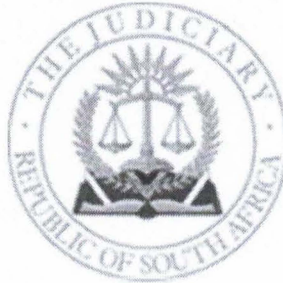


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2021/2462

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED NO


Judge Dippenaar

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

NEL, JOHANNES JACOBUS

First Respondent

NAUDE, DEKKER DIRK

Second Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 16th of August 2022.

DIPPENAAR J:

[1] The applicant, a financial institution, seeks judgment against the respondents as sureties for the liabilities of Xolisa General CC (in liquidation), formerly known as Servigraph 42 CC ("Servigraph"¹) in an aggregate amount of some R40 million in respect of various debts due by Servigraph to the applicant. The respondents were the sole members of Servigraph. It conducted large farming operations and concluded a suite of financing agreements with the applicant during the period July 2017 to December 2019, including various deeds of suretyship executed by the respective respondents to secure Servigraph's indebtedness to the applicant.

[2] The respondents placed Servigraph under supervision and business rescue under s 129(1) of the Companies Act² during May 2020. Pursuant to Servigraph being placed under supervision, two post commencement financing ("PCF") agreements were concluded on 25 June 2020 and 21 August 2020 respectively between Servigraph's business rescue practitioners and the applicant amounting to a total of R2 million³. The debts owing by Servigraph to the applicant were admitted during the course of the business rescue proceedings. Servigraph was placed under final winding up on 27 August 2021.

[3] The facts are not contentious and are by and large common cause. The respondents did not put the applicant's factual averments in support of its claims in dispute. It is common cause that the applicant concluded the various finance agreements with Servigraph in respect of which various deeds of suretyship were executed by the

¹ As the agreements were concluded at a time the principal debtor was known as Servigraph, it is convenient to refer to it by that name.

² 71 of 2008

³ R1 5000 000 and R500 000 respectively.

respondents in favour of the applicant and that Servigraph beached those agreements. It is further undisputed that the applicant made various facilities available to Servigraph from which the latter benefitted. It was also not disputed that if the suretyships were not provided by the respondents, the applicant would not have provided finance to Servigraph. The quantum of the amounts claimed and the demand made on the respondents are also not in dispute.

[4] The respondents opposed the application on three grounds, mainly predicated on legal argument. First; that the deeds of suretyship were unreasonable, oppressive and unconstitutional and a clear violation of the principles of Ubuntu and thus were liable to be set aside on the basis of constitutional values and public policy (the “public policy defence”). Second; that the facility and the loan agreements lapsed due to the non fulfilment of certain suspensive conditions, combined with an argument that the non fulfilment of those conditions prejudiced the respondents as sureties (the “conditions defence”). Third; the respondents have been prejudiced as sureties through the conduct of the applicant *vis-à-vis* Servigraph and that the suretyships should be set aside or the sureties should be released from their suretyships (the “prejudice defence”). However, no counter application was launched for the setting aside of the suretyships. It follows that, even if the respondents are successful in any of their defences, they cannot obtain an order setting aside the suretyships.

[5] The respondents’ arguments on each of these defences are intertwined, often confusingly and grounded in similar contentions used in different contexts, resulting in an unavoidable measure of repetition in dealing with each of the defences in this judgment.

[6] In broad terms these arguments can be distilled into two main groups, i.e. what I will define as the “financial means” argument and the “waiver” argument.

[7] The financial means argument is based on the contention that the applicant never undertook any financial analysis to satisfy itself that the respondents were in a financial position to comply with their obligations under the suretyship agreements and that they

had never owned sufficient assets to satisfy the magnitude of Servigraph's debt. The applicant did not in reply dispute that no such financial analysis was undertaken. It was argued that the applicant's failure to do so breached a duty it owed to Servigraph and the respondents, rendered the suretyships unconscionable and prejudiced the respondents.

[8] The waiver argument is premised on the contention that the suretyship agreements were concluded without the applicant having disclosed to the respondents that it retained an undisclosed right to waive certain "conditions" imposed in the facility and loan agreements on Servigraph, prior to funds being released or made available to it and that the applicant waived the conditions without notice and without exercising its discretion *arbitrio bono viri* (reasonably and honestly) as no evidence was presented by the applicant on this issue.

[9] The "conditions" relied on in the waiver argument were primarily those in clause 3 of the facility agreement and clause 1.4 of Appendix 1 to the loan agreement, which the respondents contended were suspensive conditions, various of which were not fulfilled⁴. Accordingly it was argued that those agreements had lapsed. The respective clauses provided for the provision of various securities and security documents as collateral for the funding advanced to Servigraph in terms of the said agreements⁵, including the suretyships relied on by the applicant. I shall collectively refer to these clauses as the "collateral provisions".

[10] As the applicant seeks final relief, the so-called *Plascon Evans* rule⁶ applies. In motion proceedings, the affidavits constitute both the pleadings and the evidence⁷. In order to raise a real, genuine and *bona fide* dispute, it is incumbent on the respondents

⁴ Clauses 3.2, 3.6, 3.11.2, 3.11.3 and 3.12.2 of the facility agreement and clauses 1.4.2, 1.4.5, 1.4.6, 1.4.9.2 and 1.4.9.3 of appendix 1 to the loan agreement.

⁵ The respondents did not persist in argument with the contention that the PPC agreements similarly contained suspensive conditions. That argument in any event lacks merit as the pre plant production ("PPC") agreements are self- standing agreements and not part of the facility agreement.

⁶ *Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634F; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)

⁷ *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D)

to seriously and unambiguously address the facts said to be disputed, specifically where the facts averred lie purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment⁸.

[11] However, the respondents' affidavits focus primarily on expanding upon the arguments raised as opposed to providing primary facts substantiating them.

[12] Having set out the grounds of the two arguments raised, I turn to consider the three defences raised by the respondents. It is convenient to first deal with the conditions defence as its determination has it impacts on the other defences raised.

The conditions defence.

[13] At the commencement of the hearing the respondents abandoned reliance on the defence hitherto advanced that the collateral provisions were suspensive conditions, various of which were not fulfilled⁹, thus rendering those agreements void and the principal debts invalid. Although the concession was in my view correctly made, it substantially eroded the respondents' argument.

[14] However, they persisted with the remainder of the argument that the said provisions in the respective agreements constituted conditions which were not fulfilled and the applicant did not prove compliance with its own contractual provisions. They further persevered with the argument that the PCF agreements contained suspensive conditions. These arguments also feature in the respondents' public policy and prejudice defences, dealt with later herein.

⁸ Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) para [13]

⁹ Clauses 3.2, 3.6, 3.11.2, 3.11.3 and 3.12.2 of the facility agreement and clauses 1.4.2, 1.4.5, 1.4.6, 1.4.9.2 and 1.4.9.3 of appendix 1 to the loan agreement.

[15] The principles relevant to interpretation are well established¹⁰. The relevant provisions of the facility and loan agreements relied upon by the parties are set out below.

[16] Clause 3 of the facility agreement regulates collateral cover and provides:

*"Notwithstanding and/or detracting from any security currently held by the Bank (if any), the utilisation by the client of the above facilities is conditional upon the following collateral/agreements being provided to the Bank for the obligations of the Client towards the Bank."*¹¹

[17] Clause 4 of the facility agreement regulates special conditions. The relevant portions provide:

"Payment/Standard conditions (Conditions to be complied with before draw down under the Facilities are allowed)

With reference to agreements and other documents, it is specifically agreed that:

4.1.1 No utilization of such new facilities will be allowed and no draw-down of such increase in funds will be permitted prior to the Client providing the Bank with the duly signed original facility agreement and signed security documentation as well as any other required agreements together with the necessary authorizing resolution(s)."

4.1.2 Insofar as this Facility Agreement relates to the existing part of facilities that are not increased, or facilities that were reviewed and without any increase, the Client undertakes to provide the Bank with the duly signed original facility agreement and security documentation as well as any other required agreements together with the necessary authorising resolution(s) within 30 days of receipt by the client hereof. In the absence whereof the bank reserves the right to renegotiate and/or cancel the facilities"

[18] Appendix 1 of the loan agreement regulates disbursement and monitoring conditions and security. The first clause of Appendix 1 to the loan agreement provides in relevant part:

¹⁰ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

¹¹ The various securities are set out in clauses 3.1 to 3.12

"The advance of the Loan is subject to the fulfilment, to the sole and absolute discretion of the Bank of the following conditions:"

[19] Clause 1.4 of Appendix 1 provides:

*"The following security and Security Documents shall be provided to the Bank's satisfaction:"*¹²

[20] As stated, the respondents' concession regarding the suspensive conditions referred to in paragraph 13 above was correctly made. Whether a term or condition of a contract amounts to a suspensive condition is to be determined from the proper interpretation of the language used by the parties¹³. As held by Keightley J in *First Rand Bank Limited v Vega Holdings Proprietary Limited* ¹⁴("Vega Holdings"):

"[15]...Do they suspend the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, in the words of Christie? Or are they more properly to be interpreted as terms of the agreement, along the line of the distinction drawn in R v Katz: 'the word condition in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase; conditions of sale. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price etc- in other words the so called accidentalia of the contract. In the sense of a true suspensive condition, however, the word has a much more limited meaning viz of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain event...In the case of true conditions the parties by specific arrangement introduce contingency as to the existence or otherwise of a contract, whereas provisions which are not true conditions bind the parties as to their fulfilment and on breach give rise to ordinary contractual remedies of a compensatory nature ie (depending on the circumstances) specific performance, damages, cancellation or certain combinations of these.

[16] As this dictum explains, the term condition is often used loosely to refer to both terms of the agreement (which do not have suspensive effect) and true conditions (that do). There is no magic in the use of the term "condition" as opposed to "term". Indeed, the two words are commonly used in conjunction in many contracts, as in the phrase "terms and conditions" that means that an interpretative exercise must be undertaken in order to determine the true legal nature of the particular contractual provisions in question".

[21] Measured against these principles I agree with the applicant that upon a proper interpretation of the said clauses, the collateral provisions in clause 3 of the facility

¹² The various securities follow in clauses 1.4.1 to 1.4.10.

¹³ *First Rand Bank Limited v Vega Holdings Proprietary Limited* 2021 JDR 2673 (GJ) para [10]- [16] ("Vega Holdings")

¹⁴ *Vega Holdings* para [16]

agreement and clause 1.4 of Appendix 1 to the loan agreements are not suspensive conditions, as it is the utilisation of the respective facilities that was conditional and not the agreements themselves¹⁵. This is borne out by clause 4.1.2 of the facility agreement which pertains to the applicant's entitlement to cancel the facilities if certain documents were not provided. This envisages that the agreement is in existence.

[22] In respect of the facility agreement, the respondents argued that the agreement did not provide for the waiver of such conditions and that they were not notified of the waiver. It was argued that as a matter of fact, the sureties had a reasonable and legitimate expectation that the conditions would be enforced by the applicant prior to advancing some R40 million to Servigraph over a period of time.

[23] A similar argument was raised in respect of the non-fulfilment of the conditions in the loan agreement. The respondents argued that on a proper construction of the loan agreement, the applicant must be satisfied that the security provided and the security documents satisfies its needs and no provision is made that the applicants may waive the provision of the securities.

[24] In their heads of argument, the respondents criticised the applicant for not putting up evidence how and when the discretion to waive compliance with all of the collateral provisions was exercised or what motivated it to do, as it must exercise its discretion in waiving its own imposed conditions, *arbitrio bono viri* and that the applicant had a duty to communicate the waiver of the conditions, which was not done. This argument is also advanced in support of the public policy and prejudice defences.

[25] The applicant countered these arguments by contending that clause 3 of the facility agreement and clause 1. 4 of Appendix 1 to the loan agreement were inserted solely for its benefit and that it was entitled to waive compliance with the conditions in the facility

¹⁵ Vega Turnkey Projects (Pty) Ltd and 2 Others v Firststrand Bank Ltd Full court decision, Gauteng Division, Johannesburg Appeal case no A5063/2020 paras [13]-[24] pertaining to provisions similar to the present;

and loan agreements without notice in its sole and absolute discretion. The applicant further relied thereon that it may, in its sole discretion, determine the nature and extent of the facilities provided. Reliance was also placed on various of the provisions in the suretyship agreement in support of these contentions. It argued that even if there were conditions which had not been fulfilled, the respondents could not rely on such non-fulfilment to escape liability. A similar argument was raised in relation to the PCF agreements.

[26] The relevant clauses of the suretyship (all of which are similar in the various suretyships executed by the respective respondents), relied upon by the applicant, provide:

Clause 2

...this suretyship shall apply whether the debt or liability has matured (become payable) or not and shall be continuous cover and shall not be reduced, lapse or terminate due to (1) any cancellation, termination, variation, amendment or novation of any agreement or undertaking for the time being in existence between FRB and the Debtor or in respect of any facility or loan provided by FRB to the Debtor, or ...

(5) FRB's whole or partial release or abandonment of, or failure to acquire, perfect, realise or collect any other security...

Clause 5

FRB may in its sole discretion determine the type, nature, extent, renewal, change, withdrawal and duration of any facilities to the Debtor from time to time.

Clause 7

FRB may without informing me/us, and without affecting FRB's rights hereunder- Release any security provided by the Debtor or anyone else; Give time to, or compound or make any other arrangement with, the Debtor, his legal representative, trustee, liquidator, administrator, business rescue practitioner, judicial manager or other person in charge/control of the Debtor's assets and affairs.

Clause 8

FRB may in its sole and absolute discretion without my/our knowledge or consent, give time, or extra time, or grant any indulgence to the Debtor or any surety or security provider, release, discharge or compound or make any other arrangements with any one or more of us with the Debtor or security provider or any other sureties without in any way prejudicing or unfavourably affecting FRB's rights hereunder against the others of us.

Clause 12

Additional Security-This suretyship is in addition to and without prejudice to any other securities or suretyships (including any suretyships signed by us) now held or hereafter to be held from or on behalf of the Debtor and this suretyship shall remain in force despite the death or legal disability of myself or one or more of us until receipt, by FRB's branches or division/s at which the Debtor is indebted, of notice in writing terminating the same (accompanied by a copy of a notice addressed to the Debtor by the terminating surety/ies) advising the Debtor of termination of his/her/their suretyship) and until the sum or sums due or to become due whether contingently or otherwise at the date of receipt of such notice shall have been paid. Despite termination as aforesaid as to one or more of us, this suretyship shall remain in force and binding as a continuing security as to the other or others of us. I/we shall remain liable under this suretyship even if FRB does not obtain the security and/or other suretyships that could otherwise have reduced my/our liability.

[27] I am persuaded that the various relevant contractual provisions do afford the applicant a wide discretion in relation to the collateral provisions. Considering the various provisions, I am further persuaded that the said conditions or collateral provisions were inserted solely for the benefit of the applicant as they deal with the provision of collateral and certain documentation, without which the applicant would not be obliged to advance the funding.

[28] As held, in the context of an exception, by Willis J in *Nedbank Ltd v Ziltrex 77 (Pty) Ltd*¹⁶:

"A condition that is exclusively for the benefit of one party cannot be relied on by the other party".

[29] It is thus not open to the respondents, or Servigraph, to rely on any non fulfilment of the provisions pertaining to the securities. Moreover, the suretyships in express terms

¹⁶ 2010 JDR 1257 (GSJ) at para [14]

in clause 12, provide that the respondents would still remain liable under the suretyships even if all the securities were not obtained by the applicant.

[30] Both clause 3 of the facility agreement and clause 1.4 of appendix 1 of the loan agreement impose obligations on Servigraph to provide the securities and documents required by the applicant as collateral. They do not impose obligations on the applicant. Not all the collateral provisions pertain to collateral with a monetary value.

[31] None of the parties raised any concern that the facility and loan agreements may have been subject to conditions that may not have been fulfilled when the funding was advanced to Servigraph from time to time and the issue was only for the first time raised much later in Servigraph's winding up proceedings¹⁷.

[32] The respondents' contentions are moreover at variance with the conduct of Servigraph and the respondents over the years. The first respondent signed the facility agreement and the loan agreement on behalf of Servigraph. The respondents put up no evidence that they had ever challenged the validity of the underlying agreements or raised any issues in relation to the securities. Servigraph and the respondents would be aware at the time of the advancement of the funds whether all the collateral in terms of the collateral provisions had been provided to the applicant or not. It is undisputed that Servigraph appropriated the proceeds of the various facilities offered to it as and when same were made available. As the only members of Servigraph, the respondents were aware thereof and benefitted therefrom. The respondents conceded that had the suretyships not been concluded, the monies needed to fund Servigraph's farming operations would never have been advanced by the applicant.

¹⁷ Vega Holdings para [27]

Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2005 (6) SA 1 (SCA)

[33] Considering these undisputed facts, I conclude that the respondents, by their conduct, clearly and unconditionally acquiesced¹⁸ to the validity of the underlying agreements.

[34] In any event, waiver can be reasonably inferred from the conduct of the respective parties from the perspective of a reasonable person in the position of the applicant and is consistent with an intention to waive the conditions pertaining to the provision of certain securities¹⁹. In adjudicating the conduct of the parties, it can reasonably be concluded that the applicant did waive the provision of the various securities complained of by the respondents, and the respondents acquiesced thereto, considering that the parties all conducted themselves as if the agreements were valid and the applicant advanced, and Servigraph accepted and utilised the funding provided by the applicant²⁰.

[35] The respondents persisted with their suspensive condition argument in relation to the PCF agreements. It was contended that the PCF agreements are not self-standing and independent contracts but flow naturally from the facility agreement. This contention lacks merit. In terms of clause 2 of Part A of the facility agreement, in the event of an inconsistency between the facility agreement and other agreements or transaction documents, the provision of the transaction documents would apply. This pertains to the PCF agreements, which are such transaction documents.

[36] The agreements regarding the provision of PCF of R1.5 million and R500 000 by the applicant are confirmed in emails from the applicant's Mr Edwards to the Servigraph business rescue practitioners dated 25 June 2020 and 21 August 2020 respectively. In essence the PCF was made available to Servigraph by increasing the limits available on the working capital facility to provide for excess funding, which enabled Servigraph to

¹⁸ L v The Central Authority for the Republic of South Africa and Another (24108/2016) [2018] ZAGPJHC 12 (20 February 2018) para [12]

¹⁹ Palmer v Putter 1983 (4) SA 11 (T) at 21A; Multilateral Motor Vehicle Accident Fund v Meyerowitz 1995 (1) SA 23 (C) 27D-E

²⁰ Vega Holdings para [27]

draw down against such facility in accordance with its terms. The PCF was to be repaid from the profits of the harvests. This did not take place.

[37] The respondents argued that the provision of PCF was subject to a suspensive condition that *"the facility would be made available within 24 hours of receipt of a list of detailed payments between now and August, satisfactory to the Bank"*. According to the respondents the list was only provided on 21 August 2020. Notwithstanding this, the applicant made a facility available to the value of R2 million, which was made available at the latest on 30 June 2020 whereafter payments were made from the facility from 30 June to 31 August 2020. It was contended that the applicant acted to the respondents' prejudice by making the post commencement finance available prior to the imposed suspensive conditions being fulfilled.

[38] On a contextual reading of the emails evidencing the PCF agreements and applying the principles already referred to, it provides that the applicant required a list of detailed payments pertaining to the harvesting of certain crops satisfactory to the applicant. The applicant wished to satisfy itself that the expenses for which Servigraph borrowed PCF were legitimate. As such the provision that the funds would be made available within 24 hours of receipt of the said list, is exclusively for the benefit of the applicant, and not Servigraph.

[39] I am further not persuaded that the PCF agreements were subject to suspensive conditions. In their terms the emails do not speak about the contract being subject for its existence on the fulfilment of any suspensive conditions.

[40] I conclude that the conditions defence and the arguments advanced by the respondents lack merit and do not avail the respondents to avoid the suretyships.

The public policy defence

[41] In this context the respondents' case was also predicated on both the financial means and waiver arguments. In relation to the both arguments, the respondents did not put up factual evidence substantiating their alleged lack of financial means or evidence in support of any lack of knowledge or an incorrect exercise of the applicant's discretion in relation to the waiver argument.

[42] The terms of the various agreements, including the suretyship agreements, illustrate the wide discretions afforded to the applicant. The respondents' arguments have already to an extent been canvassed in dealing with the conditions defence.

[43] In relation to the waiver argument, the respondents argued that there was no evidence that the applicant exercised its discretion to waive the collateral provisions *arbitrio bono viri* and no attempt was made by the applicant to illustrate this.²¹ A further premise on which the respondents' arguments are based, is that the applicant did not deal in its affidavits with why it advanced some R40 million to Servigraph, without the checks and balances the applicant itself required, being adhered to and fulfilled. In relation to the financial means argument, the respondents relied on the fact that it was undisputed that no financial analysis of their financial means was conducted.

[44] The respondents presented an elaborate argument in support of the contention that the common law alternatively the agreements impose a duty of care on financial institutions such as the applicant in two respects, underpinned by the financial means argument and the waiver argument. In the alternative it was argued that the common law should be developed to impose such a duty or duties.

²¹ NBS Boland Bank Ltd v One Berg River Drive CC & Others; Deeb & Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd 1999 (4) SA 928 (SCA) paras [24]-[25]

[45] Regarding the waiver argument, it was contended that the applicant's conduct constitutes negligent conduct on the part of the applicant and public policy demands that applicant must be upfront with the respondent as to material aspects that can affect their exposure. It was argued that it was unconscionable and inimical to public policy that the applicant can impose a condition for the provision of security to its satisfaction and then fail to take any steps to ensure that the security provided is at all satisfactory. The respondents argued that in this regard the applicant was reckless and negligent.

[46] Regarding the financial means argument, it was contended that the applicant's conduct in demanding unreasonable suretyships is unconscionable and it acted recklessly and oppressively in obtaining suretyships in circumstances where it did not know whether the surety would ever be able to perform on such suretyships.

[47] Reliance was also placed on the inherent right to dignity enshrined in s 10 of the Constitution as it is "dehumanizing" to treat the respondents as a means to an end by the mere signing of a suretyship agreement without determining whether it leads to satisfaction of imposed conditions as the applicant is appeasing its own conscience that it has done all it can to ensure the intended debt is secured. It was argued that the suretyships were entered into recklessly in a manner which is contrary to public policy, which also has the effect of causing the arbitrary deprivation of the respondents' property as contemplated in s25(1) of the Constitution, as execution could be levied pursuant to any judgment, albeit premised on suretyships entered into on a basis which is inimical to public policy. The respondents argued that the court should refuse to enforce the suretyships on the basis of constitutional values and public policy.

[48] In respect of both the financial means and the waiver arguments, it was contended that the applicant did not act with the necessary *bona fides*, reasonableness and honesty either in deciding first, to waive the conditions and second, to enter into the suretyships with the respondents without ever satisfying itself as to the viability of the suretyship agreements. Reliance was further placed on the principle of Ubuntu, which encompasses

concepts of reasonableness and justice, which values can give rise to a determination of whether a contractual term or its enforcement is contrary to public policy.

[49] The applicant's stance in response is: first, that the arguments are not supported by any authority and second, that the principle of Ubuntu cannot be applied as the respondents' propositions are inconsistent with the principles of the law of contract and are not self-standing rules which can justify the avoidance of performance under the suretyship contracts.

[50] It is well established that the concepts of good faith, justice, reasonableness and fairness including Ubuntu are not self-standing rules which can justify the avoidance of performance under contracts. These concepts are simply underlying values that are given expression through existing rules of law²².

[51] As held by the Supreme Court of Appeal in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*²³, it would be impermissible for a court to develop the common law of contract by infusing the spirit of Ubuntu and good faith to invalidate a term or clause of a contract. In the present instance the respondents seek to invalidate the entire suretyship.

[52] The Constitutional Court considered the values of good faith, justice, reasonableness and fairness in the context of the law of contract and emphasised the sanctity of contracts in *Beadica 231 CC and Others v Trustees Oregon Trust and Others*²⁴ ("*Beadica*"). The relevant concepts were explained thus:

"[72] It is clear that public policy imports values of fairness, reasonableness, and justice. Ubuntu, which encompasses these values, is not also recognised as a constitutional value, inspiring our constitutional

²² Liberty Group Ltd and Others v Mail Management CC 2020(1) SA 30 (SCA) at paras [15]-[31] and [29]

²³ 2018 (2) SA 314 (SCA) at para [30]

²⁴ 2020 (5) SA 247 (CC)

compact, which in turn informs public policy. These values for important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy.

[73] While these values play an important role in the public policy analysis, they also perform creative, informative and controlling functions in that they underlie/y? and inform the substantive law of contract. Many established doctrines of contract law are themselves the embodiment of these values...

[84]...contractual relationships are the bedrock of economic activity and out economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivized to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] the fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperiled if courts denude the principle of *pacta sunt servanda*"

[90] However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. Accordingly, the perceptive restraint principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable 'harm to the public' before a court may decline to enforce a contract on public policy grounds is alien to our law of contract.

[91] ...a party who seeks to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term. The rationale for this was explained in *Barkhuizen*: "For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequences in these circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent.

[92] The public policy imperative to enforce contractual obligations that have been voluntarily undertaken recognises the autonomy of the contracting parties and, in so doing, gives effect to the central constitutional values of freedom and dignity. This imperative provides the requisite legal certainty to allow persons to arrange their affairs in reliance on the undertakings of the other parties to a contract, and to coordinate their conduct for their mutual benefit. While the explanation provided is not the only relevant consideration, it is critical in the overall assessment of whether enforcement would be contrary to public policy in all the particular facts and circumstances of a case. In *Barkhuizen*, the majority held that, in the absence of facts establishing why the applicant did not comply with the clause, it was unable to conclude that its enforcement would be contrary to public policy. The absence of any explanation for the failure to comply, will, in most cases, be the end of the enquiry".

[53] In applying these principles, it was incumbent on the respondents to illustrate a good reason not to comply with the deeds of suretyship and that constitutional values are undermined by the suretyship agreements. As held in *Liberty Group Ltd and Others v Mall Management CC*²⁵, it is difficult to conceive how a court, in a purely business transaction, could rely on Ubuntu to import a term that was not intended by the parties to deny the other party a right to rely on the terms of a contract to terminate it²⁶. The same would apply to the present instance.

[54] The respondent's argument ultimately distils into whether the deeds of suretyship are contrary to public policy. The approach and principles set out in *Sasfin (Pty) Ltd v Beukes*²⁷ still hold true. First, the interests of the community or the public are of paramount importance. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic experience will, on the grounds of public policy not be enforced. Second, public policy generally favours the utmost freedom of contract and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. Third, the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases in which the harm to the public is substantially incontestable, lest uncertainty as to the validity of the contracts result from arbitrary and indiscriminate use of the power. Put differently, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power.²⁸

[55] Measured against these principles, I am not persuaded that the deeds of suretyship here in issue are contrary to public policy applying the principles enunciated above. Deeds of suretyship have long been accepted and recognised in our law. There

²⁵ 2020 (1) SA 30 (SCA) paras [16]-[31]

²⁶ Roazer CC v The Fall Supermarket CC 2018 (3) SA 76 (SCA) para [24]

²⁷ 1989 (1) SA 1(A)

²⁸ Ibid 9B-E

is nothing unusual in the terms of the present suretyships and the respondents did not seek to rely on any untoward terms in them.

[56] It is apposite to refer to *Jans v Nedcor Bank Ltd*²⁹, wherein Scott JA stated:

"...The various deeds of suretyship are perfectly legitimate, and even commonplace. There is nothing whatsoever unusual-or draconian- about them. Deeds of suretyship have long been accepted and recognised in our law. The typical surety in modern society is one who binds himself as co-principal debtor and guarantees the debts of a company or close corporation, which has little in the way of share capital or assets but is dependent on credit in order to conduct its business. More often than not, the business is that of the surety or a spouse who for various reasons chooses to conduct it through the medium of a company or close corporation with limited liability. A creditor will ordinarily refuse to afford credit to such a legal persona in the absence of a personal suretyship, and few businesses can operate successfully without credit. The very existence of the debt is therefore dependent upon the existence of the suretyship while the object and function of the latter is, of course, to ensure proper payment of the former. Whilst a suretyship is, by its very nature burdensome, sureties do not assume the obligations of others against their will, but with free consent. Once having done so, they cannot expect to be entitled simply to disabuse their minds of the fortunes of the principal debtor's liability, and then require the law to protect them against their ignorance".

[57] In my view, the present circumstances fall squarely within this ambit. The respondents were the only members of Servigraph, operated its business and were the very individuals who sought and procured the finance from the applicant. They conducted Servigraph's business and derived a benefit therefrom. They would also have been intimately aware of Servigraph's financial position (as well as their own) and their respective ability to meet their financial commitments to the applicant. An express condition to the advancement of the funds, was the conclusion of the suretyships. The respondents freely and voluntarily accepted the conditions under which the applicant would provide financing to Servigraph. The respondents did not offer alternative collateral but were satisfied to conclude the suretyships, nor did they reject the conditions under which the applicant was prepared to advance funding to Servigraph and approach an alternative financial institution. Insofar as the respondents in their answering affidavits refer to the applicant using its "superior financial muscle" to ensure they concluded the

²⁹ 2003 (6) SA 646 (SCA) para [30]

unreasonable suretyship agreements, they made out no case on the papers for economic duress.

[58] In my view the fact that the applicant also required additional security and may have waived certain of the security sought is of no moment in this context. The respondents, as members of Servigraph would have been aware of exactly what security had been provided by Servigraph and what not. The respondents' version is not that they objected at the time for the advancement of any funds to Servigraph. Rather, the applicant's version pertaining to the advancement of funds to Servigraph, is undisputed. The respondents' case is squarely based on the contentions that the applicant failed to satisfy itself that the respondent's had sufficient assets to meet their surety obligations and failed to notify them of its waiver of certain of the security requirements in the facility and loan agreements.

[59] I further agree with the applicant that there was no merit in the gross recklessness or negligence arguments advanced by the respondents. No authorities were advanced in support of their propositions. On the facts it cannot be concluded that the applicant breached any legal obligations or acted in a reckless or negligent fashion.

[60] It cannot in my view be concluded that the suretyship agreements or the applicant's conduct are against public policy or that the suretyships should not be enforced. It follows that this defence must fail.

The prejudice defence.

[61] The relevant principles are well established³⁰. They are enunciated thus by the Supreme Court of Appeal in *ABSA Bank Ltd v Davidson*³¹ ("*Davidson*"):

³⁰ *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA)

³¹ 2001 (1) SA 1117 (SCA) para [19]

"As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. the prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. if, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer".

[62] The waiver and financial means arguments are also raised in this context by the respondents. According to the respondents their prejudice lies in the reckless and negligent conduct of the applicant which is prejudicial to their interests as sureties and it is a prejudice that arises squarely from the applicant's failure to abide by the terms of its own agreements in relation to the collateral provisions. Had the applicant insisted on the fulfilment of the conditions to its reasonable honest and good faith satisfaction, no funds would have been released to Servigraph and the respondents would not be liable to the applicant.

[63] It is argued: *"If the applicant gave notice of its decision to waive imposed conditions, the respondents could have taken steps to protect their interests vis-à-vis the applicant. As no notice was given they were prejudiced as they could take no such steps to protect their interests"*. It was argued that this approach is in line with *Davidson* and the prejudice to the respondents is not prejudice the respondents undertook to suffer as contemplated in *Davidson*. The respondents undertook their suretyships on the basis that the respective suretyships provided to the reasonable honest and good faith satisfaction of the applicant and that no monies would be advanced to Servigraph in want of compliance therewith. The very fact that the applicant simply did not abide by its own conditions cannot be laid at the door of the respondents and the applicant acted to the respondents' prejudice.

[64] It was further argued that the non-compliance by the applicant with its own agreements prejudiced the respondents and they had a legitimate expectation that the applicant would abide by its implied duty not to act to the prejudicial detriment of the respondents by not adhering to its own imposed conditions in its agreements with

Servigraph. It is contended that the applicant did not take the securities in sufficient amounts. It is not the respondents' case that the security was not provided only the sufficiency thereof. The argument culminates in the contention that the funds should never have been advanced absent all the conditions being fulfilled.

[65] I have already dealt with this issue earlier in the judgment. Moreover, the argument entirely disregards that the respondents are not arms-length third party sureties, but the only members of Servigraph, who conducted its business activities and would be aware of the advancement of the funds without the provision of the securities complained of. In this context the argument is self-serving and does not bear scrutiny.

[66] In this context the respondents argued that the applicant's reliance on clauses 5, 7 and 8 of the suretyships in support of the discretion afforded to the applicant does not avail it as no evidence was led that the discretion was exercised in a reasonable, honest and good faith satisfaction of the applicant. The argument is further linked to respondent's contention that the applicant should have satisfied itself that the respondents had the financial capability to meet their suretyship obligations. These arguments disregard the respondents' obligation to provide cogent evidence in support of their defences. I have already concluded that there are no such implied legal duties under the agreements on the applicant.

[67] Considering the relevant terms of the agreements, including clause 2.1 of the facility agreement, the applicant could in its sole discretion determine the nature and extent of the short term facilities afforded to Servigraph. The applicant argued that there is thus no obligation on the applicant to have acted in one way or the other hence no breach of some or other legal obligation owed to either Servigraph or the respondents. The respondents did not present cogent primary factual evidence justifying the conclusion that the applicant exercised its discretion in a mala fide, unreasonable or untoward fashion.

[68] The respondents' complained that various of the collateral provisions were not complied with. Those provisions did not place obligations on the applicant, but rather on Servigraph to provide the required collateral and security documents. Similarly, the respondents complained that the applicant did not comply with clauses 4.4.1 and 4.8 of the facility agreement as the summer production facility was not repaid and interest was not serviced monthly. They also complained that clauses 4.9 and 4.10 were not complied with. However, as correctly pointed out by the applicant, the obligations referred to were Servigraph's obligations and not obligations imposed on the applicant.

[69] In my view, considering all the facts, it was not established by the respondents that the applicant had breached any contractual obligation which would result in prejudice to the respondents. It was Servigraph, managed by the respondents, who breached its obligations.

[70] A suretyship agreement must be restrictively interpreted³². On a proper interpretation of the terms of the deeds of suretyship, they illustrate that no legal obligations on the part of the applicant were breached. I have already referred to the relevant clauses of the suretyship (all of which are similar in the various suretyships executed).

[71] Moreover, considering the relevant terms of the suretyships, all prejudice befalling the respondents are prejudice which they undertook to suffer and bargained for as experienced businessmen. The complaints and prejudice raised by the respondents in my view fall squarely within the ambit of the prejudice undertaken by them in the suretyships, specifically in context of the wide discretion afforded to the applicant in the relevant clauses referred to earlier.

³² HNR Properties CC & Another v Standard Bank of SA Ltd [2004] 1 All SA 486 (SCA) at para [14]

[72] I conclude, applying the principles in *Davidson*, that the respondents' prejudice defence must also fail.

[73] It follows that as each of the defences raised by the respondents has failed, the applicant is entitled to judgment as sought.

[74] There is no reason to deviate from the normal principle that costs follow the result. The agreements provide for costs to be granted on a scale as between attorney and client. The applicant argued that the costs of two counsel were justified. Considering the issues involved and the substantial quantum of the applicant's claim, I am persuaded that such costs are warranted and should be granted.

[75] I grant the following order:

Judgment is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved, for:

[1.1] Payment of the sum of R6 638 391.74 plus interest thereon at the prime rate plus 3% per annum, compounded monthly in arrears from 31 August 2020 to date of payment;

[1.2] Payment of the sum of R5 600 321.80 plus interest thereon at the prime rate plus 1% per annum, compounded monthly in arrears from 30 November 2020 to date of payment;

[1.3] Payment of the sum of R18 388 343.56 plus interest thereon at the prime rate plus 1% per annum, compounded monthly in arrears from 30 November 2020 to date of payment;

[1.4] Payment of the sum of R3 588 356.45 plus interest thereon at the prime rate plus 1% per annum, compounded monthly in arrears from 30 November 2020 to date of payment;

[1.5] Payment of the sum of R1 966 023.21 plus interest thereon at the prime rate plus 3.5% per annum, compounded monthly in arrears from 30 November 2020 to date of payment;

[1.6] Payment of the sum of R3 219 242.59 plus interest thereon at the prime rate plus 1% per annum, compounded monthly in arrears from 30 November 2020 to date of payment;

[2] Costs of suit on the scale as between attorney and client, including the costs of two counsel where employed.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 16 May 2022
DATE OF JUDGMENT	: 16 August 2022
APPLICANTS COUNSEL	: Adv. JE Smit : Adv. M. De Oliveira
APPLICANTS ATTORNEYS	: Edward Nathan Sonnenbergs Inc..
RESPONDENTS COUNSEL	: Adv. E. Thompson
RESPONDENTS ATTORNEYS	: Martin Van Vuuren Attorneys