THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1255/2022

In the matter between:

ABSA BANK LIMITED **APPELLANT**

and

MARC CHRISTOPHER ROSENBERG **FIRST RESPONDENT**

TERRENCE ROSENBERG **SECOND RESPONDENT**

Neutral citation: *ABSA Bank Limited v Rosenburg and Another* (1255/2022) [2024] ZASCA 58 (24 April 2024)

Coram: PETSE DP, MOKGOHLOA, AND MOTHLE JJA, and BINNS-WARD and TOKOTA AJJA

Heard: 16 November 2023

Delivered: 24 April 2024

Summary: Contract – interpretation thereof – whether the guarantee agreement concluded between the parties and securing the indebtedness of the credit grantee is enforceable against the respondents as guarantors.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Bezuidenhout AJ sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Petse DP et Tokota AJA (Mokgohloa and Mothle JJA and Binns-Ward AJA concurring):

Introduction

[1] 'The same words often mean different things to different people. This helps to keep the forensic pot boiling', so said Schutz JA in his inimitable style in *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd*.[1] What is at issue in this appeal affords a classic example of the truism in that statement. The present dispute arises from a deed of agreement executed by the respondents during August 2019 and countersigned on behalf of the appellant in March of the following year. The contemplated agreement was a contract in terms of which the respondents guaranteed payment on demand of the debts owed to the appellant, Absa Bank Ltd (ABSA Bank), by Uwoyela Environmental Services (Pty) Ltd (UES). The second respondent, Mr Terrence Rosenberg, is the majority shareholder in UES's holding company. The first respondent, Mr Marc Christopher Rosenberg, is the second respondent's son.

[1] *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* [1998] ZASCA 66; 1998 (4) SA 885 (SCA) at 887B.

[2] The contentions of the parties in this court, as in the court below, as to the meaning to be ascribed to the deed, are diametrically opposed. For its part, ABSA Bank asserted that the wording 'is clear and extends to any indebtedness owed by the borrower [UES] whether past, present or future.' Therefore, ABSA Bank asserted that the respondents' argument that they 'had executed the guarantee for the purposes of the borrower procuring an *increased facility*[2] from the bank and that by virtue of the bank not having acceded to the grant of such increased facilities, the guarantee did not take effect' is plainly unsustainable. This was so, Absa Bank contended, because the 'respondents' argument is in conflict with the express and clear wording of the guarantee' and, in any event, undermines the very purpose and the background underpinning the preparation and production of the document.

[3] By contrast, from the perspective of the respondents their signature of the guarantee was entirely predicated on the expectation, recorded in the deed of agreement, that ABSA Bank would increase the credit facility afforded to UES. And, because ABSA Bank had determined, prior to its countersignature of the deed, that the stipulated increase would not be forthcoming, the whole agreement fell away and is, as a result, ineffectual.

[4] Accordingly, if the contentions advanced by the respondents are sustained, they will have succeeded in avoiding a substantial claim of some R46 million (plus interest) for which ABSA Bank sought to hold them jointly and severally liable. For convenience, we shall refer to the first and second respondents collectively as the respondents. However, when the context so dictates, they will be referred to by their respective first names solely to distinguish the one from the other as they share the same surname.

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[2] Underlining in the original text.

[5] The court a quo (the KwaZulu-Natal Division of the High Court, per Bezuidenhout AJ) dismissed ABSA Bank's application to enforce performance of the guarantee agreement against the respondents. It is not altogether easy to fathom the court's reasons for dismissing the claim. It does seem, however, that it decided that the operation of the guarantee furnished by the respondents was indeed contingent upon the provision by ABSA Bank of additional funding to UES.

[6] The respondents resisted the claim and relied on a number of defences in support of their repudiation of it. We shall revert to the issue of the nature of the defences raised by the respondents and what such defences entailed in a moment. The respondents also filed a counter-application against ABSA Bank. The respondents' counter-application was also dismissed, with no order as to the costs associated therewith.

[7] This is an appeal by ABSA Bank against the dismissal of the main application and the order pertaining to the costs of the counter-application. The appeal is with the leave of the high court.

Factual background

[8] In order to elucidate the nature of the issue at the heart of the dispute between the parties, it is necessary to set out the relevant facts in some detail. A couple of years prior to 1994, and as a result of the oil embargo then existing against South Africa, one of the world's largest oil storage facilities, owned and operated by the Strategic Fuel Fund (SFF), a state owned business entity, was developed in Mpumalanga. SFF's substantial quantities of oil were stored in a number of old coal mines at a depth of between 40m and 80m underground.

[9] During 2013 UES was awarded a tender by the SFF to recover and reprocess oil sludge from an underground storage facility known as the Ogies Storage Facility (Ogies Project). UES was required, for its own account, to recover the oil sludge and to process the product and sell it as either fuel oil and/or crude oil and/or sludge residue to its off takers.

[10] The majority shareholder of UES was Oakbrook Holdings (Pty) Ltd, of which Terrence was the majority shareholder. UES approached ABSA Bank and applied for overdraft facilities to fund the Ogies Project.

[11] On 10 August 2018, an agreement was concluded between ABSA Bank and UES, the terms of which were recorded in a Facilities Letter dated 2 August 2018. In the Facilities Letter, UES is referred to as the Borrower and ABSA Bank is referred to as the Lender. In terms of the Facilities Letter, ABSA Bank made a primary lending facility of US$2,5 million available to UES, as well as a commercial asset finance facility of R199 000. The conditions concerning the security required by ABSA Bank from UES to cover its exposure to the latter (a cession of debtors by UES, a limited guarantee from Enviroshore Project Financing Ltd (Mauritius) and a subordination of debt agreement by the latter company) were duly fulfilled.

[12] Although the Ogies Project commenced in 2014 it was put on hold in 2019 due to operational health and safety concerns as well as serious cash flow challenges confronting UES. For this reason, the project was delayed. In March 2019, UES approached ABSA Bank for additional funding to finance an escrow account required by SFF in the amount of US$14 653 500 and for operational finance in the amount of US$8,5 million.

[13] In May 2019, ABSA Bank undertook a due diligence investigation of the Ogies Project to confirm its viability. As a result of the due diligence, the originally contemplated bridging loan was revised and reduced from US$23 153 500 million to US$18,5 million (comprised of the aforementioned sum for the escrow account and US$3 846 500 for general corporate purposes) to be effected by way of an increase to the existing facility under the Facilities Letter.

[14] ABSA Bank indicated, however, that the envisaged increase would only be effected upon the fulfilment of several conditions precedent. Of pertinence to the current matter, the conditions precedent included the provision of a guarantee by the respondents in terms of a deed of agreement prepared by the Bank. The respondents signed the guarantee agreement on 7 August 2019 in the course of the endeavours by UES to achieve satisfaction of all the stipulated conditions precedent for the release of the contemplated increased facility.

[15] The principal operative clause of the guarantee agreement was clause 3, which provided:

'3.1 With effect from the **Signature Date**, the Guarantors hereby irrevocably and unconditionally, on a joint and several basis, as a principal and primary obligation in favour of the Lender:

(a) guarantee to the Lender, the due, proper and punctual performance by the **Borrower** of the **Secured Obligations**, which guarantee the Lender hereby accepts; and

(b) undertake to pay to the Lender on first written demand all sums which are now, or at any time or times in the future shall become due, owing or incurred by the **Borrower** to the Lender pursuant to the **Secured Obligations**.

3.2 This **Guarantee** constitutes a separate primary obligation enforceable against each Guarantor.

3.3 A written demand for the payment of the amounts contemplated in Clause 3.1 made to each Guarantor at his *domicilium* address, set out in Clause 17(*Notices and Domicilia*) below, from the Lender specifying that an event of default (howsoever described in the **Facilities**

Letter) has occurred and is continuing, shall constitute a demand for payment of the amount guaranteed to the Lender under Clause 3.1 hereof.

[16] Clause 3 falls to be read and understood with reference to certain terms therein, which we have identified in bold font in the quotation of the clause in the preceding paragraph, that were specially defined in clause 1.1 of the guarantee agreement. We set out those special definitions below, when we engage more widely with the terms of the contract.[3] Critically, for present purposes, the definition of 'Secured Obligations' cross-referenced to the term 'Facilities Letter', which, in turn, was defined so as to include reference to a contemplated increase of the US$2,5 million facility granted in August 2018 to ‘an aggregate amount not exceeding USD 18,500,000.00 (eighteen million five hundred thousand US dollars) on or about the 'Signature Date'. 'Signature Date' was defined to mean 'the date of signature of this Guarantee by the Party last signing'.

[17] ABSA Bank signed the guarantee agreement on 19 March 2020 more than 7 months after the respondents did. This was at a stage when it had already declined to increase the aggregate amount available under the Facilities Letter because it had become apparent by then that not all of the stipulated conditions precedent for the contemplated increase would be met. Moreover, ABSA Bank had also become concerned about UES' ability to service its debt. According to the tenor of the deed, the 19th March 2020 was therefore the 'Signature Date' as defined therein. It was thus also the date contemplated in the definition of 'Facilities Letter', on or about which the amount made available by Absa Bank to UES under the lending facility was to be increased. However, ABSA Bank executed the guarantee agreement at a time when it knew that it would not implement the increase in the lending facility in favour of UES as stipulated in the definition of the 'Facilities Letter' in clause 1.1 of the guarantee agreement.

[3] See paragraphs 35 and 36.

[18] We shall describe the factual circumstances in some detail presently, but for now it will suffice to say that the respondents contested liability under the guarantee agreement because ABSA Bank had failed to increase the amount available under the Facilities Letter 'on or about the Signature Date'. Relying on clause 1.5 of the guarantee agreement (quoted in paragraph 37 below), the respondents contended that ABSA Bank had refused to perform the reciprocal obligation in consideration of which their obligations as guarantors had been undertaken and were thereby disqualified from being able to enforce the agreement. It is unnecessary to consider the additional defences raised by the respondents as they were palpably without merit.

[19] As previously mentioned, the respondents brought a contingent counter-application for rectification of the agreement in the event that their contentions concerning the proper interpretation of the guarantee agreement were rejected. The counter-application was dismissed with no order as to costs. The respondents did not apply for leave contingently to cross-appeal against the dismissal of their counter-application. They were nevertheless, of course, still at liberty to argue the susceptibility of the agreement to rectification in defence of their refusal to satisfy ABSA Bank's demand for payment under the guarantee agreement, [4] but did not do so with any enthusiasm at the hearing before us.

[20] On 22 July 2020, ABSA Bank sent to UES the First Amendment of the Facilities Letter, a letter that was directed at recording an amendment to the terms of credit set out in the August 2018 Facilities Letter. The letter was countersigned on behalf of UES on 10 September 2020 by Terence in his capacity as chairman of the board of directors and by one Shaun Smith in his capacity as the company's chief operating officer. In terms of the First Amendment, the US dollar denominated facility afforded to UES in terms of the aforementioned Facilities

[4] Compare: *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 824B-C.

Letter in the amount of $2,5 million was converted to an overdraft facility denominated in South African currency in the amount of R43 664 000.

[21] The First Amendment of the Facilities Letter provided for certain amendments to the Facilities Letter of August 2018. Pertinent to the question in the current matter was the provision in paragraph 4 of the Amendment Letter that clause 8 of the Facilities Letter, which provided:

'8. **SECURITY**

8.1 Security required by the Bank:

8.1.1 Cession of debtors by the Borrower.

8.1.2 Limited Guarantee from Enviroshore Project Financing Limited (Mauritius) (Registration Number C143700 C2/GBL.).

8.1.3 Subordination Agreement by Enviroshore Project Financing Limited (Mauritius) (Registration Number C143700 C2/GBL.).'

be deleted and replaced by the following:

'8. **SECURITY**

8.1 Security currently held with the Bank:

8.1.1 Security Cession of debtors signed 10 August 2018 by the Borrower.

8.1.2 Limited Guarantee signed 03 August 2018 from Enviroshore Project Financing Limited (Mauritius) (Registration Number C143700 C2/GBL.).

8.1.3 Subordination Agreement signed 03 August 2018 by Enviroshore Project Financing Limited (Mauritius) (Registration Number C143700 C2/GBL.).

8.1.4 Limited guarantee agreement signed 07 August 2019 by Marc Christopher Rosenberg (Identity Number xxxx) and Terence Rosenberg (Identity Number xxxx).'

ABSA Bank contended that the substituted clause 8.1.4 constituted confirmation that the guarantee agreement was accepted by the parties to be of full legal force and effect notwithstanding the Bank's failure or refusal to increase the facility granted to UES in August 2018.

[22] On 4 May 2021, ABSA Bank addressed a written demand and notice of cancellation of the Facilities Letter to UES in terms of clause 3 of the Facilities Letter. Thereafter several demands and extensions were made to UES to honour the Facilities Letter Agreement by repaying the amount it owed to ABSA Bank. UES failed to pay. UES' inability to repay the amount due led to an application being made for its provisional winding up. ABSA Bank then turned to the respondents for payment of the amount that UES owed to it at the time of the demand in respect of the pre-existing debt prior to them signing the guarantee agreement. The respondents refused to pay.

[23] As indicated, the respondents opposed the application on the grounds that ABSA Bank did not increase the facility amount to US$18,5 million as agreed, in consideration whereof they had provided the personal guarantees. In the alternative, they contended that there was a misrepresentation on the part of ABSA Bank, and, further alternatively, that there was a *justus error*, which induced them to sign the agreement, further alternatively, that the common intention of the parties was not properly reflected in the guarantee agreement. For this latter reason, they contingently sought rectification of the guarantee agreement to reflect what they contended were the true intentions of the parties, namely that the guarantee agreement would take effect only upon ABSA Bank availing the additional funding to UES which it in fact refused to do.

[24] It bears emphasising that ABSA Bank's claim was predicated on the contention that, in terms of the guarantee agreement, the respondents undertook to pay to ABSA Bank upon 'first written demand all sums which are now, or at any time or times in the future shall become due, owing or incurred by the Borrower to the Lender pursuant to the Secured Obligations' as set out in clause 3.1(b) of the guarantee agreement (quoted above).

[25] As already mentioned, both the main and counter-applications came before Bezuidenhout AJ who dismissed both applications, the former with costs and the latter with no order as to costs. To the extent discernible from its judgment, the foundation for the conclusion reached by the high court, broadly stated, was that it was evident from the tenor of the guarantee agreement – read as a whole – that the liability of the respondents under the guarantee agreement was conditional upon ABSA Bank approving the application for the increase of the credit facility extended to UES from US$2,5 million to US$18,5 million. As this did not materialise because ABSA Bank declined the application, so the learned Acting Judge reasoned, ABSA Bank's refusal to approve UES' application for additional funding rendered the guarantee agreement stillborn. This consequence, so concluded the high court, disposed of the dispute between the parties rendering it unnecessary to adjudicate the counter-application.

Issues

[26] As will have become clear from what has already been stated above, the central issue in this appeal pivots on the proper interpretation of the guarantee agreement concluded between the parties. As to how the guarantee agreement falls to be interpreted, in the light of the words used read in their context, the contentions of the parties are diametrically opposed.

Interpretation of documents

[27] The principles to be applied in interpreting written documents are now well settled, but it would be useful for present purposes to rehearse them. The approach to interpretation of documents, broadly stated, is to give consideration:

'...to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of these facts. The process is objective and not

subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results, or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "*inevitable point of departure in the language of the document itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*'[5] (Emphasis added.)

[28] That was said by Wallis JA more than a decade ago in *Endumeni*.[6] *Endumeni* has consistently been followed by this court[7] ever since, and endorsed by the Constitutional Court.[8]

[29] Hot on the heels of *Endumeni*, in *Bothma-Batho Transport*,[9]Wallis JA made plain that his statement in *Endumeni* quoted in para 27 above 'reflected developments in regard to contractual interpretation espoused in *Masstores (Pty) Ltd v Murray & Roberts Construction Ltd. (Pty) Ltd and Another*.[10] He went on to emphasise that 'the process of interpretation does not stop at a perceived literal meaning of those words [employed in the document being interpreted], but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being.' And, with reference to

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[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.
[6] Ibid fn 6 above para 18.
[7] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) (*Bothma-Batho Transport*); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] All SA 29 (SCA) paras 24-28; *Auction Alliance v Wade Park* [2018] ZASCA 28; 2018 (4) SA 358 (SCA) para 19.
[8] *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) para 136; *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC); *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC) paras 30-32.
[9] *Bothma-Batho Transport* paras 11-12.
[10] *Masstores (Pty) Ltd v Murray & Roberts Construction Ltd. (Pty) Ltd and Another* 2008] ZASCA 94; 2008 (6) SA 654 (SCA); [2009] 1 All SA 146 (SCA) para 23.

foreign authority,[11] Wallis JA went on to say that 'Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'[12]

[30] Two years earlier, and in the course of construing a pension fund rule, Lewis JA noted that:

'The principle that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning, is now clear. It is the principle upon which *Bekker NO* [*Bekker NO v Total South Africa (Pty)* Ltd 1990(3) SA 159 (T) at 170G0H] was decided, and, more recently, *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* [*Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2008 (6) SA 654 (SCA)] was based on the same logic. The principle requires a court to construe a contract in context – within the factual matrix in which the parties operated. In this regard see *KPMG Chartered Accountants v Securefin* [*KPMG Chartered Accountants v Securefin* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) ([2009] All SA 523) para 39].'[13] (Footnotes omitted.)

We are astute, of course, to the consideration that those remarks do not afford a court authority to construe an agreement at odds with its language so as to improve it or make it fairer. They do, however, convey that where the language is ambiguous or unclear context and commercial sense play an important part in divining the intended import of the text.

[31] In addition, it is apposite to make reference to a passage in *Hillas & Co Ltd v Arcos Ltd*[14] referred to with approval by Hoexter JA in *Murray & Roberts*

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[11] *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50 [2012] Lloyds Rep 34 (SC) (*Rainy Sky* SA) para 21 and the authorities therein cited especially *Society of Lloyd's v Robinson* [1999] 1 All E.R. (Comm) 545, 551 in which the following was stated:

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[12] *Bothma-Batho Transport* para 12.

[13] See *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA); [2010] 2 All SA 195 (SCA) para 13.

[14] *Hillas & Co Ltd v Arcos Ltd* 147 LRT 503 (*Hillas & Co*).

Construction Ltd (Pty) Ltd v Finat Properties (Pty) Ltd [15] in which Lord Wright pertinently observed:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'[16]

[32] Whilst those observations were made as cautionary remarks against any inclination by the courts to render business agreements ineffectual by subjecting them to a too nice or exacting linguistic analysis, they tacitly also carried the more general import that the interpretation of commercial agreements should be undertaken mindful of the evident business intentions of the contracting parties.

[33] To conclude, a further foreign decision also merits brief reference. It is *Rainy Sky SA v Kookmin Bank*,[17] in which Lord Clarke SCJ similarly observed that interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, . . . would have understood the parties to have meant.' Lord Clarke SCJ proceeded to quote a passage from the *Society of Lloyd's v Robinson*,[18] where the following was stated:

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the

[15] *Murray & Roberts Construction Ltd (Pty) Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (AD).
[16] Ibid at 514C.
[17] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 ([2012] Lloyd's Rep 34(SC)).
[18] *Society of Lloyd's v Robinson* [1999] 1 AER (Comm) 545, 551.

reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[34] In the context of the facts of this case, we think that it can fairly be said that the guarantee agreement is couched in terms which are by no means a model of draftmanship and, in some instances, somewhat obscure. It is therefore, particularly in light of this, that the importance of the circumstances leading to the production of the documents at issue in this appeal looms large.

[35] It is now timely to turn to the guarantee agreement itself. In this regard, we deem it necessary to quote fairly extensively some of the clauses of the guarantee agreement that are at the core of this case for one to appreciate the nature of the issue confronting us in this appeal. The face of the agreement records the identity of the contracting parties and the date on which it was executed by the respondents as follows:

'This Guarantee is made on 7 August 2019 between:

1. Marc Christopher Rosenberg, an adult male with identity number... ("Marc");
2. Terrence Rosenberg, an adult male with identity number... ("Terry", and together with Marc, the "Guarantors" and each a "Guarantor"); and
3. Absa Bank Limited (acting through its Corporate and Investment Banking Division), registration number 1986/004794/06, a limited liability public company and registered bank incorporated in accordance with the laws of South Africa (as "Lender").'

[36] And clause 1 in turn records the following:

'It is agreed as follows:

4. Definitions and Interpretation

1. Unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them in their corresponding definition provisions, and cognate expressions bear corresponding meanings:

"Borrower" means Uwoyela Environmental Service Proprietary Limited (formerly known as Enviroshare Trade and Logistics Proprietary Limited) registration number 2010/014452/07, a

limited liability private company duly incorporated in accordance with the laws of South Africa;

"Discharge Date" means the date upon which all the Secured Obligations, contingent or otherwise, have been irrevocably and unconditionally paid and performed in full and the Lender has notified the Borrower (and copied to the Guarantors) in writing that the Secured Obligations have been so discharged (the delivery of such notice shall not be unreasonably withheld or delayed by the Lender) or such earlier date as the Lender may otherwise agree in writing, taking into account the profitability of the Project and the Lender becoming satisfied that the Project has, in the Lender's sole discretion (acting reasonably), reached and is expected to maintain a steady state level of production;

"Facilities Increase Letter" means the request for increase letter submitted by the Borrower to the Lender requesting an increase in the primary lending facility and confirmed by the Lender pursuant to a reply notice thereto on or about the Signature Date;

"Facilities Letter" means the banking facilities letter issued by the Lender on 2 August 2018 and countersigned by the Borrower on 10 August 2018, in terms of which the Lender shall make available a primary lending facility to the Borrower in an aggregate initial amount of USD2,500,000.00 (two million five hundred thousand US dollars), *which initial amount shall on or about the Signature Date, be increased to an aggregate amount not exceeding USD 18,500,000.00 (eighteen million five hundred thousand US dollars) pursuant to the Facilities Increase Letter*; (emphasis added);

"Finance Documents" means –

(a) the Facilities Letter; and

(b) any other agreements, documents, deeds or instruments entered into by the Lender with the Borrower in terms of which the Lender makes any financing or funding commitment available to the Borrower;

"Guarantee" means this guarantee agreement;

"Ogies Storage Facility" means the now decommissioned underground oil storage facility located at Ogies terminal in eMalahleni, Mpumalanga;

"Parties" means the parties to this Guarantee;

"Project" means the extraction of crude oil and sludge by the Borrower from the Ogies Storage Facility;

"Secured Obligations" means any and all indebtedness or obligations of any nature whatsoever of the Borrower (whether actual or contingent, present or future) to the Lender from time to time, under and in terms of any Finance Documents (including but not limited to

the Facilities Letter), including in respect of the principal amount, interest, costs, expenses, fees and the like;

"Signature Date" means the date of signature of this Guarantee by the Party last signing.'

. . .'

[37] It is also necessary to refer to clause 1.5, which reads:

'1.5 Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in this Clause 1 or elsewhere in this Guarantee, shall be given effect to as if it were a substantive provision in the body of the Guarantee.'

[38] Clause 2, which is headed 'Introduction', reads:

'2.1 The Borrower is Indebted to the Lender and has undertaken to perform under and in terms of the Secured Obligations.

2.2 Each Guarantor knows and understands the full terms and conditions of the Secured Obligations.

2.3 Each Guarantor has agreed to irrevocably and unconditionally guarantee to the Lender the due, proper and punctual performance by the Borrower of the Secured Obligations on the terms and conditions contained herein.'

The high court's reasoning

[39] In upholding the contentions of the respondents, the high court, inter alia, reasoned as follows:

'During argument, counsel for the applicant referred to various significant dates, such as when the written guarantee was signed as well as the First Amendment to the Facilities Letter. I pointed out to him that the First Amendment letter did not refer to the Guarantors at all and was not signed by them, despite it affecting them materially.

It was submitted in response to my observation that there was a link between the Guarantee Agreement and the First Amendment Letter. The Guarantee Agreement referred to the Facilities Letter, and the Facilities Letter in turn is dealt with in the First Amendment letter. It was also submitted that the correspondence that followed could not have left the respondents in any doubt that they were giving a guarantee and that the applicant could proceed in terms of

the guarantee. It was further submitted that the first respondent was copied in on the e-mails and he could not say that he did not have knowledge of it.
As mentioned above however, the first respondent was copied in for the first time only on 14 December 2020, sometime after the First Amendment letter was signed.

It is indeed so that the written guarantee is clearly linked to the Facilities Letter. And herein, in my view, lies the problem for the applicant. The definition of the Facilities Letter as contained in clause 1 of the Guarantee Agreement makes it clear that it was envisaged that the primary lending facility of USD2.5 million "shall on or about the Signature Date" be increased to an aggregate amount not exceeding USD18.5 million "pursuant to the Facilities Letter". The Facilities Letter is clearly identified as the letter issued by the applicant on 2 August 2018.

The Facilities Letter is also referred to in the definition of "Secured Obligations". The variation of the terms of the Facilities Letter, by issuing the First Amendment to the Facilities Letter, by implication also varies the Guarantee Agreement. (In terms of clause 19.2 of the Guarantee Agreement, no variation will be of any force or effect unless in writing and signed by both parties. This was clearly not done. I will return to this issue in due course).'[19]

[40] The high court then concluded:

'It is clear from all the correspondence that preceded the signing of the Guarantee Agreement, that it was but one of many requirements the applicant set as Conditions Precedent. It was clearly contemplated at the time of its signing by the respondents that it would serve as part of the security required for the increase of the existing facility to USD18.5 million. This much is clear from the plain reading of the entire definition of the Facilities Letter in clause 1 of the Guarantee Agreement. It was clearly anticipated that the initial amount "shall on or about the Signature Date, be increased to ... USD18.5 [million]". These are clearly circumstances which should be taken into account when considering the meaning of the terms of the Guarantee Agreement and to assess the parties' contractual intentions. The probabilities suggest in my view that the respondents only ever intended to bind themselves as Guarantors to comply with the conditions set by the applicant in order to ensure the approval of the request for an increase

[19] Paras 104-108 of the high court judgment.

in the facility of UES. When this event did not occur, the need for the Guarantee Agreement fell away.'[20]

Appellant's contentions

[41] ABSA Bank's contentions, briefly stated, are that the underlying purpose of the guarantee was to secure UES' contractual obligations, as the Borrower, in respect of funds advanced by ABSA Bank as the Lender to UES. And, having regard to the fact that 'the wording of the guarantee is clear and extends to any indebtedness owed by the borrower, *whether past, present or future*', the defences advanced by the respondents were therefore unsustainable. (Emphasis added.)

[42] Counsel appearing for ABSA Bank,[21] contended that the phrase 'Secured Obligations' as contained in clause 3.1 (a) of the guarantee agreement includes any indebtedness of any nature whatsoever by the Borrower (ie UES) whether actual or contingent, present or future, to the Lender (ie ABSA Bank) from time to time in terms of the Facilities Letter. He therefore argued that the terms of the guarantee agreement are wide enough to include past and future obligations of the Borrower arising out of any document or agreement.[22] In elaboration, counsel emphasised that clause 2.1 of the guarantee agreement makes explicit reference to an existing indebtedness of the Borrower to the Lender. Clause 2, which bore the subheading 'Introduction', merely recorded that the guarantors had agreed to guarantee 'the due, proper and punctual performance by [UES] of the Secured Obligations *on the terms and conditions contained herein*'. (Emphasis added.) In our view, counsel's reliance on clause 2 (quoted in paragraph 38 above) was profitless because the provision begged the question what 'the terms and conditions contained herein' (see clause 2.3) were.

[20] Para 111 of the high court judgment.
[21] ABSA Bank was represented by different counsel before the high court.
[22] This was a reference to the Facilities Letter that predated the guarantee agreement.

[43] Significantly, so counsel submitted, that there was no increased facility at that stage or thereafter – because the application for the increased facility was not acceded to – was of no consequence. Counsel was at pains to emphasise that in resisting the claim, the respondents wrongly focused on a restrictive approach directed at the negotiations for the increase of the facility stemming from April 2019 to 6 March 2020 in order to contextualise the guarantee agreement whereas ABSA Bank instead rightly adopted a broader approach.

Respondents' contentions

[44] The respondents contended that since ABSA Bank declined to increase the overdraft facility from US$2,5 million to US$18,5 million, the guarantee agreement was unenforceable. They argued that they signed the agreement subject to, and on a clear understanding that ABSA Bank would increase the initial amount of US$2,5 million to an aggregate amount not exceeding US$18,5 million by the signature date. And, in terms of the guarantee agreement, 'signature date' was defined as 'the date of signature of the Guarantee by the party last signing.'[23] As the guarantee agreement was signed on behalf of ABSA Bank only on 19 March 2020, some six days after it had declined the application for an increase, the common intention of the contracting parties – borne out by the words of the guarantee agreement – had been frustrated.

[45] Therefore, the thrust of the respondents' argument is that for them to have become contractually bound to honour their obligations under the guarantee agreement, ABSA Bank was obliged to fulfil its side of the bargain first by increasing the initial amount as undertaken in terms of the guarantee agreement. Accordingly, having failed to do so, it had no right of recourse in law against them in respect of UES' pre-existing indebtedness of US$2,5 million. Looked at

[23] See clause 1.1 in para 35 above.

from this perspective, the respondents' defence is in essence in the nature of an *exceptio non adempleti contractus*. In terms of this defence, ABSA Bank would not be entitled to demand counter-performance from the respondents unless it has itself performed, or tendered to perform, as the case may be.[24] In short, this defence entails the principle of reciprocity.

Discussion

[46] In our judgement, the construction of the guarantee agreement contended for by ABSA Bank's counsel does not take proper account of the textual or factual context of the agreement. The factual context indicates that the reason that the guarantee was sought by ABSA Bank was as part of the additional security sought by the bank in respect of UES's application for an increased facility to fund an escrow account and provide operational funding. There is nothing in the evidence to indicate that ABSA Bank required additional security at that stage for its existing exposure to the risk of UES defaulting on its debt. On the contrary, the correspondence between the principal parties subsequent to the execution of the guarantee agreement was directed at concerns regarding the fulfilment of the remainder of the conditions precedent for the extension of the increased facility. The parties' description of the provision by the respondents of personal guarantees as a 'condition precedent' stands as confirmation of their common perception that the guarantee was sought and provided in consideration for something to happen in return. Thus, there can hardly be any doubt that that 'something' was the contemplated increase in UES's borrowing facility.

[47] The factual context suggests that construing the guarantee in a manner that would burden the respondents with liability for UES's debt even if UES' borrowing facility were not increased would lead to a most unbusinesslike result.

[24] *Smith v Van Den Heever and Others* [2011] ZASCA 5; 2011 (3) SA 140 (SCA) paras 14-15.

The facts indicate strongly that the company would be incapable of continuing with the Ogies Project if it was unable to fund the escrow account as required by the SFF and acquire access to a substantial sum to finance its operational expenses. In those circumstances it is most unlikely that ABSA Bank would have called upon the respondents to secure the existing indebtedness of the distressed company that had no prospect of settling its debts without a lifebuoy to trade itself out of difficulty. If the guarantees were required irrespective of a related obligation by ABSA Bank to provide additional finance, its conduct in inducing the contract could be stigmatised as opportunistic, if not extortionate. The exchanges between ABSA Bank's representatives and Terrence that took place at the time the respondents signed the guarantee agreement and for some time thereafter are not consistent with any such cynical conduct on the part of the bank. As mentioned, they were rather directed at the achievement of a situation in which the bank would be able to make the contemplated additional lending happen. Similarly, the notion that the respondents would conclude an agreement exposing themselves to personal liability for the distressed company's existing debt irrespective of the bank providing the lifebuoy to keep it afloat is bereft of any commercial sense.

[48] Therefore, the construction of the guarantee agreement contended for by ABSA Bank overlooks and fails to give any meaning to the wording in the definition of 'facilities letter' related to the increase in UES's borrowing facility and its timing 'on or about the Signature Date'. The contextual significance of 'the Signature Date' – both factually and linguistically – is its relationship to the timing of the implementation of the contemplated increased facility. It is significant that ABSA Bank itself provided the deed of agreement to the respondents for them to sign first. Its conduct in so doing demonstrated its appreciation that it would be 'the Party last signing' and would thereby be in control of whether, and if so when, its contemplated obligation to implement the increased facility would accrue. The

bank would have no interest in delaying the counter-signature of the guarantee agreement for more than seven months, as it did, if the common intention were that the guarantee agreement were to be operative in respect of UES's existing debt irrespective of the implementation by it of the contemplated increased facility.

[49] Accordingly, we agree with the submission by the respondents' counsel that the effect of clause 1.5 of the guarantee agreement (quoted above)[25] makes it clear that the reference in the definition of 'facilities letter' to the increased facility imported an obligation upon ABSA Bank to implement it according to the tenor of the definition, and on or about the date of its counter-signature of the agreement. Thus, ABSA Bank was in no position to enforce the agreement without discharging its side of the bargain.

[50] It matters not that the definition of 'Secured Obligations' included the existing indebtedness of UES to ABSA Bank. Whilst we agree with the bank's counsel that it plainly did, accepting the defined meaning of 'Secured Obligations' contended for by ABSA Bank, however, does not answer the question whether the agreement became enforceable by it against the respondents. For the reasons canvassed in the preceding paragraphs, we have concluded that would only be after ABSA Bank had implemented the contemplated increased facility.

[51] ABSA Bank's counsel's argument, in our view, not only contains seeds of its own destruction but also overlooks several relevant considerations. First, the language used in the guarantee agreement is in the respects relevant clear and unambiguous. It points unequivocally in the direction of an anticipated approval of the increase in funding applied for on behalf of UES. The definition of

[25] See paragraph 37 above.

'Facilities Letter' explicitly stipulates that the Lender 'shall make available, the primary lending facility in the aggregate initial amount of US$2,5 million, which amount *shall on or about the "Signature Date" be increased to an aggregate amount not exceeding US$18,5 million*.' (Emphasis added.) The effect of clause 1.5 read with the definition of ‘Facilities Letter’ was to impose an obligation on ABSA Bank to increase the facility on or about the 'Signature Date'.

[52] Secondly, it entirely ignores the manifest purpose that the guarantee agreement was, on conception, designed to serve. On this score, clause 3 of the guarantee agreement assumes great significance. When clause 3 is read in context, as it must be, there can be little doubt that the words 'irrevocably and unconditionally' contained therein were intended to take effect once the envisaged increase was approved. That much is confirmed by the qualifying effect of the phrase in clause 2.3 of the deed 'on the terms and conditions contained herein'. Put differently, both the language of the document itself – which is the 'inevitable point of departure' in the interpretive exercise – and the commercial context of the respondents' willingness to undertake the obligation as guarantors of UES' debt impel the conclusion that the respondents would become liable for UES' pre-existing debt of US$2,5 million only once the facility was increased to US$18,5 million. On its proper construction, the guarantee agreement lends itself to no other tenable interpretation.

[53] It bears emphasising that to suggest that the guarantee agreement would bind the respondents regardless of whether or not the facility was increased to US$18,5 million, as ABSA Bank would have it, would be to ascribe a meaning to the document that would lead to insensible or unbusinesslike results. Such a result fundamentally undermines the apparent purpose of the document in a way that would effectively be foisting on the contracting parties a contract other than the one they in fact made. And, borrowing from the words of Lord Clarke SCJ in

Rainy Sky SA, 'no reasonable commercial person would construe' the guarantee agreement in the way for which ABSA Bank contended. Thus, it is no stretch of the imagination to suppose that 'the reasonable commercial person' would be 'unimpressed with technical interpretations and undue emphasis on niceties of language' urged upon this court on behalf of ABSA Bank.

[54] It is as well to bear in mind that where the default position is not expressly recorded in an agreement itself – as in this instance – resort could also be had to the circumstances leading to the conclusion thereof. This will shed light on the intention of the parties as borne by the words used in the document being interpreted. In this case the circumstances surrounding the conclusion of the guarantee agreement can also be gleaned from the conduct of one or more of the parties. From April 2019 there were serious and prolonged negotiations regarding the increase of UES' then existing facility. Before the protracted negotiations finally bore fruit, the parties concluded the guarantee agreement in anticipation of the required increased facility which the respondents signed on 7 August 2019. On 16 September 2019, this was followed by a formal application for the increase of the existing facility of US$2,5 million to US$18,5 million, all at the behest of ABSA Bank.

[55] Some six months later, on 6 March 2020, ABSA Bank declined the application for the increase sought. Yet, curiously on 19 March 2020, ABSA Bank signed the agreement. The timing of the signing of the guarantee agreement by ABSA Bank was indicative of the fact that only after the Borrower repaid a measly amount of US$131 164,48 on 3 February 2020 and therefore unable to reduce the initial amount to any appreciable degree, did it apparently dawn on ABSA Bank that there was a serious risk that the Borrower was in financial distress. However, due to the fact that ABSA Bank had already turned down UES' application for the increase of the facility amount, its act in signing the guarantee

agreement on 19 March 2020 was, for the reasons already stated, incapable of rendering the agreement legally effectual. If by the 'Signature Date' the increase had been approved – and additional funding advanced – the liability of the respondents would, as a result, have been triggered.

[56] Where a party seeks to enforce performance of an obligation undertaken in terms of a contract which is conditional upon performance by himself of a reciprocal obligation owed to the other party, then the performance by the former of his or her reciprocal obligation or the tender of such performance, is a necessary pre-requisite of his or her right to sue. Conversely, in such a case the party to whom the reciprocal obligation is owed may raise a defence, known as the *exceptio non adempleti contractus*. The fact that the claimant has failed to perform or, as the case may be, failed to tender performance of his or her own reciprocal obligation absolves the other party from the obligations undertaken in terms of the contract.[26]

[57] Almost a century ago, this court reaffirmed the principle that in any bilateral contract where each party undertakes obligations towards the other, neither party is entitled to enforce the contract unless that party has performed or tendered performance of its own obligations.[27] More than five decades ago, Corbett J aptly put it thus:

'For reciprocity to exist there must be such a relationship between the obligation by one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other.'[28]

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[26] *Myburgh v Central Motor Works* 1968 (4) SA 864 (T) at 865.

[27] *Hauman v Nortje* 1014 AD 293 at 300. This principle has been consistently applied by this court in several decisions. See, for example: *Wolpert v Steenkamp* 1917 AD 493 at 499; *Rich and others v Lagerwey* 1974 (4) SA 748 (A) at 761-2; *Nesci v Meyer* 1982 (3) SA 498 (A) at 513F; *Smith v Van den Heever NO and Others* [2011] ZASCA 5; 2011 (3) SA 140 (SCA) para 14; *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* [2017] ZASCA 185; 2018 (3) SA 65 (SCA) para 20.

[28] *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 809D.

[58] Pretty much a similar situation obtains in this case. Here, ABSA Bank ought to have first rendered complete performance of its contractual obligation by approving UES' application for the increase of the latter's existing facility of US$2,5 million to the aggregate amount of US$18,5 million. Upon the approval of such application by ABSA Bank, the respondents would consequently have become contractually bound to perform their reciprocal obligation as guarantors of UES' indebtedness. On a proper interpretation of the guarantee agreement, only then would the respondents' liability arise, not just in respect of the additional amount advanced but also the existing debt prior to the execution of the guarantee agreement on 19 March 2020.

[59] As *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd and Others*[29] tells us:

'Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

If all of this is appreciated, then it readily becomes clear why the contentions advanced on behalf of ABSA Bank cannot be sustained.

[60] In all the circumstances therefore and having regard to the language of the agreement, the context and the purpose to which it was directed, the sensible commercial meaning to be ascribed to it that is legally tenable is the one for which the respondents contended.

[29] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 51.

[61] The First Amendment of the Facilities Letter, which the Bank sought to contend signified that the parties accepted that the guarantee agreement was effective notwithstanding its refusal to afford UES an increased facility, did not in any way affect the import of the guarantee agreement as described above. Inasmuch as the substituted clause 8 inserted by the First Amendment purported to record that as at July 2020 the Bank held the guarantee agreement as effective security, it was factually incorrect. As we have sought to explain, the guarantee agreement had already become a dead letter in March 2020, when the Bank indicated that the increased facility, in consideration for which the guarantee was to be provided, would not be granted. Nothing in the First Amendment breathed life back into it. Neither of the respondents was party to the First Amendment in their personal capacity and the evidence of Marc was that he had no knowledge of the First Amendment at the time it was executed.

[62] Taking into account all of the above, we are not persuaded that the end result of the judgment in the court below was wrong. The consequence is that the appeal must fail. Insofar as the question of costs is concerned, there is, in our view, no reason to depart from the general rule that costs should follow the event.

[63] It remains to address the appellant's appeal in relation to the costs of the counter-application for rectification of the guarantee agreement. The high court stated that it did not 'deem it necessary to deal with' the counter-application 'in great detail, save to say that the requirements of a claim for rectification have not been met.' Consequently, it dismissed the counter-application 'with no order as to costs.' It is trite that the award of costs is pre-eminently a matter for the discretion of the court of first instance. Therefore, an appellate court's power to interfere with the exercise of such discretion is circumscribed. Having regard to the ultimate conclusion reached in this appeal, we do not think that interference with the costs order made by the court a quo would be warranted.

[64] In the result the following order will issue:

The appeal is dismissed with costs.

X M PETSE

DEPUTY PRESIDENT

SUPREME COURT OF APPEAL

B R TOKOTA

ACTING JUDGE OF APPEAL

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