thought by the bank to be those of Mrs Soodhoo was but one part of the general defence that the suretyships were invalid for want of written consent on the part of Mrs Soodhoo. That defence failed.

I accordingly make the following order.

Judgment is granted in favour of the plaintiff against the R Soodhoo Family Trust (Master's reference IT1551/2008/PMB), represented by the first, second and third defendants in their capacities as Trustees, and against the fourth defendant, the liability of the said Trust and of the fourth defendant being joint and several, the one paying, the other to be absolved, for

(a) payment of the sum of R12,3 million;

(b) interest thereon at the rate of 9.5% per annum from 2 March 2016 to date of payment;

(c) costs of suit.

OLSEN J

APPEARANCES

Date of Hearing:	12, 13, 14, 15, 16 & 21 OCTOBER 2020
Date of Judgment :	FRIDAY, 12 MARCH 2021
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