



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No.: 4417/2020P

In the matter between:

INVESTEC BANK LIMITED

APPLICANT

and

VEJANDRAN SHUNMUGAM PILLAY

FIRST RESPONDENT

VEJANDRAN SHUNMUGAM PILLAY N.O.

SECOND RESPONDENT

JENNY PILLAY N.O.

THIRD RESPONDENT

ORDER

The following order is granted:

1. Judgment is granted against the respondents jointly and severally with each other, the one paying the other to be absolved, for payment of the sum of:
 - 1.1 R59 064 140.93 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
 - 1.2 R14 441 916.30 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
 - 1.3 R4 871 907.66 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
 - 1.4 R2 857 732.05 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;

- 1.5 R17 500 000 together with interest thereon at the rate of 7.25% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
- 1.6 R92 000 000 together with interest thereon at the rate of 7.25% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive.
2. The respondents are to pay the costs of this application jointly and severally on the attorney and client scale.

JUDGMENT

HIRALALL AJ:

Introduction

[1] The applicant is Investec Bank Limited, a bank duly registered and incorporated as such, a registered credit provider, with its principal place of business at 5 Richeford Circle, Ridgeside Office Park, Umhlanga Rocks, Durban.

[2] The first respondent is Mr Vejandran Shunmugam Pillay, an adult male, attorney and businessman, who carries on business at Suite SF01, The Square, 250 Umhlanga Rocks Drive, Umhlanga Rocks, Durban.

[3] The second and third respondents are cited in their capacities as duly appointed trustees of the Jenny Pillay Family Trust, registration number IT173/96. The trustees are Mr Vejandran Shunmugam Pillay N.O. and Ms Jenny Pillay N.O., the second and third respondents respectively, with their principal place of business at Suite SF01, The Square, 250 Umhlanga Rocks Drive, Umhlanga Rocks, Durban.

[4] The applicant, represented by a duly authorised representative, and Misty Blue Investments (Pty) Ltd ('Misty Blue'), represented at all material times by the first respondent, concluded various written loan agreements on various occasions as detailed below:

- (a) On 23 December 2016, the applicant loaned and advanced R60 228 000 to Misty Blue. Misty Blue undertook to repay that amount in 24 equal monthly instalments of R532 965.54, and a final residual instalment of R60 228 000. Accordingly, the full debt was due, owing and payable by no later than December 2018.
- (b) On 9 September 2013, the applicant loaned and advanced a principal debt of R75 456 588.80 to Misty Blue. Misty Blue undertook to repay that amount, together with interest thereon, in one residual amount of R75 276 436.92, 18 months after the date of the loan agreement. Annexed to the written loan agreement are various written addendums, culminating in the addendum dated 23 January 2017 in terms of which the parties agreed, in writing, that the full amount due in terms of the loan was due and payable by no later than 25 April 2017.
- (c) On 12 November 2013, the applicant loaned and advanced R6 000 000 to Misty Blue. Misty Blue undertook to repay that amount, together with interest thereon in 60 equal monthly instalments, and a final residual instalment of R3 900 000, 60 months after the date of signature of the loan agreement.
- (d) On 11 August 2014, the applicant loaned and advanced R3 100 000 to Misty Blue. Misty Blue undertook to repay that amount in 60 equal monthly instalments together, with a final residual instalment of R2 015 000.
- (e) On 3 March 2017, the applicant loaned and advanced R14 750 000 to Misty Blue. Misty Blue undertook to repay that amount in 12 equal monthly instalments, and a final residual instalment of R14 750 000. Accordingly, the whole loan was due, owing and payable by no later than April 2018.

[5] On 10 April 2014, the applicant, represented by a duly authorised representative, and Personify Investments (Pty) Ltd ('Personify'), represented at all material times by the first respondent, concluded a written loan agreement in terms of which the applicant loaned and advanced R92 000 000 to Personify. This amount together with interest thereon was repayable by Personify in monthly instalments, with a final residual instalment of R73 600 000.

[6] The various loans advanced to the debtors were *inter alia* to finance the acquisition of a number of immovable properties known as Central Park (phases 1 and 2), Auberge Hollandaise Guest House, the scheme known as Urban Park, the

hotel and office park known as The Square, and the hotel known as The Waterfront Hotel and Spa.

[7] On various dates from 9 September 2013 to 20 December 2016, and at Durban, the first respondent and the Jenny Pillay Family Trust signed and executed written guarantees in favour of the applicant for the due and punctual payment of all and any moneys owed to the applicant by Misty Blue and Personify.

[8] Both Misty Blue and Personify breached their repayment obligations in terms of all of the aforesaid loans. As a result, a settlement agreement was concluded during July 2019 between the applicant on the one hand, and Misty Blue, Personify, Huntrex 302 (Pty) Ltd, ('group of companies'), the first respondent, and the Jenny Pillay Family Trust, on the other. The settlement agreement provided *inter alia* as follows:

- (a) The debtors (which included the respondents as principal debtors) accepted joint and several liability to Investec for the amounts set forth in the various loan agreements which totalled R191 041 630.
- (b) A restructured payment plan, with specified due dates, with the entire indebtedness being payable by no later than 31 December 2019.
- (c) Release of all of Investec's security over Central Park phases 1 and 2 upon timeous payment of specified amounts.
- (d) In order to achieve payment of at least R50 million, an option for the debtors to realize immovable property, bonded in favour of the applicant as security for the indebtedness, as the debtors saw fit, and the applicant would release the aforesaid properties subject to the conditions stipulated in the settlement agreement.
- (e) Suitable guarantees for all payments as stipulated in the settlement agreement.
- (f) Various further payments pending settlement of the indebtedness in full.
- (g) Various further conditions in relation to *inter alia* the pending liquidation proceedings, and business rescue proceedings.
- (h) The agreement would not constitute a novation of Investec's claims against the debtors nor did it in any way vary or modify the terms and conditions of the various individual loan agreements concluded with Investec.

[9] As at 19 December 2019, the debtors were in breach of the terms of the July 2019 agreement and two further addendums affording them extensions. In addition, the debtors advised that they had received an application for business rescue from two intervening creditors. The introduction of yet another application for business rescue, albeit from alleged at arms-length creditors, was of concern to Investec. However, it was at the instance of the debtors that the creditors who brought that application agreed to withdraw those proceedings. On 19 December 2019 Investec's attorneys wrote to the debtors recording that they remained in breach of the settlement agreement and the addendums, and entered into discussions with the debtors as to how to remedy the situation. The debtors responded as follows on 19 December 2019:

'we would like to settle this matter and pursue settlement apart from the urban park issue, we believe this is very possible. We urge you to hold this over until the new year when this matter can be resolved amicably. In the light of your threats to liquidate, we are forwarding your letter to our attorneys for the reply.'

[10] On 31 December 2019 Investec's attorneys wrote to the debtors stating that: 'as you are aware there's a pending business rescue application, set down for 15 April 2020. Kindly advise what your position is in respect of the business rescue application.'

[11] On 16 January 2020 the debtors wrote to Investec's attorneys with proposals as to how to bring various arrear payments up to date and stated as follows 'I confirm I am meeting with the business rescue creditors this afternoon to settle their application. My proposals herein a subject to their consent to withdraw their application.'

[12] On 16 January 2020 the debtors informed Investec in writing that the properties known as The Square and the Waterfront Hotel and Spa were reserved for auction on 17 March 2020, and that unless the parties apparently interested in purchasing those properties by private treaty secured a purchase by 31 January 2020, then Investec could proceed to advertise and sell the properties on auction. On 31 January 2020 the debtors confirmed in writing that they were in the process of having the business rescue application withdrawn. On 19 February 2020 the debtors provided Investec's attorneys with an update in regard to the property known as the

Waterfront Hotel and Spa which was allegedly to be sold for R50 million subject to a due diligence.

[13] On 5 February 2020, a further written settlement agreement was concluded between the applicant on the one hand, and the group of companies, the first respondent, and the Jenny Pillay Family Trust, on the other. The settlement agreement provided *inter alia* as follows:

(a) The debtors acknowledged their joint and several indebtedness to Investec for the amounts set out in the various loan agreements which altogether totalled R186 592 993.87, plus interest and costs on the attorney and client scale.

(b) The debtors undertook to pay this amount as set out on the terms reflected in the agreement.

(c) The debtors undertook to furnish Investec with a guarantee for R15 million by no later than 14 February 2020, and to make payment of this amount by no later than 28 February 2020. The debtors complied with the obligation to provide the guarantee. The guarantee was extended and stated to expire on 10 April 2020. On 26 March 2020 Investec's attorneys sent a letter stating:

'Please note that the guarantee issued in our client's favour in the sum of R 15 000 000.00 in respect of the sale of the Imperial Hotel expires on 10 April 2020. Please ensure that this date is extended accordingly and provide our offices with proof thereof prior to the expiry date.'

On 9 April 2020 Investec's attorneys sent a further letter stating as follows:

As set out in our letter dated 26 March 2020, the guarantee issued in our client's favour in the sum of R 15 000 000.00 in respect of the sale of the Imperial Hotel expires on 10 April 2020. Please ensure that this date is extended accordingly and provide our offices with proof thereof prior to the expiry date.'

The debtors breached clause 1 of the agreement in that the guarantee which they furnished expired without payment, and payment of R15 million was not received by 28 February 2020.

(d) The debtors undertook to furnish Investec with a further guarantee of R15 million by no later than 14 February 2020, and to pay Investec this amount by no later than 28 February 2020. However, the debtors failed to furnish the guarantee and to make the required payment, thereby breaching their obligations.

(e) The debtors agreed to provide Investec with a guarantee of R10 million in respect of the Auberge Hollandaise Guest House, and to pay Investec this amount by no later than 31 May 2020. No guarantee was furnished and no payment was received.

(f) The debtors agreed to provide Investec with a guarantee for the minimum amount of R50 million in respect of the sectional title scheme known as Urban Park, by no later than 30 April 2020, and to pay Investec the amount of R50 million by no later than 31 May 2020. No guarantee was furnished and no payment was received.

(g) The debtors agreed that Investec would be entitled to procure the sale and/or auction of The Square, for a minimum net purchase price of R90 million, and for The Waterfront Hotel and Spa, for a minimum price of R47,5 million, on the strength of duly executed powers of attorney. A sale agreement in regard to The Square was obtained by the applicant and concluded on 4 February 2020 for the price of R90 million including VAT. The purchase price was payable as follows: R5 million within 5 days of acceptance, and the balance of R85 million by way of a bank guarantee to be delivered to Investec within 45 days of the acceptance of Investec's consent to the sale. Subsequently, the debtors advised that the purchaser had requested an extension of time. Investec responded with a proposed addendum which, if signed and accepted by both parties, would have resulted in an agreement to extend the date for the furnishing of the guarantees but it was never signed or accepted by any of the parties. The result was that the guarantees for R85 million were not furnished. Investec then received correspondence indicating that the purchaser no longer qualified for finance sufficient to cover the R85 million owed for the balance of the purchase price.

(h) The entire amount owed by the debtors to Investec was to be settled in full by no later than 30 June 2020.

Issues

[14] The applicant seeks judgment as prayed in the notice of motion. According to the applicant, the amounts owed by the respondents, and for which the applicant seeks judgment against the respondents jointly and severally with each other, the one paying the other to be absolved, are as follows:

- (a) payment of the sum of R59 064 140.93 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
- (b) payment of the sum of R14 441 916.30 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
- (c) payment of the sum of R4 871 907.66 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
- (d) payment of the sum of R2 857 732.05 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
- (e) payment of the sum of R17 500 000 together with interest thereon at the rate of 7.25% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
- (f) payment of the sum of R92 000 000 together with interest thereon at the rate of 7.25% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive.

[15] The respondents dispute that there is an indebtedness which is due, owing payable, and contend as follows:

- (a) The applicant's claim is based on the guarantees referred to in para 12 of the founding affidavit. It is alleged that the applicant now seeks to introduce a new case in argument by relying on the 31 January 2020 settlement agreement, which it is not entitled to do without an amendment to its existing papers.
- (b) The settlement agreement is based on guarantees that are unenforceable, against public policy, and contrary to the Constitution, and it is therefore tainted with the same invalidity as the guarantees.
- (c) The settlement agreement is itself invalid and unenforceable because it seeks to deprive the courts of jurisdiction.
- (d) The Covid-19 pandemic has led to a supervening impossibility of performance of the settlement agreement.
- (e) Business rescue in respect of all three companies has commenced.
- (f) There is a limitation of liability in respect of Misty Blue.

- (g) There was an agreement for deferment of payment.
- (h) The *exceptio non adimpleti contractus* applies as it was Investec who caused the financial difficulties which the group of companies found themselves in.

What is the cause of action?

[16] The first issue to be decided arises from the respondents' contention that the applicant's claim is based on the guarantees referred to in para 12 of the founding affidavit, and that the applicant seeks to introduce a new case in argument by relying on the 31 January 2020 settlement agreement as governing everything, which it is not entitled to do without an amendment to its existing papers. It is further alleged that the settlement agreement is also merely a payment mechanism and not a compromise. According to the respondents this was a change of tack by the applicant, and thus a tacit concession in relation to the offending clauses in the guarantees. Mr Harpur SC, for the respondents, submitted that it is evident from the wording of para 12 that the applicant is relying on the guarantees since it sets this out as its cause of action and attaches copies of the guarantees to the founding affidavit. The applicant's case was never that there was a compromise. He submitted that the replying affidavit even records at para 43 that 'this is not a novation' and that the applicant's 'claims are neither extinguished nor reduced'. The settlement agreement was a mechanism to pay, however the original indebtedness remained.

[17] Mr Harpur referred the court to *Mostert and others v FirstRand Bank Ltd t/a RMB Private Bank and another*¹ where one of the issues to be decided by the court was whether any reliance could be placed on an argument that was only raised in the replying affidavit. I will return to this aspect later.

[18] The founding affidavit records the following:

'12. On various dates, and at Durban, the first respondent and the Jenny Pillay Family Trust signed and executed written guarantees in favour of the applicant for the due and punctual payment of all and any monies owed to the applicant by Misty Blue and Personify respectively. Copies of these guarantees are annexed hereto marked "G1" to "G7" respectively and the terms thereof appear in the written documents.

¹ *Mostert and others v FirstRand Bank Ltd t/a RMB Private Bank and another* 2018 (4) SA 443 (SCA) para 13.

13. On the 5th February 2020 at Durban, the applicant (represented by its authorized employee) on the one hand, and Misty Blue, Personify and Huntrex 302 (Pty) Limited, the first respondent and the Jenny Pillay Family Trust concluded an agreement of settlement, a copy of which is annexed hereto marked "H". In terms thereof the debtors (including the first respondent and the Jenny Pillay Family Trust) acknowledged that they were jointly and severally indebted to the applicant in the amounts set out therein, being the amounts due and payable by Misty Blue and Personify set out in annexures "A" to "F" above and further:

13.1 agreed that the said indebtedness would be discharged by way of the various instalments set out in annexure "H";

13.2 in the event of any payment not being made on due date, and the debtors, including the first respondent and the Jenny Pillay Family Trust, failing to remedy such default upon 5 business days written notice, the entire indebtedness would immediately become due and payable to the applicant.'

[19] Mr Stokes SC, acting for the applicant, submitted in response that it is incorrect to suggest that the applicant makes out a new case in its heads of argument, since it is clear from the founding affidavit that the applicant's case is pleaded on the settlement agreement. Paragraph 13.2 of the founding affidavit proceeds to enforce the acceleration clause which only appears in the settlement agreement, and which provides at para 25 thereof that in the event of breach, the entire indebtedness shall immediately become payable. That the respondents understood the applicant's claim as such appears from the content of para 32 of the answering affidavit, which acknowledges that the applicant's claim is based on the fact that the group of companies and the respondents are all in breach of their obligations in terms of the 31 January 2020 agreement. The answering affidavit then proceeds to set out defences claiming supervening impossibility of performance due to the Covid-19 pandemic, and deferment of payment. Nowhere in the answering affidavit is it claimed that the settlement agreement is void.

[20] The pertinent issue to be decided here is: What is the cause of action, and whether it was only raised in the heads of argument? The question whether the settlement agreement constitutes a novation, or a compromise or *transactio*, and whether it is valid and enforceable will be decided later in the judgment.

[21] It is clear that although the applicant has referred to, and annexed copies of, the guarantees to its founding affidavit, its claim is based on the settlement agreement which is also an annexure to the founding affidavit. Paragraph 13.2 of the founding affidavit proceeds to enforce the acceleration clause which only appears in the settlement agreement, and which makes the entire indebtedness due and payable upon breach. It is not correct to say that the applicant has introduced a new case in argument.

[22] That the respondent understood that the applicant's claim was based on the settlement agreement is evident from the defences raised thereto. The defences raised are not in relation to the guarantees as the guarantees have not stipulated any immediate obligations other than guaranteeing, as a principal obligation, the due and punctual payment and performance of all or any moneys and obligations which the debtors may from time to time or in the future owe to the applicant. The defences relating to *inter alia* the alleged supervening impossibility of performance due to the Covid-19 pandemic, and the deferment of payment, are directly related to the settlement agreement.

[23] It is noted that in any event, the court in *Mostert supra* saw it fit, in the circumstances of that case, to exercise its discretion to allow the new matter raised in the replying affidavit. In this regard, the court considered the following factors: 'no new facts were raised in the replying affidavit; the merits of the matter were fully argued in the court a quo; there was no indication of prejudice; and the litigation proceedings had been protracted'.² It has not been necessary to consider this route in the present case.

Is the settlement agreement dated 31 January 2020 invalid and unenforceable?

[24] The validity of the settlement agreement is challenged by the respondents on the following two grounds:

(a) the settlement agreement is based on guarantees that are unenforceable, against public policy, and contrary to the Constitution, and therefore tainted with the same invalidity; and

² Ibid from the headnote at 443H-444A.

(b) the settlement agreement itself contains clauses, specifically clauses 39 to 41.5 which seek to deprive the court's jurisdiction.

Is the settlement agreement, based on guarantees that are unenforceable, against public policy, and contrary to the Constitution, and therefore tainted with the same invalidity?

[25] Mr Stokes submitted that the respondents have not specifically pleaded a challenge to the validity of the settlement agreement, and that if they wished to challenge the validity of the settlement agreement, this should have been pleaded. He correctly submitted that the respondents acknowledged that the applicant's claim was based on the settlement agreement, and proceeded to set out their defences thereto. It was never the respondents' contention in their answering affidavit that the settlement agreement was invalid on account of the purported invalidity of the guarantees.

[26] It is noted that there is a vague and indirect reference to a novation of the guarantees in para 72 of the answering affidavits (notwithstanding a specific provision in the settlement agreement stating that the settlement agreement does not constitute a novation of Investec's claims against the debtors, and that its claims were neither extinguished nor reduced).

[27] It is submitted at para 23 of the respondents' heads of argument, without it appearing in the answering affidavit, that the 'settlement agreements are tainted with the same invalidity that renders the guarantees unenforceable and are themselves unenforceable'. Be that as it may, the contention bears consideration as it is pertinent to the sustainability of the applicant's claim.

[28] The respondents base their argument on the contention that clauses 1, 2 and 6.2 of the guarantees are unenforceable, against public policy, and contrary to the Constitution. It was submitted in the respondents' heads of argument that:

(a) Clause 1, which provides that 'the guarantees shall be unaffected by any compromise of any claim that the applicant may have against the debtor', means the applicant could compromise its claim against the debtor by agreeing to receive a lower amount of its claim, and then be paid that lower amount but nonetheless still

recover the full amount from the guarantors. This permits a double recovery by the applicant in that it would first recover the lower compromised amount from the debtor, and then recover the same compromised lower amount from the guarantors, plus the differential between the compromised amount and the full amount of the claim.

(b) Clause 2 allows the recovery of amounts which are unenforceable, invalid or illegal (this was never pleaded by the respondents). The courts are accordingly required to enforce invalid and illegal amounts which is contrary to public policy.

(c) Clause 6.2 of each of the guarantees provides that they shall remain in force irrespective of any occurrence or circumstance which might otherwise constitute a legal or equitable discharge or defence of the guarantors.

(d) This effectively renders nugatory the guarantor's constitutional right of access to courts under section 34 of the Constitution which grants the right '... to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. . . '.

(e) These results are contrary to public policy, and contrary to the Constitution.

(f) They are not severable from the remainder of the guarantee, notwithstanding clause 20 of the guarantees providing that each clause shall be severable from the others, and if any clause is found to be defective or unenforceable for any reason by any court, then the remaining clauses shall remain of full force and effect. This is because the offending clauses relate to the enforceability of any or all of the terms of the contract.

[29] The applicant's response to these contentions was as follows:

(a) In relation to clause 1, it has long been held that the clause referred to by the respondents which entitles Investec to compromise its claim against the debtor, while still recovering the full amount from the guarantors, is perfectly acceptable and not contrary to public policy, even in the case of suretyships, let alone guarantees.

(b) This clause does not allow a double recovery, and there is nothing in the guarantee which entitles Investec to obtain more than what it is owed.

(c) The wording of clause 6.2 was admitted but the construction and impact placed thereon was disputed.

(d) It was disputed that these clauses go to the principal purpose of the guarantees (as principal not accessory obligations) and are not subsidiary or

collateral, or that they are not severable from the remainder of the guarantee. Clause 20 of the guarantees provides that each clause shall be severable from the others, and if any clause is found to be defective or unenforceable for any reason by any court, then the remaining clauses shall remain of full force and effect.

[30] As a starting point, in relation to the novation argument, according to *Christie's Law of Contract in South Africa*:³

'Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged, but novation is not to be regarded as a form of payment There is a presumption against novation because it involves a waiver of existing rights. A creditor who has rights under an existing contract and then enters into another connected contract will be presumed to intend rather to strengthen and confirm its existing rights than to waive them and accept its rights under the new contract in substitution, or there may be any one of a number of reasons for entering into the new contract. The onus of proving novation therefore lies on the party who asserts that it has taken place, and it must be specifically pleaded. Where it cannot prove an express intention to novate, it must prove a tacit intention; the intention must be clearly proved, and must itself reflect a clear and unequivocal intention to novate.' (Footnotes omitted.)

[31] In *Gibson v Van der Walt*,⁴ a case which dealt with the novation of a wagering debt, the court stated as follows:

'The test in such a case, to my mind, should be whether the Court is asked, in effect, to enforce the unenforceable claim; in other words, is the later transaction on which the plaintiff relies merely a device for enforcing his original claim, is it merely his original claim clothed in another form or with some term or condition added to it, or a ratification or even novation of the original claim which leaves its essential character unchanged; if so, the plaintiff must fail.'

And further:

'I am inclined to agree with BLACKWELL, J., that the conversation relied on in the case now before us did not amount to a fresh agreement to pay, but was merely an admission of the original debt plus the addition of a time stipulation to it. However, even if we construe it as a fresh undertaking, it was an undertaking to pay the betting debt and was, on the test I have indicated, unenforceable. . . .'⁵

³ GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 521-524.

⁴ *Gibson v Van der Walt* 1952 (1) SA 262 (A) at 270A-B.

⁵ *Ibid* at 271C-D.

[32] According to *Christie's*,⁶ a compromise or *transactio*, is 'the settlement by agreement of disputed obligations, whether contractual or otherwise'. (Footnote omitted.)

[33] Harms in *Amler's Precedents of Pleadings*,⁷ defines a compromise or settlement as 'a contract which has as its object the prevention, avoidance or termination of litigation'.

[34] In *Benefeld v West*⁸ the court stated as follows:

'[14] The contested agreement as pleaded by the plaintiff is, on the face of it, a settlement. It is not a novation. A compromise is a settlement of litigation or envisaged litigation. It is a substantive contract that exists independently of the original cause. In the case of a novation, the original invalid contract taints the novated contract, but a compromise is not affected by the invalidity of the original obligation. I am in respectful agreement with what was held in that regard in the *Dennis Peters* case supra, and in the *Georgias* case supra. I am not convinced that what was said in those judgments regarding compromises is wrong.

[15] In my view, the argument that the compromise is void and *contra bonos mores*, just because the 1984 agreement was, cannot be upheld.

[16] A compromise is a self-standing contract. It is independent of the cause that gave rise to it. In this instance the cause, which is alleged to have given rise to the compromise, is the cause of action in the magistrates' court.' (Footnote omitted.)

[35] In *Moraitis Investments (Pty) Ltd and others v Montic Dairy (Pty) Ltd*:⁹

'The general principles were stated as follows:

"A transactio, whether extra-judicial or embodied in an order of Court, has the effect of res judicata. . . . It is obvious that, like any other contract (and like any order of Court), a *transactio* may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is *justus*.'" (Footnote omitted)

[36] In relation to the unenforceability argument, in *Shabangu v Land and Agricultural Development Bank of South Africa*,¹⁰ the court stated as follows:

⁶ GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 528.

⁷ L T C Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 338.

⁸ *Benefeld v West* 2011 (2) SA 379 (GSJ) paras14-16.

⁹ *Moraitis Investments (Pty) Ltd and others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) para 14.

[22] This argument is sound as far as it goes, but the rigid distinction between public and private in relation to state commercial activity is not necessary to arrive at the same conclusion. A subsequent agreement between private parties that seeks to resuscitate an invalid agreement itself remains tainted with invalidity, even if the invalidity does not stem from illegality or immorality. In *Gibson*, Fagan JA stated:

“In the matter before us the claim arose out of a betting transaction which was neither illegal nor immoral, so there is no room for an inquiry whether its connection with some other transaction taints the latter with illegality or immorality, for the original transaction itself was not so tainted. *The test in such a case, to my mind, should be whether the Court is asked, in effect, to enforce the unenforceable claim; in other words, is the later transaction on which the plaintiff relies merely a device for enforcing his original claim, is it merely his original claim clothed in another form or with some term or condition added to it, or a ratification or even novation of the original claim which leaves its essential character unchanged; if so the plaintiff must fail.*”’

[37] In *Standard Bank of South Africa Ltd v Bloemfontein Celtic Football Club (Pty) Ltd*¹¹ the following was said:

‘Clause 2.2 fell squarely into the category of offensive and unconscionable agreements, while also having the tendency to deprive the respondent of its constitutional right of access to the courts (see [25]). It made no difference that the respondent was a company, not a person: both sequestration and liquidation involved a change of status (see [26]). It also made no difference that the respondent had filed an answering affidavit: the offending agreement or clause remained illegal and could not be transformed by expedience or pragmatism (see [28]). Since clause 2.2 was contrary to public policy and void, the applicant could not fall back on the original notice of motion to seek the respondent's liquidation (see [29]).’

[38] Mr Stokes submitted in relation to the settlement agreement that:

- (a) It is an entirely new agreement;
- (b) It adds on a new party, namely Huntrex 302 (Pty) Ltd, which is not a party to the previous transactions;
- (c) The preamble records that Misty Blue, Personify and Huntrex take on liability;

¹⁰ *Shabangu v Land and Agricultural Development Bank of South Africa* 2020 (1) SA 305 (CC) para 22.

¹¹ *Standard Bank of South Africa Ltd v Bloemfontein Celtic Football Club (Pty) Ltd* 2020 (3) SA 298 (FB) at 299 as per the headnote.

- (d) At the time it was concluded during July 2019, there was already pending litigation in the form of liquidation proceedings;
- (e) The parties did not intend that the agreement was merely an extension of time for the respondents to pay. It was a whole new agreement with an exchange of rights and obligations;
- (f) Investec gave up rights with regard to the mortgage bond and sought guarantees;
- (g) The agreement allowed the applicant to sell The Square for R90 million, a right which arose from the agreement;
- (h) In para 10, the applicant gave the respondents additional time and also sought guarantees;
- (i) The positions of the parties were materially altered in the agreement;
- (j) Further, the debtors were all jointly and severally liable as principal debtors;
- (k) The agreement refers to pending litigation at paras 18 and 19, and provides for consents to judgment;
- (l) The intention was to put a hold on liquidation and perfection in order to give the debtors time, and to avoid further litigation by obtaining consents to judgment; and
- (m) All of this fell squarely within the definition of a *transactio* or a compromise.

[39] Referring to *Tauber v Von Abo*,¹² Mr Stokes submitted that the validity of a subsequent agreement entered into between the same parties following upon an earlier invalid agreement depends on whether it amounts to a novation (in which case it remains tainted) or a compromise (in which case it is not tainted).

[40] He also submitted that the respondents incorrectly contended that because the agreement stipulated that there was no novation, it meant that the applicant was relying on the earlier agreement and that in fact, the position was actually the opposite. On this score, it does seem that the respondents' arguments in relation to novation have been contradictory and inconsistent.

¹² *Tauber v Von Abo* 1984 (4) SA 482 (E) at 566.

[41] Having regard to the features of the settlement agreement in this case, it is clearly a *transactio* or a compromise. It does not obliterate the rights and obligations flowing from the original agreement but rather recognises and affirms the original agreement, namely the guarantees, whilst rearranging rights and obligations, and resolving disputes and pending litigation.¹³ It was also specifically agreed in the settlement agreement that it did not constitute a novation of Investec's claims and that the claims were neither extinguished nor reduced.

[42] In view of my finding that the settlement agreement constitutes a compromise or *transactio*, and not a novation, it is not necessary to make any findings on the respondents' contention that the guarantees were unenforceable, against public policy, and contrary to the Constitution.

Is the settlement agreement dated 31 January 2020 invalid and unenforceable?

[43] According to the respondents, the 31 January 2020 settlement agreement is invalid and unenforceable as clauses 39 to 41.5 of the agreement seek to deprive the court's jurisdiction.

[44] The content of Clauses 39 to 41.5 records the following:

'39. The debtors will not bring or support any business rescue proceedings with regard to Misty Blue, Personify and Huntrex and waive and abandon all rights to do so;

40. The debtors warrant that there are no business rescue proceedings pending and that the application brought by Aroonkumar Soni and West Investments CC under the case number D 10640 /2019 has been withdrawn;

41. The debtors are aware of the currently pending business rescue application, and are fully conversant with their rights and opportunities to place the various corporate entities into business rescue, or to bring applications to this end. This agreement is concluded by Investec on the basis of representations and warranties by the debtors that

41.1 after taking financial and legal advice, they hold the view that business rescue is not inappropriate under the circumstances;

41.2 it is not in the interests of creditors, including Investec Bank Limited, to place the various corporate entities into business rescue;

¹³ See also *Prinsloo v Derksen and others* [2007] ZAGPHC 96.

41.3 the best option for these corporate entities to honour their financial obligations to creditors, is by means of the terms of the settlement agreement, which will achieve the most beneficial financial outcome for all of the creditors;

41.4 accordingly business rescue would not be in the interests of the corporate entities or the creditors;

41.5 in whatever capacity, the debtors waive and abandon any option to apply for business rescue.'

[45] The court was referred, by the respondents, to *Standard Bank v Essop*¹⁴ and *Standard Bank v Bloemfontein Celtic Football Club*.¹⁵ The court held as follows in *Bloemfontein Celtic*:¹⁶

'[23] The applicant effectively agreed not to oppose a future application for its liquidation in the event that it did not comply with the terms of the settlement agreement. This stipulation deprived the respondent of its right to defend any proceeding in a court of law. In *Standard Bank of SA Ltd v Essop* the settlement agreement contained a similar clause. It provided that —

“(i)n the event of the respondent failing to pay any amount on the due date, the applicant shall be entitled to reinstate the application for the respondent's sequestration on the unopposed motion roll and to utilize the affidavit deposed by the respondent consenting to a provisional and final order of sequestration”.

[24] Meskin J considered the clause and correctly said the following about it:

“In my opinion, applicant's conduct in having purported to stipulate for these rights was, and remains, unconscionable. It has purported to empower itself. in the event of any relevant default by the respondent, to deprive him of his status as a solvent person, and inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act, without any notice to him and without his being able in any event to defend himself. This conduct offends my, and in my opinion it would offend any reasonable person's, sense of what is procedurally fair and it offends my, and in my opinion would offend any reasonable person's, sense of justice.”

[25] Clause 2.2 falls squarely into the category of offensive and unconscionable agreements as described by Meskin J. It also deprives the respondent of a constitutional right. Section 34 of our Constitution expressly gives everyone the right to have any dispute that can be

¹⁴ *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D).

¹⁵ *Standard Bank of South Africa Ltd v Bloemfontein Celtic Football Club (Pty) Ltd* 2020 (3) SA 298 (FB).

¹⁶ *Ibid* paras 23-25.

resolved by the application of law decided in a fair public hearing before a court. Clause 2.2 has a tendency to deprive the respondent of that right.' (Footnotes omitted.)

[46] In terms of section 34 of the Constitution

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[47] In *Sasfin (Pty) Ltd v Beukes*¹⁷ the court stated that

'The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.'

[48] There are clearly instances where the courts will give effect to the need for parties to settle their disputes on terms agreeable to them. In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and another*,¹⁸ the court stated as follows:

'... Here, the power of the Labour Appeal Court's approach is obvious. What is at issue here is a powerful consideration of public policy – the need for parties to settle their disputes on terms agreeable to them. That need arises in their own interests, and the interests of the public.

[23] Here, the applicant had engaged in outright material deceit and misrepresentation. He himself, confronted with the misrepresentation in his curriculum vitae, confessed he had no defence. It was then that he entered into a final agreement to put a present dispute to bed. He did so full knowingly, with his eyes open to his own future interests. It may have been different if he had agreed to abjure recourse to the courts in future disputes. But here the dispute was hot and fresh, and present. He agreed to part ways with Reckitt on terms that were final, and that protected him from further action by his employer – including the possibility of a disciplinary process that could wound his career irremediably. That finality included an agreement that the courts would not be involved. The parties would go their ways without more.

¹⁷ *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 94; 1989 (1) SA 1 (A) at 9B-C.

¹⁸ *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and another* [2016] ZACC 33; 2016 (12) BCLR 1515 (CC) paras 22-24.

[24] The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.’(Footnote omitted.)

[49] In the present case, the parties, and particularly the respondents, since it is the respondents who claim that the agreement which they signed freely and voluntarily with full knowledge of their rights, is invalid and unenforceable, entered into the settlement agreement fully conversant with their rights, with the intention to resolve their disputes as recorded in the settlement agreement. The first respondent can hardly claim that he is not conversant with his rights or that he did not understand the agreement. Furthermore, the settlement agreement was not the first document of its kind to be signed by the respondents. An earlier agreement had been signed along similar lines. According to *Gbenga-Oluwatoye*¹⁹ parties ‘. . . must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced’.

[50] In *Beadica 231 CC and others v Trustees, Oregon Trust and others*,²⁰ after examining the principles of *pacta sunt servanda* and ‘perceptive restraint’, the court stated as follows:

‘Two principles derived from case law need further elucidation: *pacta sunt servanda* and “perceptive restraint”. The former was not a relic of our pre-constitutional past. This court has recognised that, in general, public policy required contracting parties to honour obligations that have been freely and voluntarily undertaken. It was crucial to economic development that individuals should be able to trust that all contracting parties would be bound by obligations willingly assumed. Certainty in contractual relations advanced constitutional rights and was essential to the achievement of our constitutional vision. However, there was no basis for privileging *pacta sunt servanda* over other constitutional rights and values; the

¹⁹ Ibid para 24.

²⁰ *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) at 249-250 from the headnote.

requirements of public policy were informed by a wide range of constitutional values. Where a number of constitutional rights and values were implicated, a careful balancing exercise was required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances. As for “perceptive restraint”, while it was a sound approach, courts should not rely on it 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 As was decided in *Barkhuizen*, *a party seeking to avoid the enforcement of a contractual term was required to demonstrate good reason for failing to comply with the term. While the explanation provided was not the only relevant consideration, it was 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 most cases the absence of an explanation would be the end of the enquiry. Here, the only reasons advanced by the franchisees for their failure were that they were not sophisticated businesspeople and not fully apprised of their rights and obligations. Yet, the terms of each lease governing termination and renewal were in simple, uncomplicated language, which an ordinary person could reasonably be expected to understand. The inference was inescapable that there were no circumstances that prevented the applicants from complying with the terms of the renewal clauses in the leases and that they had simply neglected to comply when it was possible for them to do so. The harsh outcome alone, absent an explanation for their failure to comply with the terms of the renewal clauses, did not constitute a sufficient basis to hold that the enforcement of the clauses would be contrary to public policy. It followed that they did not show that enforcement of the clauses would be contrary to public policy. . . .’ (My emphasis.)

[51] I find that the settlement agreement is valid and enforceable.

[52] The respondents’ further alternative defences are as follows:

‘[22] There is no amount which is due owing and payable by any of the companies (and hence no entitlement of the applicant to sue under the guarantees) due to

- (a) temporary supervening impossibility of performance due to covid 19 and national lockdowns,
- (b) alternatively because business rescue proceedings had begun,
- (c) further, alternatively, the applicant has breached the provisions of the agreements and is not entitled to accelerate payments. The *exceptio non adimpleti contractus* applies against the applicant.”

Temporary supervening impossibility of performance

[53] As a general rule, impossibility of performance brought about by supervening events will excuse performance on a contract. In *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*,²¹ the court stated the following:

‘[28] This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to “look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied”. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.’ (Footnotes omitted.)

[54] In *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd*²² it was held that

‘Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.’

[55] In *The Asphalt Venture: Windrush Intercontinental SA and another v UACC Bergshav Tankers AS*,²³ the court stated as follows:

‘[33] It is hard to discern why the court a quo rejected Justice Khare's opinion. The doctrine of impossibility or frustration is applicable to contracts of employment where supervening events rendered the performance of the contract impossible or radically different from what had been undertaken when the contract was entered into. And whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree. In English law a contract may be frustrated if supervening events prevent its further

²¹ *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] ZASCA 27; 2008 (4) 111 (SCA) para 28.

²² *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) para 9.3.1.

²³ *The Asphalt Venture: Windrush Intercontinental SA and another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA) para 33.

performance. The principle forms part of the law of contract in India too in terms of s 56 of the Indian Contract Act 9 of 1872, which provides that —

“a contract to do an act, which after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful”.’ (Footnotes omitted.)

[56] According to the respondents, after the conclusion of the 31 January 2020 agreement, the group of companies was in constant discussions and negotiations with the applicant. Due to the Covid-19 pandemic, the hospitality industry was adversely affected by the travel ban and lockdown, and most of the hotels within the group were closed and generating no income. It was anticipated that there would be minimal business for at least a few months after the lockdown. Furthermore, the larger clients of the group and governmental agencies indicated that they would be unable to keep up with their payment plans, and as a result the cash flow of the group of companies would be hampered, and they would be unable to make payments under the agreement. In the circumstances, on 3 April 2020, an email was addressed to the applicant requesting a deferment of payments due for a period of 90 days. On 9 April 2020 the applicant agreed to provide the respondents with the requested 90 day deferment of payment, which would result in the next instalment being payable on 30 June 2020. Guarantees in terms of the settlement agreement were delayed by the Covid-19 pandemic, and an extension of time was requested within which the guarantees would be provided. On 29 April 2020, when it became apparent that the lockdown might last longer than anticipated, a further letter was addressed to the applicant requesting that the payment dates be moved to 31 July 2020 as hospitality trade was only permitted to operate more fully under lockdown level 1, and could only realistically start trading in July 2020. On 26 May 2020, more than a month later, the applicant then addressed a letter to the group advising that it would not be extending the dates any further and that it will be issuing breach notices under the agreement. The applicant also referred to a liquidation application by Verbaan Construction against Misty Blue which was in respect of a disputed debt which had since been settled, and the application was withdrawn. On 26 May 2020 a letter was addressed by the respondent to the applicant confirming that the 90-day deferment previously referred to was acceptable.

[57] It appears from the facts which are common cause, that the financial difficulties of the group of companies did not start with the Covid-19 pandemic. The respondents' answering affidavit records that with the passage of time, the group of companies ran into financial difficulties. In this regard, it was contended by the respondents that Investec singlehandedly engineered the financial difficulty which caused the group of companies to fall into the difficulties they found themselves in, because of its refusal, despite an agreement to do so, to release an additional R10 million for the Urban Park development. It is alleged that had the applicant released the balance of R10 million in the facility (which was by agreement to have been applied in the reduction of the Central Park loan from R14 000 000 to R4 000 000), the Central Park development would have been completed.

[58] Investec's response was that at the time when the R10 million advance was claimed, Misty Blue was already in arrears, and contractually Investec was not obligated to continue advancing under the facility whilst Misty Blue remained in breach. A copy of the loan agreement was attached to the applicant's replying affidavit. According to the loan agreement, if Misty Blue was in default under any of its other facilities with Investec, it would constitute a default under the agreement in question. At the time, the amount owing under loan agreement 282762/004 remained unpaid and Misty Blue was in default of its obligations. The applicant presented a similar response to the respondents' contention that it refused to release units for sale, and had this been permitted the entire development would have been paid off. According to the applicant, the debtors were frequently in breach and did not perform under the proposal. There was accordingly no obligation on Investec to continue allowing the release of units at the reduced sum of R300 000 each. Further, an advance of R10 million or even a release of some of the units in Central Park phase 1 for R300 000 per unit would not have made a difference to the situation.

[59] According to the applicant, the respondents' financial difficulties did not start with the Covid-19 pandemic. The group of companies repeatedly signed written settlement agreements and various addendums acknowledging their indebtedness to Investec, and agreeing to terms of the loans and repayment structures in accordance with the written documents which all contain non-variation clauses. Thus, irrespective of the respondents' complaints, which were now raised for the first time

in their answering affidavit on 31 January 2020, the parties concluded a further settlement agreement providing for the debtors to discharge their indebtedness in accordance with its terms. The settlement agreement was signed on 31 January 2020. The respondents first defaulted on their obligations in February 2020, and this continued for the rest of the period until the notice of breach.

[60] The long and short of this is that the respondents' dire financial circumstances pre-dated the first settlement agreement, and was not on account of the Covid-19 pandemic.

[61] The applicant correctly submits that there is not a single word in the answering affidavit suggesting that the current respondents, who are manifestly completely unaffected by the lockdown regulations and do not aver the contrary, were themselves impacted financially. The high watermark of the respondents' case is that the hotels conducted by Misty Blue and Personify suffered a reduction in income. This has no bearing on the current respondents.

Business rescue proceedings have begun

[62] According to the respondents the first respondent on 7 August 2020 made applications to the Durban High Court to commence business rescue proceedings in respect of Misty Blue, Personify and Huntrex in terms of section 131(1) of the Companies Act 71 of 2008.

[63] The respondents contend that the applications for business rescue suspend the liquidation proceedings until the court has adjudicated upon the business rescue applications. On 12 August 2020, the liquidation applications were adjourned sine die and transferred to the Durban High Court.

[64] The applicant disputes the contention of the respondents.

[65] The relevant provisions of sections 132 and 133 of the Act are as follows:

'132 Duration of business rescue proceedings

(1) Business rescue proceedings begin when-

(a) the company-

- (i) files a resolution to place itself under supervision in terms of section 129 (3); or
- (ii) applies to the court for consent to file a resolution in terms of section 129 (5) (b);
- (b) an affected person applies to the court for an order placing the company under supervision in terms of section 131 (1); or*
- (c) a court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 131 (7).

....

133 General moratorium on legal proceedings against company

(1) During business rescue proceedings, no legal proceeding, including enforcement action, *against the company, or in relation to any property belonging to the company, or lawfully in its possession*, may be commenced or proceeded with in any forum, except-

- (a) with the written consent of the practitioner;
- (b) with the leave of the court and in accordance with any terms the court considers suitable;
- (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;
- (d) criminal proceedings against the company or any of its directors or officers;
- (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
- (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.' (My emphasis.)

[66] In *Investec Bank Ltd v Bruyns*²⁴ the question for determination was whether section 133(2) of the Act should be interpreted as providing that during business rescue proceedings a suretyship given by A in favour of B for the indebtedness of the company may not be enforced by B against A without the court's leave. Rogers

²⁴ *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC).

AJ (as he then was) held that the section explicitly referred to the stay of a suretyship undertaken by the company, and not to a suretyship undertaken by a third person for the indebtedness of the company. He also held that the statutory moratorium in section 133(1) on claims against the company under business rescue was a defence purely personal to the principal debtor, namely the company, and could not be raised by the surety. It follows that the statutory moratorium in section 133 of the Act does not have the effect of suspending the indebtedness of any surety to the company placed under business rescue. The court held as follows in this regard:

'[17] The question whether the defendant as surety can raise as a defence the statutory moratorium in favour of GDI and WC (ie the moratorium in terms of s 133(1), which precludes the plaintiff from enforcing the claims in question against GDI and WC as principal debtors) depends on the well-known distinction between defences in rem and defences in personam: 26 *LAWSA* (first reissue) para 201; and *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another* 1984 (2) SA 693 (C). *A defence which is purely personal to the principal debtor may not be raised by the surety. Examples of defences which are purely personal to the principal debtor include restrictions on the enforcement of claims against parties under sequestration or liquidation (see the SA Fire Equipment case at 695F – 696F). In Worthington v Wilson* 1918 TPD 104 the court held that where the principal debtor had the benefit of a statutory moratorium in favour of soldiers on active service the moratorium was a defence in personam which did not avail the surety. The judgment of Gregorowski J in *Worthington* contains a discussion of the old authorities, including the procedure which obtained in Holland whereby a distressed debtor could obtain from the court a moratorium on the enforcement of claims by way of letters of *inductie* or *atterminatie*. Voet and Van Leeuwen were agreed that in such a case a surety for the distressed debtor could not resist the creditor's claim on the basis of the moratorium granted to the principal debtor.

[18] In my view the statutory moratorium in favour of a company that is undergoing business rescue proceedings is a defence in personam. It is a personal privilege or benefit in favour of the company. As was stated in the *SA Fire* case (at 696E – F) the essence of a defence in rem is that the defence attaches to the claim itself in the sense that the defence (if upheld) shows that the claim against the principal debtor is invalid or has been extinguished or discharged. A defence in personam, by contrast, arises from a personal immunity of the debtor in respect of an otherwise valid and existing obligation. Clearly the moratorium afforded by s 133(1) falls into the latter class. The obligations of the company as principal debtor are not extinguished or discharged and their validity is in no way impaired. Indeed,

with the consent of the business rescue practitioner or the court the obligations may be enforced.

[19] I thus conclude that the statutory moratorium in favour of GDI and WC does not avail the defendant.' (My emphasis.)

[67] In the present case, quite apart from the fact that the respondents, as guarantors, cannot claim the defence available to the group of companies, they are also principal debtors in terms of the settlement agreement.

Whether there is a limitation of liability in respect of Misty Blue

[68] The respondents contend that the last dated guarantee in respect of Misty Blue, annexure 'G2', which was signed on 20 December 2016, was the only prevailing guarantee, and provided that the liability of the guarantors, in respect of Misty Blue's liability to make due and punctual payment of all moneys then or in the future due, or obligations under existing contracts or agreements, or contracts or agreements to be entered into in the future, was expressly limited to R10 million. Thus according to the respondents, the guarantee claims in respect of Misty Blue are limited to R10 million.

[69] The applicant's response to this contention is that, save for the guarantees marked 'G2' and 'G6', each of the guarantees contains a reference, on the top right hand side, to the contract number to which it relates. The same contract numbers appear in each of the loan agreements marked 'A' to 'F'. There is a separate guarantee and indemnity in regard of each of the six loan agreements. But even if this were not the case, there was absolutely no reason to contend that subsequent guarantees novated or cancelled the earlier ones. It was ludicrous to suggest that any of the parties ever intended for Investec to accept a single guarantee of R10 million, and somehow to waive and abandon its existing guarantees given the extent of Investec's exposure which was ever-increasing. On the respondents' argument the loans would be increasing, while the securities decreased, which made no sense.

[70] For the purposes of this case, as stated earlier, the respondents have undertaken obligations, jointly and severally with the group of companies, as co-

principal debtors in the settlement agreement. It is therefore not relevant for the court to decide whether 'G2' was the only prevailing guarantee in respect of the indebtedness of Misty Blue. Further the arguments of the applicant that it makes no sense that the loans would be increasing while the securities decrease is a valid one.

Deferment of payment

[71] The respondents contend that on 9 April 2020 the applicant agreed to provide them with 'the requested ninety (90) day deferment of payment which would result in the next instalment being payable on 30 June 2020'. Annexure 'VSP3' was referred to in this regard.

[72] The applicant's response to this contention was that it is clear from the correspondence and its founding affidavit that there was no agreed deferment of payment of the sum of R1,5 million, but in any event non-payment of those amounts was a small part of the detailed various breaches of the settlement agreement. Assuming the respondents are correct and there was such a deferment, the remainder of their breaches are not denied by them.

[73] The correspondences at annexure 'VSP3' records the following:

(a) Email dated 2 April 2020 from Mr Vejan Pillay to Ms Karen Sivewright:

'... We also foresee minimal business for at least a few months after lockdown . Furthermore, a lot of our larger clients have indicated that they are unable to keep their payment plan such as Tourvest, TWF and government agencies.

It is therefore necessary for us to appeal to you to defer any payments due for a period of 90 days. . . .'

(b) Email dated 9 April 2020 from Ms Kandi Hilliar to Mr Vejan Pillay:

"those instructing us have agreed to defer payment in respective clauses 15.2 and 15.3 of the settlement agreement for a period of 90 days.

An addendum to the settlement agreement will be forwarded shortly for signature.'

[74] The payments referred to in clauses 15.2 and 15.3 were for two payments of R1,5 million each, payable by 28 February 2020 and 31 March 2020 respectively. It is not known whether the promised addendum to the settlement agreement was ever

forwarded to the respondents for signature but it is clear that there was an agreement for deferment of the two specified payments to at least 9 July 2020.

[75] It is inconceivable, however, that an agreed deferment of R3 million should prevent the applicant from accelerating payments due in respect of the rest of the breaches on the settlement agreement. Further, it is noted that the breach notice was extended until 10 July 2020.

The exceptio non adimpleti contractus

[76] The respondents' claim of *exceptio non adimpleti contractus* is predicated on the contention that it was the applicant's conduct of tightening the noose on the group of companies which caused it to single-handedly engineer the financial difficulty which the group of companies found themselves in, by:

- (a) Not advancing the full amount of the facilities and by unlawfully retaining portions thereof thereby making it difficult for Misty Blue to complete the developments.
- (b) Nevertheless expecting the group of companies to pay raising fees and monthly instalments on amounts that were not advanced to it.
- (c) Threatening to charge penalty interest.
- (d) Unreasonably withholding its consent for Misty Blue and Personify to sell properties for amounts which would adequately pay off the mortgage bonds held by the applicant. The applicant, as mortgage bond holder, demanded unreasonable purchase prices with no justification, and Personify and Misty Blue were unable to sell these properties which would have increased its cash flow, as it required the applicant's consent to sell the properties.
- (e) Dealing in bad faith with Misty Blue and its associated companies, by negotiating and obtaining increased securities without following through in releasing units for transfer as agreed, and by negotiating in bad faith pursuant to the section 345 letter.²⁵
- (f) That in these circumstances, the applicant cannot benefit from the fact that it has solely, and wrongfully, brought about the financial situation in which Misty Blue and its associated companies find themselves.

²⁵ In terms of section 345 of the Companies Act 61 of 1973.

[77] The applicant disputed the respondents' contentions stating that Investec was not contractually obliged nor willing to advance further moneys whilst Misty Blue was in breach and unable to repay. It always relied on its written loan agreements and security documents, including registered mortgage bonds which Investec required to be settled before releasing units in Central Park. Because the sureties and mortgage bonds were cross sureties and cross securities, and because they were the only protection which Investec enjoyed, it was not willing to release its securities in the absence of payment. It was correct that Investec from time to time stipulated the amounts which properties would be released for, but those amounts were always within Investec's rights in accordance with the loan agreements and the securities. The amounts stipulated by Investec were never just thumb-sucked, as the respondent contended, but were calculated within Investec's rights with reference to the value of its remaining securities and the outstanding debts owed by the debtors.

[78] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*,²⁶ the court gave effect to the well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* in holding that:²⁷

'[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. . . .'

²⁶ *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) paras 12-13.

²⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[79] In the present case, whereas the applicant sets out a clear and unambiguous case, most of which is common cause or not disputed, the respondents have met the case with generalisations. What the respondents fail to address is the fact that they were in breach, with such breach seemingly pre-dating any complaints against Investec not releasing R10 million or units at a certain price, and that the applicant was not contractually obliged to advance further moneys whilst Misty Blue was in breach and unable to repay. The trail of agreements and correspondences between the parties is indicative of the applicant's attempts to protect its interests as well as to avoid litigation. It was open to the respondents at any time to refuse to further engage with the applicant or to raise the constitutional challenges it saw fit to raise in this application.

Conclusion

[80] I find that the respondent's defences must fail, and that the applicant is entitled to the judgment it seeks. Costs should follow the result.

Order

[81] The following order is granted:

1. Judgment is granted against the respondents jointly and severally with each other, the one paying the other to be absolved, for payment of the sum of:
 - 1.1 R59 064 140.93 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
 - 1.2 R14 441 916.30 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
 - 1.3 R4 871 907.66 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
 - 1.4 R2 857 732.05 together with interest thereon at the rate of 7% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;

- 1.5 R17 500 000 together with interest thereon at the rate of 7.25% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive;
- 1.6 R92 000 000 together with interest thereon at the rate of 7.25% per annum and penalty interest at a rate of 5% calculated daily and compounded monthly from 14 July 2020 to date of payment, both days inclusive.
2. The respondents are to pay the costs of this application jointly and severally on the attorney and client scale.

HIRALALL AJ

DATE OF HEARING: 5 February 2021

DATE OF JUDGEMENT: 31 May 2021

FOR THE APPLICANT: Adv A Stokes SC

Instructed by Johnston & Partners

Locally represented by Stowell & Co

FOR THE RESPONDENT: Adv G D Harper SC

Instructed by T.Giyapersad Incorporated

Locally represented by Schoerie Sewgoolam Inc