IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: D3809/2016

IN THE MATTER BETWEEN:

NEDBANK LIMITED **PLAINTIFF**

and

RICHARD DAVID DOLBEY **FIRST DEFENDANT**

LOUISE HELEN DOLBEY **SECOND DEFENDANT**

ORDER

(a) The plaintiff's summons and particulars of claim are amended so as to reflect the second defendant as LOUISE HELEN RIDDLE;

(b) Subject to paragraph 3 hereunder, judgment is entered against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:

(i) Payment in the amount of R2 454 998.62;

(ii) Interest thereon at a rate of 10.50% per annum from 09 May 2017 to date of payment in full;

(iii) Costs of suit.

(c) Save that:

(i) The judgment against the second defendant is limited to R2 million;

(ii) The first defendant is not required to pay any costs from 26 August 2020.

JUDGMENT

Delivered on: 28 April 2021

Hadebe J:

[1] For ease of reference, the parties will be referred to as they appear in the summons. On 11 November 2014 (as per the summons) but (11 October 2014 in terms of the attachment to the Index Trial Bundle), the Plaintiff ('Nedbank') entered into a written term loan agreement ('the agreement') with an entity known as Typically Midlands FLM (Pty) Ltd ('the company').

[2] On 19 September 2014, the first defendant (Mr Dolbey) executed an unlimited deed of suretyship in respect of the company. He was at that stage one of seven shareholders at the company. By resolution passed at a meeting of Directors / Officials of the company held on 8 September 2014, he had been authorised to sign the necessary Power of Attorney for the registration of the Notarial Bond ('bond') on behalf of the company. This was after a resolution had been taken to borrow the sum of R7 8 million from the plaintiff. This bond was meant as a continuing covering security to secure the repayment of the loan.

[3] On 30 July 2014, the second defendant (Mrs Dolbey) purportedly executed a deed of suretyship for a limited amount of R2 million in respect of the obligations of the company. The word 'purportedly' is deliberately used in this paragraph. The liability of Mrs Dolbey to Nedbank is what is at issue in these proceedings.

[4] The R7.8 million borrowed from Nedbank was to be repaid within a period of sixty months in equal instalments of R166 300.23 with the first instalment being payable on 1 November 2014. In the normal course of business, the final instalment would be due on 1 October 2019. Interest was to be levied on the loan amount at the variable prime rate of interest of the plaintiff plus 1%.

[5] In a document entitled 'Extract from the Minutes of a Meeting of Typically Midlands FLM (Pty) Ltd' which it would seem was held on 30 April 2014 (the date on

the document is not clear) the first respondent was authorised to settle the terms and to sign the facility letter (containing the offer of the loan facility) to the company. The document was said to be a true extract signed by the secretary and the chairperson of the company.

[6] It is common cause between the parties that the company was subsequently placed under business rescue on 19 November 2015 as per Notice of Appointment of Business Rescue Practitioner in terms of s129 (3)(*b*) of the Companies Act 71 of 2008. The plaintiff avers that as a result of this, the company placed itself in a position wherein it is in breach of clause 12 of the agreement. The said clause deals with instances where breach of the agreement will be deemed to have taken place. It provides as follows:

'**12. BREACH**

12. Should the Client breach any term or condition contained in this Agreement and/or any term, condition or covenant recorded in the Facility letter, or should the Client breach a term or condition of any other Agreement with the bank (which breach shall constitute a breach of this Agreement), or in the event that:

12.1.1. ……

12.1.2. ……

12.1.3. ……

12.1.4. ……

12.1.5. ……

12.1.6. the Client is voluntarily or compulsorily placed under judicial management or is wound up or enters into a compromise, composition or arrangement with its creditors, or any class thereof; or

12.1.7. the ultimate beneficial control of the Client changes during the period of the Loan Amount; or

12.1.8. ……

12.1.9. ……

12.1.10. ……

12.1.11. ……

12.1.12. ……

12.1.13. the bank shall be entitled, without derogating from any other right which the bank may have, to claim immediate repayment of the Loan Amount together with the interest and all amounts owing or claimable by the bank in terms of this Agreement, all of which amounts shall

> Immediately become due and payable, or to increase with immediate effect, the Interest Rate applicable to the Agreement with a maximum of 5% (five percent) Every event of breach shall trigger this increase, in the bank's discretion, and any failure to exercise the right to Immediately Increase the Interest Rate shall not be construed as a waiver thereof and may be exercised by the bank at any time after an event or events of breach has/have occurred, and irrespective of whether the breach was rectified or not.'

[7] Flowing from the provisions of clause 12 of the agreement, the plaintiff claims that the whole amount outstanding as at the date of the breach is now due and payable. In terms of the certificate of balance signed by two of the bank's managers, (Labotsibeni Nokwethemba Seme and Sijabulile Sibongile Ntshangase) the amount outstanding and due to the company is the sum of R2 454 998.62 with interest thereon at the rate of 1% above the prime overdraft rate as applicable from 9 May 2017.

[8] Having entered an appearance to defend, the first defendant subsequently signed the confession to judgment for the plaintiff's claim along the following lines:

'2. I have no defence to the action instituted against me and confess to final judgment in favour of the plaintiff in respect thereof.

3. Now therefore please take notice that I the undersigned Richard David Dolbey, the first defendant, do hereby confess to the plaintiff's claims and consent to final judgment being granted against me for:

3.1 payment in the sum of R2 454 998.62;

3.2 Interest thereon at the rate of 10.50% per annum from 9 May 2017 to date of payment in full;

3.3 costs of suit.'

[9] Having secured this confession to judgment by the first defendant, the plaintiff now seeks the following order against the second defendant:

'1. The plaintiff's summons and particulars of claim are amended so as to reflect the second defendant as Louise Helen Riddle;

2. Subject to paragraph 3 hereunder judgment is entered against the first and second defendants, jointly and severally, the one paying the other to be resolved, for:

2.1 payment in the amount of R2 454 998.62;

2.2 interest thereon at a rate of 10.50% per annum from 9 May 2017 to day of payment in full;

2.3 costs of suit.

3. Save that:

3.1 The judgment against the second defendant is limited to R2 000 000-00;

3.2 The first defendant is not required to pay any costs from 26 August 2020'

[10] The claims by the plaintiff are countered by the second defendant on a number of grounds. These are, amongst others, that:

(i) She never appended her signature to the suretyship agreement. In this regard, the second defendant raises a number of issues which she argues will prove that she did not attend the plaintiff's premises on 30 July 2014 and thus did not place her signature on the document purporting to be a deed of suretyship. The second defendant avers that the curve and the slant of the letters purporting to be her signature differs from her own signature.

(ii) She further argues that she was neither a shareholder nor a director and she had no financial interests in the company. She was married out of community of property to the first defendant and that at the alleged time of the signing of the deed of suretyship, they were living separately.

(iii) She produced two documents automatically generated by the systems of her erstwhile employer. The documents were meant to show that on the day in question, the 30th of July 2014, she was at her place of employment. One document purportedly shows tasks the second defendant would have completed on the day in question, whereas the other document is said to reflect the leave days taken by the second defendant during the years 2012 to 2014.

(iv) The second defendant denies ever meeting the first witness for the plaintiff, Ms Shoba Kirpal (Ms Kirpal) prior to October 2014.

(v) Her argument is that she only met Ms Kirpal for the first time after the opening of the Food Lovers Market Store in October 2014 and that the only time she met with Mrs Kirpal in her office was in March 2015 after she became a member of Whysalls Property CC (Whysalls) and required asset finance. She challenged the plaintiff to show proof by way of an attendance book wherein she would have signed in. According to her, she only became aware of her purported suretyship somewhere in 2016, when she was contacted by Ms Kirpal regarding the Whysalls motor vehicle finance.

(vi) In so far as she was concerned, the suretyship document contained numerous errors and discrepancies for her to have appended her signature. These are, according to her, the reference to her in the marital status declaration as Dolbey, instead of Riddle, and that the deed of suretyship referred to incorrect parties. A consideration of the suretyship document indicates that it is entitled 'Incorporating Cession of claims' and what purports to be an indication for 'suretyship' is written as 'suretship'). The document further indicates that the suretyship is entered into in consideration of any indebtedness incurred or to be incurred by:

(a) Typically Midlands FLM (Pty) Ltd
Reg. No **020131 958 807**

(b) Typically Midlands FLM (Pty) Ltd
Reg. No **201 319 318 807**

(c) Typically, Midlands FLM (Pty) Ltd
Reg. No **201 319 518 80**7

Whilst at this issue of the reference to the company, it is worth noting that in the agreement between Nedbank and the company, the registration number of the company, referred in the agreement as the "client", is reflected as being **201 319 518 807**

[11] The defences raised by the second defendant relating to the validity of the 'suretyship' document (relating to whether she signed this document), are challenged by the plaintiff as follows:

(a) It would be unreasonable to expect the court to draw a negative inference against the plaintiff for not presenting the security register for an event that would have occurred more than six years ago – if, at all, one existed.

(b) On the issue of security which was purportedly held by the second defendant at the time she purportedly signed the suretyship document, the second defendant contended that the plaintiff's argument that Ms Kirpal had conducted due diligence before meeting with the second defendant and had established that the second defendant was a member of Whysalls and owned property, is demonstrably false. This was so, the second defendant argued, because it had been established that the second defendant had only become a member of this entity in February 2016.

(c) The plaintiff argues in this regard that it is irrelevant whether the security was held in the name of Whysalls or the second defendant. What matters, according to the plaintiff is that there was such security. The plaintiff seems to simply dismiss the second defendant's argument of when she became a member of Whysalls and thus acquiring the necessary security.

Surely the plaintiff would not have accepted the suretyship of the second defendant without satisfying itself that there was sufficient security against which she could bind herself as a surety for the amount of R2 million. If it was not in the form of membership by the second defendant in Whysalls, as argued by the second defendant, one would then wonder what was considered by the plaintiff to have persuaded it to enter into the suretyship agreement.

[12] The plaintiff also argues that although the second defendant denies executing the suretyship, as pleaded, however, she had not specifically disputed that she was at the plaintiff's premises on 30 July 2014 until she gave evidence in court. In this regard, it must be noted that at paragraph 10 of the plaintiff's particulars of claim, the plaintiff alleged that the second defendant executed a deed of suretyship, limited to an amount of R2 million, in respect of the obligations of the company. It was further indicated that a copy of the deed of suretyship which is annexed and marked "D", only indicates that it was signed in Durban without specifying the plaintiff's premises.

The second defendant's reply in this regard is couched as follows '[t]he second defendant denies these allegations'.

[13] In my mind, this response can safely be said to be in line with the generalised tone of the allegation made by the plaintiff. In the premises, I am of the view that the plaintiff is not at liberty to demand specifics from the second defendant when its own allegations were not thus couched.

[14] Still, with regards to the allegations as per paragraph 10 of the particulars of claim, the second defendant had pleaded as follows:

'AD PARA 10

13 . . .

14. **In the alternative** and in the event that it is held that the second defendant signed the document annexed to the particulars of claim marked "D" then:

14.1 the plaintiff did not ever-

14.1.1 expressly request the second defendant to sign a suretyship;

14.1.2 inform the second defendant that she was signing a suretyship;

14.2 the plaintiff, to the best knowledge of the second defendant, presented the suretyship to the second defendant for signature as part of a bundle of documents which the plaintiff's representative explained were-

14.2.1 unrelated to the business of the company;

14.2.2 simply for record-keeping or administrative purposes;

14.3 accordingly at the time that the second defendant signed the suretyship, the plaintiff had represented to the second defendant that the document was not a suretyship <u>alternatively</u> would not cause the second defendant to become bound to the plaintiff;

14.4 the second defendant signed the document in reasonable reliance on what was conveyed as alleged in paragraph 14.2 above;

14.5 there was no reasonable appearance of consensus upon which the plaintiff could have relied;

14.6 accordingly, the suretyship is not binding on the second defendant.'

[15] The plaintiff argues that this alternative plea suggests that the second defendant was at the plaintiff's premises. The plaintiff further argues that the error that appears on the suretyship form listing the principal creditor more than once, does not invalidate the suretyship. According to the plaintiff, this is so because the second defendant did not pursue this argument, notwithstanding it being part of her plea.

[16] According to LTC Harms *Amler's Precedents of Pleadings* 9 ed (2011)[1], it is usual to insert a prayer for alternative relief but not necessary to do so because the presence of such a prayer does not entitle the court to grant relief that is inconsistent with the terms and statements of the express claim. See in this regard *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C); *Mgoqi v City of Cape Town and Another; City of Cape Town v Mgoqi and Another* 2006 (4) SA 355 (C).

[17] Section 6 of the General Law Amendment Act 50 of 1956 (Amendment Act) deals with formalities in respect of contracts of suretyship. These are that:[2]

(a) The terms of the contract of suretyship must be embodied in a written document signed by or on behalf of the surety;

(b) The document must identify the creditor, the surety and the principal debtor;

(c) In addition, the nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the written document supplemented, if necessary, by admissible extrinsic evidence.

[18] The same section also deals with the obligations of a plaintiff who wishes to claim on a deed of suretyship. These are that, such plaintiff must comply with the ordinary rules relating to the pleading of contracts and that the onus rests on such plaintiff to allege and prove the following:

(a) a valid contract;

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[1] LTC Harms *Amler's Precedent of Pleadings* at 350

[2] *Sapirstein and Another v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 12B-D.

(b) that the causa debiti is one in respect of which the defendant undertook liability and

(c) the indebtedness of the principal debtor, that is the amount itself and the fact that it is due.

[19] In commenting on the provisions of s 6 of the Amendment Act, CF Forsyth and JT Pretorius *Caney's The Law of Suretyship* 6th ed (2010), say the following on the issue of the formalities of a suretyship[3]:

(a) A 'signature' means any mark – whether it be a person's full name and surname, or his initials and surname, or only his initials, or a mere mark, placed on the contract with the intention of identifying the signatory. The learned authors further state that a signature need not be in ink, nor be written in a specific manner or in a specific place;

(b) Further, the learned authors state that as a general rule these had to be capable of ascertainment by reference to the written document. They further state that failure to include any of these terms in writing, meant that there was no compliance with s 6, and that, in these circumstances, the contract would be void. The authors state further that a meticulous description of the principal debt and, presumably, the various parties, is not required.

(c) In this regard, the authors conclude that it is sufficient if the essential terms can be properly identified, and that extrinsic evidence may, however, be required to identify the essential terms in question. They state further that evidence by the parties in regard to their negotiations and consensus is excluded, the reason being that, to admit such evidence would be contrary to the provisions of s 6 as it would amount to 'giving effect to a consensus not reduced to writing and embodied in the document'. See: *African Lumber Co (Pvt) Ltd v Katz* 1978 (4) SA 432 (C) at 435.

[20] In her denial of her alleged liability to Nedbank, the second defendant's main contention is that she did not attend at the plaintiff's premises and did not place her signature on the document purporting to be a deed of suretyship. The plaintiff has correctly noted that in as much as the second defendant pleaded in the alternative,

[3] At chapter 5 – p.69 – p.72

such plea has not been pursued in evidence before court. In supplementation of her averment that she was not at the plaintiff's premises on the date in issue, the second defendant produced two computer generated documents which have already been referred to earlier on in this judgment. In an effort to have these two documents admitted as part of her defence, she placed reliance on the provisions of s 15 of the Electronic Communications and Transactions Act 25 of 2002.

[21] Section 15(3) provides as follows:

'(3) In assessing the evidential weight of a data message, regard must be had to-

(a) The reliability of the manner in which the data message was generated, stored or communicated;

(b) The reliability of the manner in which the integrity of the data message was maintained;

(c) The manner in which the originator was identified; and

(d) any other relevant factor.'

A consideration of the record of the evidence in this matter will show that none of the imperatives mentioned in subsec 3(1)(*a*) to (*c*) were complied with by the second defendant in an attempt to place reliance on the two documents.

[22] In its reply to the second defendant's heads of argument, the plaintiff referred the court to *L A Consortium & Vending CC t/a L A Enterprises v MTN Service Provider (Pty) Ltd* 2011 (4) SA 577 (GSJ) para 19, where it was stated that:

'The principle of 'functional equivalence' does not free data messages from the normal strictures of the law of evidence, but only from those referred to in s 15(1). It follows that, despite the very wide words of s 15(4), any hearsay contained in a data message must pass the criteria set out in s3 of the Law of Evidence Amendment Act 45 of 1988.' (footnotes omitted)

Section 3(1)(*b*) of the Law of Evidence Amendment Act provides that hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings.

[23] Section 3(3) of the same act makes a proviso that if the person upon whose credibility the probative value of such evidence depends does not later testify it can also be admitted by the court if each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings., . Section 3(1)(*c*) makes such admission dependent on the discretion of the court having had regard to the circumstances listed under such subsection. In the present matter, the person on whose credibility the probative value of the two documents depends did not testify, neither were reasons given why he did not testify. At one stage during the proceedings, a stand down was requested so as to consider the availability of such a person. On resumption there was an indication that such person was no longer going to be called to adduce evidence relating to the two documents produced by the second defendant. No reasons were advanced for this decision. It stands to reason that, in the circumstances, the two documents qualify as hearsay evidence and they are inadmissible.

[24] On the issue of the validity of the suretyship document, it is true that on a consideration of Annexure "C", the disputed suretyship document shows a few shortcomings. The heading of the document is entitled 'Incorporating cession of claims' and in a handwritten segment it shows 'suretship' (sic): where it refers to the principal debtor, the entity is depicted as three entities under one name but with different registration numbers.

[25] The issue to be decided is whether the aforementioned shortcomings invalidate the suretyship. In *Fourland (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 345, the following was stated regarding the identity of the principal debtor

'…identification of the principal debt and debtor is not only a term of the contract but is essential to the creation of the surety's liability, suretyship being an accessory obligation. It is a term of the contract in the true sense, in that it both defines and limits the surety's obligation under the contract and determines the extent or scope of the rights and obligations of the parties.'

This same sentiment was referred to with approval in *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 (1) SA 365 (SCA)[4].

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[4] At 3 F - H

[26] In *Sapirstein and Another v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 3F-H, the following was stated

'The test for the validity of the suretyship is whether "the reasonable person" or the "reasonably intelligent reader" may clearly visualise, or "obtain a clear picture", of the description of the terms (the principal debt) *ex facie* the writing, without recourse to the oral evidence…of either of the parties…If the principal debt does not so appear *ex facie* the writing, then the writing is an avoidance of embodying the terms of the suretyship, as the suretyship is then only partly written and partly oral, which is exactly what the legislature wanted to avoid, as a reference to the oral part could lead to dispute which the writing could not, on its own, "set at rest"'. (footnotes omitted).

[27] The second defendant is, in my opinion, and having seen her testify before court, one of those 'reasonably intelligent readers'. Although not a shareholder at the entity, she, however, played a vital role to assist her ex-husband in the day to day running of the business. In her own right, and around February 2015, she became a member of Whysalls. In *Industrial Development Corporation of SA (Pty) Ltd,*[5] the suretyship document did not reflect the name of the principal debtor at all, with the space reserved for the inclusion of the principal debtor's name having been left blank. The court of appeal held that the principle of incorporation by reference applied in cases of sales of land and that there was no justification for holding that the principle did not apply in the case of contracts of suretyship.

The appellant was thus allowed to rely on the reference in the deed of suretyship to the loan agreement, which in turn disclosed the identity of the principal debtor.

[28] In the present case, the principal debtor is identified in the suretyship agreement, the only difference is that it is reflected three times under different registration numbers. A consideration of the agreement shows the name of the principal debtor and the registration number. The registration number on the agreement, corresponds with at least one of the registration numbers appearing on the entities cited in the suretyship agreement. I am of the view that the discrepancies in the suretyship agreement are not of such magnitude as to invalidate the agreement itself. The principal debtor is easily identifiable, even by the principle of

[5] *Industrial Development Corporation of SA (Pty) Ltd* para 6.

incorporation if the suretyship document is contrasted with the agreement. In the circumstances, this defence by the second defendant falls to be rejected.

[29] It has been argued that the probabilities do not favour that the plaintiff's representative, Ms Kirpal would produce a document riddled with errors and knowingly allow a client to sign the said document. The other improbability that has been raised is that of Ms Kirpal having an independent recollection of the exact documents signed by the second defendant. This is so, as argued on behalf of the second defendant, because the document in question was concluded in the course and scope of ordinary business, that there was nothing untoward or extraordinary about the transactions. The other averments raised on behalf of the second defendant are that it is highly improbable that the defendant would bind herself as a surety when she had no interest whatsoever in the company; that she was, at that stage, not on good terms with 'the soon to be ex-husband' and where she was never asked to sign a deed of suretyship.

[30] Against the improbabilities being raised by the second defendant, the following aspects must be considered:

(a) The disputed signature on the deed of suretyship document is only the defendant's say so. As correctly pointed out by the plaintiff, the second defendant is not a handwriting expert. She cannot be the judge in her own case, that is, comparing and disputing her own signature in a case like the present where the plaintiff places reliance on the averment that the second defendant signed the disputed document. Surely her own comparison carries no weight. It is clearly bound to be biased in favour of her case.

(b) When the second defendant was told about the existence of the suretyship in 2016, she did not challenge it. She said she waited for the issuance of process. This is improbable if one considers the amount she was alleged to have bound herself surety to. One would have expected the second defendant to make it clear to Ms Kirpal at that first mention of the suretyship that she was not party to such an agreement. Her case in this regard is further weakened by the fact that even when she pleaded, this was never raised, neither did she give an indication that the signature on the document was being disputed as well as the allegation of her attendance at the plaintiff's premises.

(c) The second defendant cannot rely on the state of her relationship with her now ex-husband seeing that a year after the alleged signature on the suretyship, she was at a meeting with the very same husband. It does not assist the second defendant that they had arrived in separate vehicles. From her own statement, when the court wanted to know why the ex-husband was at that meeting, she told the court that the reason was that he wanted the deal to be processed so that he could be in a position to utilise the vehicle that was being purchased at his own company. Surely this means that the two parties were still very much in touch even after the alleged signing of the suretyship document.

(d) I have dealt extensively with the reasons why the two documents produced by the second defendant cannot be of any assistance to prove that she could not have been at the plaintiff's premises.

[31] The approach expounded in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at 14-15 relating to a resolution of a factual dispute by a court and to ascertain where the truth lies between two conflicting factual assertions, is as follows:

'To come to a conclusion on the disputed issues a court must make findings on:

(a) the credibility of the various factual witnesses;
(b) their reliability; and
(c) the probability or improbability of each party's version on each of the disputed issues.

. . .

In light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail.'

[32] Having considered the credibility of the plaintiff's witnesses as well as that of the second defendant as a witness along with their reliability, I am satisfied that the probabilities favour a finding that the second defendant was at the plaintiff's

premises on 30 July 2014 and did sign the suretyship agreement wherein she bound herself as a surety to the amount of R2 million. The second defendant's defences accordingly fall to be rejected as improbable and not reliable.

QUANTUM AND COSTS

[33] The second defendant has raised issues in so far as the outstanding amount is concerned. Her argument is that, in the event of the court finding that the document that is being challenged is a valid and a binding deed of suretyship, then the court should consider the provisions of clause 10 of the offer of banking facility clause 10.1.2 of this covenant, which reads as follows:

'Shareholder(s) loan funds, minimum R1 500 000 (one million five hundred thousand rand), to be ceded and not to be withdrawn without prior consent of Nedbank'.

[34] According to the second defendant, the plaintiff's evidence of, Sijabulile Sibongile Ntshangase, employed by the plaintiff presently as a divisional manager, but previously having held the position of the Recoveries Manager was that the amount of R1.5 million was not deducted from the outstanding balance as she was not aware of the aforesaid security. The second defendant further avers that the plaintiff did not deny the existence of such security which means it still holds the aforesaid amount. That being the case, the second defendant's submission is that the aforesaid amount ought to be deducted from the outstanding balance before the plaintiff can rely on any other security in the form of a surety.

[35] This argument by the second defendant is challenged by the plaintiff who avers that the unchallenged evidence of Ms Ntshangase was that, save for the first and second defendants, all recoverable security had been recovered and allocated against Typically Midlands accounts. The other leg of the plaintiff's argument is that its cause of action arises principally from annexure "A" (The Term Loan Agreement) and not exhibit C34 which is the suretyship agreement. According to the plaintiff, these two documents are not the same.

[36] In my view, the key word in this argument is 'all recoverable security'. In the circumstances, Ms Ntshangase's evidence stands, including the evidence on her

certificate of balance. As a result, the argument by the second defendant on the issue of the amount of R1.5 million remains unsubstantiated.

[37] The plaintiff has sought an order amending the particulars of claim so as to claim the costs of suit. It notes it had omitted the claim for costs in the delivery of its amended pages, notwithstanding the fact that the notice of amendment did not make such withdrawal. In the circumstances, the plaintiff seeks an order amending the particulars of claim so as to claim costs. The other amendment being sought by the plaintiff is that of the second defendant's names from Louise Helen Dolbey to Louise Helen Riddle. This application follows on some of the queries raised by the second defendant on reasons why she could not have signed the suretyship document. She noted that her surname was spelled incorrectly in the marital status declaration.

[38] I am inclined to grant these two amendments for the following reasons:

(a) Costs are at the discretion of the court. It is trite that costs follow the result unless there may be a just cause shown for deviation from this practice.

(b) A change in the second defendant's surname does not entail any prejudice to her, at any rate, when she entered into a suretyship agreement she was still married to the first defendant; her now ex-husband. So a change in her present surname will have no adverse effect on her.

[39] In the final analysis, I am satisfied that the plaintiff has made out a case for the order that it seeks. I accordingly grant the following order:

(a) The plaintiff's summons and particulars of claim are amended so as to reflect the second defendant as LOUISE HELEN RIDDLE;

(b) Subject to paragraph 3 hereunder, judgment is entered against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:

(i) Payment in the amount of R2 454 998-62;

(ii) Interest thereon at a rate of 10.50% per annum from 09 May 2017 to date of payment in full;

(iii) Costs of suit

(c) Save that:

(i) The judgment against the second defendant is limited to R2 million;

(ii) The first defendant is not required to pay any costs from 26 August 2020.

Hadebe J

APPEARANCES:

Date of Hearing:	07 October 2020
Date of Judgment:	28 April 2021
Counsel for the Plaintiff:	Adv. D.W. Eades
Instructed by:	Shepstone & Wylie
Ref No:	DJDV/NEDC1.5959
Counsel for the 2^{nd} Defendant:	Adv. Z. Ploos van Amstel
Instructed by:	Morris Fuller Williams Inc.
Ref No:	Ms S Taylor/D031