IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 3127/2018

In the matter between:

THE LAND AND AGRICULTURAL BANK OF SA Applicant

and

JANDREA BOERDERY CC 1st Respondent
(Reg No. 2008/167252/23)

JAN FREDERICK CRONJÉ N.O. 2nd Respondent
(In his capacity as duly authorised trustee of the JAMANLÉ FAMILIETRUST, IT 1088/1996)

ALFRED SLABBERT N.O. 3rd Respondent
(In his capacity as duly authorised trustee of the JAMANLÉ FAMILIETRUST, IT 1088/1996)

JANICE ANDREA ZENI N.O. 4th Respondent

(In her capacity as duly authorised trustee of the
JAMANLÉ FAMILIETRUST, IT 1088/1996)

JANICE ANDREA ZENI 5th Respondent
(ID No. […])

JAN FREDERICK CRONJÉ 6th Respondent
(ID No. […])

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION 7th Respondent

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HEARD ON: 25 OCTOBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 08 NOVEMBER 2018

I INTRODUCTION

[1] The main dispute between the parties is about the applicant's right to claim payment of an amount of about R8m from the principal debtor, a close corporation that has been deregistered lately, and its sureties, jointly and severally.

[2] In order to enforce its monetary claim the applicant seeks revival of the close corporation, or put otherwise, an order declaring the dissolution thereof void.

II THE PARTIES

[3] Land and Agricultural Development Bank of South Africa, a statutory body and bank established in terms of the Land and Agricultural Development Bank Act, 15 of 2002 and also a registered credit provider, is the applicant. Adv LW de Koning SC appeared for the applicant before me.

[4] Jandrea Boerdery CC, (herein later referred to as "the CC""), a close corporation, is cited as the first respondent. The trustees of the Jamanlé Familietrust ("the Trust") are cited in their representative capacities as 2nd to 4th respondents respectively. They are Jan Frederick Cronjé ("Cronjé"), Alfred Slabbert ("Slabbert") and Janice Andrea Zeni ("Zeni"). Zeni and Cronjé are cited in their personal capacities as 5th and 6th respondents respectively. Adv A Sander appeared for 2nd to 6th respondents before me, but no doubt, they have in mind that 1st respondent who was not represented due to its deregistered status, shall remain defunct, "dead and buried".

[5] The Companies and Intellectual Property Commission is cited as 7th respondent, but it neither opposed the application, nor played any role in the proceedings.

III <u>THE RELIEF CLAIMED AND RULE *NISI* GRANTED *EX PARTE*</u>

[6] On 5 July 2018 a rule *nis*i was issued in respect of the relief sought in Part A of the notice of motion which I quote *verbatim:*

1. A rule *nisi* is issued, returnable on **16 AUGUST 2018** calling upon all interested persons to show cause why an order should not be made in the following terms:

1.1 Declaring the dissolution of Jandrea Boerdery CC, void in terms of section 83(4) of the Companies Act 71 of 2008;

1.2 Directing the seventh respondent to restore Jandrea Boerdery CC's name to the register of Companies;

1.3 The assets of Jandrea Boerdery CC are declared to be no longer bona vacantia and are re-vested in the close corporation;

1.4 The liabilities of Jandrea Boerdery CC, immediately prior to its dissolution are declared to re-vest in the corporation;

2. This rule is to be serve on:

2.1 The companies and Intellectual Property Commision;

2.2 The South Africa Revenue Services;

2.3 The Master of the High Court;

2.4 The Minister of Finance;

2.5 Any interested person who has been identified as such.

3. The rule is to be published one in:

3.1 The Government Gazette in English and Afrikaans;

3.2 An English daily newspaper, circulating in the Sasolburg area;

3.3 An Afrikaans daily newspapers, circulating in the Sasolburg area;

4. Costs are reserved for adjudication during the hearing of Part B of the relief sought.

5. Leave is granted to the applicant to approach the Honourable Court on the same papers, duly amplified, for the relief set out in Part B hereof.

[7] Part B of the notice of motion which applicant intended to move for on 30 August 2018 reads as follows:

"1. That judgment be entered against the First to Sixth Respondents, jointly and severally, the one to pay the other to be absolved, for the amount of R 7 859 024.86;

2. Interest on the amount of R 7 859 024.86 at the rate of 11.5% per annum from 1 April 2018 to date of payment;

3. Costs of suit on a scale as between attorney and client;

4. Further and/or alternative relief."

IV **POSTPONEMENT AND EXTENTION OF RULE *NISI* ON 30 AUGUST 2018**

[8] Proper service and publication took place in accordance with the aforesaid order. However, on the return date, to wit 30 August 2018, respondents' counsel appeared and requested time to file answering affidavits. The request was granted, the rule *nisi* extended and the application postponed to 25 October 2018, costs to stand over for later adjudication.

V **THE DISPUTES**

[9] It is still in dispute whether applicant is entitled to an order in terms whereof the CC's deregistration is set aside, although Mr Sander failed to make any submissions in this regard during oral argument and in so many words left the decision in the court's hands. He provided the court from the bar with an unreported judgment which I shall deal with during my evaluation of the disputes.

[10] The disputes relating to Part B of the main application will be dealt with under separate headings below. These are the following: 1) the National Credit Act, 34 of 2005 defence, and related thereto, the fact that no notice of demand was given to the CC prior to institution of the application, causing the applicant's claims to be premature; 2) applicant's alleged lack of *locus standi*; 3) the alleged voidness of the credit agreement; 4) the validity of the suretyship agreement between the Trust and applicant.

[11] In the counter-application the trustees, 2nd, 3rd and 4th respondents, seek cancellation of the registered mortgage bonds based on the alleged voidness of the suretyship agreement. Applicant disputes this entitlement, submitting that insofar as respondents deny a valid cession between Suidwes and applicant, the relevant party, to wit Suidwes, is not before the court and therefore no relief could be granted in its absence. However, it is also applicant's case that a valid suretyship agreement was entered into and that the mortgage bonds are valid and should not be set aside.

VI THE UNDISPUTED MATERIAL FACTS

[12] Several material facts are undisputed or are accepted to have been proven. I refer to the following:

1) Applicant's status as a statutory body and bank established in terms of the Land and Agricultural Development Bank Act, 15 of 2002.

2) Suidwes Landbou (Pty) Ltd ("Suidwes") is a registered credit provider in accordance with the National Credit Act, 34 of 2005, an entity that *inter alia* provides financial assistance to the farming community within the area in which it operates.

3) The CC was registered as such during 2008 and started with its farming enterprise on 7 August 2008. Cronjé and Zeni, the 6th and 5th respondents respectively, were appointed as the only members at incorporation of the CC and they are still regarded as the only members thereof according to a company report obtained by applicant.

4) On 18 June 1996 the Trust was established as an *inter vivos* trust and Cronjé and Petro Cronjé, were appointed the first trustees thereof. On 22 April 2010 amended letters of authority were issued by the Master in terms whereof Cronjé, Zeni and an auditor, Slabbert were certified to be the new trustees of the Trust.

5) It is important to point out at this stage that Slabbert's company, Opfin Chartered Accountants Inc, is also the accounting officer of the CC.

6) Cronjé's parents were the donors of the Trust and according to Deed of Transfer T21941/1998 the two properties relevant to the relief sought herein, portions 2 and 3 of the farm Jeanette 216, district Parys, were transferred by his parents to the trustees of the Trust.

7) The beneficiaries of the Trust are the lawful children of Cronjé and Petro Cronjé and/or their children as more fully described in the Deed of Trust.

8) *Ex facie* the Deed of Trust, and having considered the context within which loans were applied for *in casu,* there cannot be any doubt that Cronjé is and was at all relevant times the farmer in *de facto* control of all farming activities on the Trust's properties.

9) As we have experienced over the last few decades in practice, farmers often do not farm in their personal capacities anymore. The farms are usually bought by making use of especially trusts, or as in this case a trust is created by family members, usually the grandfather, both for estate planning and tax purposes and to protect the property from the farmer's creditors. Then farmers ensure the incorporation of close corporations (when that was still possible) or companies which are then conveniently used as the vehicles for conducting farming operations. The private person/farmer is always a member of the close corporation and often the sole member thereof and simultaneously a trustee of the trust. The kingpin of activities is the farmer who runs the business as if it is his/her own and will do his/her best never to incur personal liability for any debt. *In casu* Cronjé is a prime example as the papers show, save insofar as he bound himself as surety.

10) In order to apply for credit from Suidwes the CC (actually Cronjé) had to supply the credit provider with the CC's financial statements. These would have been prepared by Slabbert as the auditor.

11) In March 2014 the CC applied for a long term credit facility as well as a production facility for the 2015 season. The two applications for R1.8m and R6m respectively were successful.

12) On 11 April 2014 Cronjé signed a consent for a mortgage bond of R8m to be registered over the Trust's property. He warranted his authority in the document.

13) On 23 April 2014 several documents were signed relating to the credit agreements. Personal suretyships by 5th and 6th respondents on behalf of the CC were signed as well. An alleged suretyship by the Trust and the trustees' alleged resolution to bind the Trust form part of the documents signed on 23 April 2014. On applicant's own admission, patent errors are apparent from the trustees' resolution on p 150 of the papers. I shall deal with this soon.

14) On 5 May several further documents were signed. The resolution by the trustees to register a mortgage bond over the Trust's property shall be scrutinised later in more detail. The other documents will be addressed as well.

15) On 15 and 16 May 2014 there was email correspondence between Suidwes and Slabbert's office whereupon Slabbert signed the resolution of trustees, which he did not do previously.

16) On 17 July 2014 a surety covering mortgage bond in the amount of R8m was registered in favour of Suidwes over three properties

of the Trust. Simultaneously the mortgage bond was ceded to applicant as the endorsement on a copy of the registered mortgage bond indicates.

17) During September 2014 a restructuring of the CC's debt was agreed upon. On 12 September 2014 restructured credit was granted for R6.5m. Again further suretyships were given by 5th and 6th respondents personally and the Trust, based on a resolution passed by all three trustees. Although more than one credit agreement came into existence, applicant relies on the restructuring agreement which restructured the CC's debt and all further reference herein to a single credit agreement is a reference to this agreement.

18) During February 2015 consent was given for a second surety covering mortgage bond to be registered over the properties of the Trust. Slabbert also signed the resolution like the other two trustees. Again, Cronjé signed the power of attorney for the mortgage bond to be registered This second mortgage bond in the amount of R3m in favour of Suidwes was also ceded to applicant upon registration.

19) During July 2015 the one property was released from the mortgage bonds and the trustees were allowed to transfer that property to the Tharina Trust.

20) It appears from the records of 7th respondent that the CC was deregistered in October 2010, which deregistration was cancelled

the next month. The CC failed to file its annual returns for 2016 and 2017 and was again deregistered on 14 June 2017.

21) It is admitted that the CC has fallen in arrears in respect of the restructured credit agreement. On applicant's version and based on the customary acceleration clause in the agreement, the full outstanding amount became due and payable. On 26 February 2018, and apparently unaware of the CC's deregistration, Suidwes as applicant's agent sent letters of demand, ostensibly in terms of s 129 of the NCA to the CC, the trustees and to 5th and 6th respondents. All letters were sent to the same postal address, to wit the address indicated in the credit agreement.

22) On 25 June 2018 this application was issued whereupon the rule *nisi* of 5 July 2018 was issued.

[13] Having set out the uncontested issues as well as the aspects in dispute, I shall now deal with the disputes, the parties' submissions and relevant authorities *seriatim*.

VII **<u>APPLICANT'S *LOCUS STANDI*</u>**

[14] Applicant instituted these proceedings as cessionary in terms of a written sale agreement pertaining to the sale, cession and delegation of Suidwes' right, title and interest in and to its existing and future debtors' book. The objective facts serve as proof that Suidwes' rights, title and interests in the credit agreement, Deeds of Suretyship and two mortgage bonds relevant *in casu* have been ceded to

applicant. The ceded mortgage bonds must be considered together with the sale and service level agreements filed by applicant in response to respondents' rule 35(12) notice. It is respondents' case that applicant has not proven that it has taken cession of Suidwes' rights as stated under oath and indicated in the various documents presented to the court. Notwithstanding respondents' denial of these facts, I am satisfied that they failed to present any facts in support of such bare denial. The facts stated by applicant are supported by documentary evidence and it is not open to respondents to challenge that on the basis it did in an unsustainable manner. Mr Sander did not try to convince me of this defence, either in his written heads of argument, or during oral argument and I do not have to say much more than that I am satisfied a proper cession has taken place. The facts deposed to on behalf of applicant are accepted as correct. This defence falls to be rejected.

VIII THE REVIVAL APPLICATION

[15] Deregistration of a close corporation was initially dealt with in terms of s 26 of the Close Corporations Act, 69 of 1984 before its amendment. That section now stipulates that ss 81(1)(f), 81(3), 82 (3) to (4) and 83 of the Companies Act, 71 of 2008, each read with the changes required by the context, apply to the deregistration of a close corporation. Deregistration may cause tremendous hardship to creditors. Although the liabilities are not extinguished by deregistration, creditors' claims are unenforceable during deregistration. Creditors are not able to claim from a deregistered close corporation as it is not existing anymore and its assets have become *bona vacantia*. See: *Missouri Trading v Absa Bank* 2014 (4)

SA 55 (KZD) at para [25]. When a close corporation is liquidated, there is at least a chance of dividends being payable to creditors who have filed claims. Sureties are not discharged from their liabilities as a result of deregistration. See: *Traub v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 633-634 and s 83(2) and (3) of the Companies Act.

[16] The 7th respondent has over the years increasingly adopted the approach to deregister close corporations and companies by removing them from its register for failing to file their annual returns for two or more years in succession. This is allowed by s 82(3)(a)(i) and(ii) of the Companies Act. The only manner in which a creditor can try and claim what is due to him is to apply for restoration of the close corporation’s registration, or put otherwise, to obtain an order declaring its dissolution void and then to proceed with legal action. Therefore, in order for applicant to be able to claim from the CC the approximately R8m due to it, it has no option than to seek an order declaring the dissolution of the CC void in order for it to revive as a body corporate. It is not surprising that members of close corporations intentionally fail to ensure proper compliance by close corporations and thereby effectively see to the demise thereof in a cheap fashion without having to pay to have the close corporation liquidated.

[17] Applicant has followed a proper procedure as outlined in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) and I am satisfied that proper service and advertisement have taken place. There is no substantial objection to the relief claimed, save for a reliance on applicant’s alleged lack of *locus standi*

which I already considered *supra* and a further faint objection by the 2nd to 6th respondents. Mr Sander failed to make any oral submissions to me, although he referred to an unreported judgment, to wit *Amelia Morgenrood v The Companies and Intellectual Property Commission* delivered on 12 March 2015, a judgment of the Gauteng Division, Pretoria, which is to the effect as stated in para [21] that the "…mere existence of a debt or a claim cannot be the sole ground that justifies the nullification of deregistration." See also the examples provided as reasons for relief in para [25].

[18] I differ with respect from the reasons contained in *Morgenrood*. A creditor who advanced a long term loan to a close corporation conducting a business such as a farming operation should not be prevented from seeking a declaratory order in terms of s 83(4) whilst millions of Rands as *in casu* are still due and payable. Such an approach would make it extremely difficult for creditors to claim relief. They would not normally know what caused the close corporation to close its doors, whether it was still conducting a banking account at deregistration stage or thereafter, whether one of the members merely stepped into the shoes of the close corporation, or whether the close corporation has sold its business and its members decided to have it deregistered without settling its debts.

[19] The application is brought in terms of s 83(4) of the Companies Act, allowing a court to declare the dissolution of the CC void and to make any further order that is just and equitable in the circumstances. I am satisfied that a proper case has been made out for the relief claimed in Part A of the notice of motion. The rule *nisi* should be confirmed.

IX THE NATIONAL CREDIT ACT ("NCA") DEFENCE

[20] It should be reiterated that it is admitted that the CC fell in arrears with its payments in terms of the credit agreement. In fact, a proper reading of the answering affidavit leaves no doubt that the correctness of the outstanding amount and interest claimed as set out in paragraphs 67, 68 and 70.6 of the founding affidavit is not in dispute. No evidence was provided to contest the evidence in this regard. An issue is raised about the unsigned certificate of balance (which was supposed to be signed by Mr RM Nagel in his capacity as Manager: Collections of Suidwes) attached to Mr Nagel's founding affidavit, but he confirmed the amount and interest under oath. In fact he appended an updated and signed certificate as annexure "R8" to the replying affidavit. Therefore, save for the particular defences raised by respondents with which I deal herein, the outstanding amount and interest are found to be admitted by necessary implication. I shall now consider the defence relating to failure to serve a demand in terms of s 129 of the NCA.

[21] Coupled with the NCA defence, Mr Sander submitted that applicant failed to comply with a peremptory term of the credit agreement which states in clause 19.3 that notice must be given to the CC prior to the institution of steps for cancellation or enforcement of the contract due to the CC's non-compliance. In response to Mr De Koning's oral arguments, Mr Sander stated immediately when he got on his feet that "…we miss one point; the requisite notice was not given…" and this failure "…serves as a bar to claim for money."

[22] The facts speak for themselves. Notice was in fact given to the CC and its members as stated above. It is accepted that the notice does not comply with the requirements of s 129 of the NCA and that the CC was already non-existent when it was sent. I shall deal with both issues *seriatim*.

[23] The credit agreement and accompanying documents are clearly "copy and paste jobs" that one does not expect from a major credit provider such as Suidwes. Although it appears from the answering affidavit that respondents contend that the credit agreement is void for non-compliance with the NCA, Mr Sander did not make any submissions in this regard as he probably acknowledged that he could not make any submissions with conviction. See the definition of "juristic person" in s 1 as well as ss 4 and 7 of the NCA. Section 129's purpose is to inform a debtor in default of his/her rights to resolve a dispute or to agree on a plan to make payments in future. Although the credit agreement specifically mention s 129, it is apparent that none of the rights contained therein could be utilised by the CC in the present instance.

[24] The members of the CC made it impossible for Suidwes to comply with the notice requirement, either in terms of s 129, or at all. I accept that their action or lack thereof caused deregistration of the CC. In my view it must be accepted that there was a fictional fulfilment of the notice requirement, it being a term of the credit agreement. See: *Du Plessis NO v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) at paras [22] to [29]. It would be non-sensical to restore the CC's registration and then force the applicant to give notice thereafter before it is allowed to claim what is

due to it. Mr De Koning submitted that respondents' attitude in resisting revival of the CC and simultaneously claim lack of proper notice is akin to a child who has murdered his parents and then argue during mitigation that he is an orphan. There is merit in this argument.

[25] Section 129 must be read with s 130 as well. The CC has no assets and the applicant seeks enforcement of the remaining obligations under the credit agreement. There is no reason why the application against the CC should be dismissed or deferred for notice to be given after an order for the revival of the CC has been made, specifically in light of what I found *supra.* This defence is without merit.

X <u>ALLEGED VOIDNESS OF THE CREDIT AGREEMENT</u>

[26] This is quite an astonishing defence, particularly based on the *de facto* situation *in casu* set out above and s 54 of the Close Corporations Act. Cronjé is the kingpin of the farming activities and the driving force behind the operations of the Trust as is apparent from the Deed of Trust, the CC's records, the applications for credit and completion of all documents in that regard. He was also the person consulting with and instructing lawyers in respect of the opposition of the application. These factors serve as proof that the CC was his *alter ego.* However, it is not even necessary to come to such a conclusion as s 54 is clear. Every member of a close corporation is regarded as an agent of the close corporation in relation to outsiders dealing with it. It is stated as follows in *Northview Shopping Centre v Revelas Properties Johannesburg CC* [2010] 3 All

SA 422 (SCA) at para [17]: "Section 54(2) does no more than express the usual rules relating to ostensible authority. And section 54(1) simply confers on a member authority to act for a close corporation, as the common law confers on a partner the power to bind the partnership."

[27] No one in his right mind with information as to how the CC conducted its business would have thought that Cronjé had no power to bind the CC. The employees of Suidwes cannot be blamed, save for the blunders they made as mentioned and discussed *infra,* for acting in the manner they did pertaining to the granting of credit to the CC. This defence is also without merit.

XI NO VALID RESOLUTION TO BIND THE TRUST

[28] This is somewhat more problematic than the previous disputes. Suidwes and their attorneys really made a mockery of the standards expected of a reputable financial institution and the attorneys' profession. The issue is whether the obvious hurdles can be overcome in order to grant the relief claimed. Mr De Koning submitted that in the worst case scenario, *i.e.* in the event of the court being unable to find in favour of applicant that the Trust is bound as surety, the particular dispute should be referred to oral evidence, alternatively that the claim against the Trust and the counter-application be referred to trial.

[29] It is apposite to now deal with the documentation before the court relating to the alleged suretyship agreement entered into on behalf of the Trust. I conveniently start off with the documents which were ultimately registered in the Deeds Registry. The heading of the two

mortgage bonds, annexures "RMN7" and "RMN8" to the founding affidavit reads: "Borg Dekkingsverband" (in English: Surety Covering mortgage bond). The R8m mortgage bond was registered on 14 July 2014 and the R3m mortgage bond on 17 March 2015. On 23 April 2014 Cronjé signed a separate suretyship agreement in his capacity as trustee of the Trust in favour of Suidwes for the CC's debt. He and Zeni also signed suretyship agreements in their personal capacities for the debts of the CC and the Trust.

[30] When the validity of the suretyship by the Trust was attacked in the answering affidavit, applicant responded with a voluminous replying affidavit. Several documents were attached thereto. Cronjé signed a written consent on 11 April 2014 for the registration of the R8m surety mortgage bond and confirmed that he was duly mandated by the Trust. See annexure "RA2". The farms are identified in the document, but it is disturbing to note that the reference is to "my" – Cronje's properties -instead of the Trust's properties. The document, as most of the others, was drafted by Suidwes. Annexures "R2B", "R2C", "R2D" and "R2E" were clearly drafted by Suidwes' attorneys. These are respectively an affidavit by Cronjé, an extract of minutes of a meeting of trustees relating to a resolution by the trustees, signed by Cronjé and Zeni and a power of attorney to pass a mortgage bond together with the draft bond, signed by Cronjé. In the affidavit Cronjé again confirmed his authority to act on behalf of the Trust. However, reference is made to a loan having been granted to the Trust in the amount of R8m which is clearly wrong. The extract of the minutes indicates that Cronjé was authorised to sign all documents required to pass the mortgage bond over the Trust's properties. However, again the *ratio* for the mortgage bond is incorrectly stated to serve as

security for a loan of R8m having been granted to the Trust. The power of attorney dated 5 May 2014, read together with the draft bond, is indicative of the true intention of the parties, *i.e.* to register a surety covering mortgage bond.

[31] During May 2014 Suidwes' attorneys had email correspondence with Slabbert's office and as a consequence he not only signed the required certificate as auditor of the Trust, but co-signed the extract of the minutes of a trustees' meeting ostensibly held on 5 May 2014, confirming that the Trust had borrowed R8m from Suidwes and that Cronjé was authorised to sign all required documents to *inter alia* see to registration of mortgage bonds over the Trust's properties. I refer to page 583. Again, a mistake has been made pertaining to the *ratio* for registration of the mortgage bond. Hereafter the surety mortgage bond for R8m was registered.

[32] A second surety mortgage bond for R3m was registered in 2015 as mentioned. At that stage Cronjé again negotiated with Suidwes. He again signed the power of attorney to pass the bond and stated that he was duly authorised to act on behalf of the Trust. An extract of the minutes of a trustees' meeting of 18 February 2015 was relied upon. Initially this document was signed by Cronjé and Zeni only, but Slabbert's signature was obtained on the same basis as previously. This occurred prior to registration of the second mortgage bond. See page 605. The same mistakes occur in these documents as pointed out earlier.

[33] Reference should also be made to two documents identically worded, the one dated 23 April 2014 signed by Cronjé and Zeni only, and the

other dated 15 September 2014 signed by all three trustees. I refer to pages 150 and 606 (annexure "R3") respectively. In terms hereof the trustees resolved to authorise Cronjé to, in his discretion, enter into negotiations with Suidwes for credit facilities and to sign all documents on behalf of the Trust, including documents to mortgage the Trust's properties. After registration of the mortgage bonds the Trust sought consent for one of its mortgaged properties to be released from the mortgage bonds as this property had been sold. Such consent was given and the property was sold and transferred free of the mortgage bonds.

[34] I shall firstly deal with Mr Sander's submissions. He submitted that when applicant felt the shoe pinching, it tried to rectify the situation in a 50 page replying affidavit and several annexures, but failed to prove its case. When I asked Mr Sander why respondents did not apply for striking out of the alleged new matter in the replying affidavit, he conceded that applicant merely responded to allegations in the answering affidavit and that a striking out application was not called for. It should be mentioned that I also allowed a further affidavit by applicant with the consent of respondents. Mr Sander relied on *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) and *Land and Agricultural Bank of SA v Parker and others* 2005 (2) SA 77 (SCA) for the well-known principle that trustees must act jointly unless the Deed of Trust provides otherwise. He submitted that an agreement is invalid and unenforceable if signed by a single trustee purporting to enter into the agreement on behalf of a trust as occurred *in casu*. A trust must be administered in terms of the Deed of Trust and the trustees can only act as specified therein. Consequently, so he argued, the suretyship

agreement and surety mortgage bonds are null and void as Cronjé only, he being one of three trustees, signed these purportedly on behalf of the Trust. Mr Sander argued in conclusion in this regard that the belated signing by all three trustees authorising Cronjé cannot be countenanced, the reason being that ratification of an unlawful act is not allowed. I disagree. Any alleged unauthorised act was merely such and not unlawful.

[35] Clause 11.4 of the Deed of Trust stipulates that all contracts, deeds or other documents to be signed on behalf of the Trust may be signed in the manner that the trustees prescribe in writing from time to time. In my view the documentation referred to indicate clearly that the trustees authorised Cronjé in writing to sign all documents required by Suidwes for purposes of the Trust's liability as surety. The following *dictum* by Harms JA in Nieuwoudt at para [23] is apposite:

> "However, as mentioned by Farlam JA, the fact that trustees have to act jointly does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but whether a particular trustee has the ostensible authority to act on behalf of the other trustees is a matter of fact and not one of law."

[36] Mr Sander also submitted that the patently wrong documents referred to *supra* should not be rectified as Suidwes, the party to those documents, is not a party to the present proceedings. This entity, and not respondents, must be blamed for the mistakes and live thereby according to him.

[37] I am satisfied that, if the totality of the documentation is considered objectively and having regard to the context and surrounding circumstances, there can be no doubt that all three trustees knew that credit would be and was in fact provided to the CC on certain conditions only, *inter alia* suretyships by 5th and 6th respondents personally and by the Trust, the property owner with valuable immovable assets and that surety mortgage bonds would have to be registered. They could not authorise Cronjé to sign powers of attorney to pass the mortgage bonds on the assumption that the Trust was the principal debtor that borrowed money from Suidwes. In that regard the resolutions are incorrectly worded. However, they expressly authorised Cronjé to sign all documentation on behalf of the Trust in respect of the transactions with Suidwes and in particular, to pass mortgage bonds to mortgage the Trust's properties as security in favour of Suidwes. The errors in the documents are patent, but a "mistake must (always) yield to the truth." See: *Kathmer Investments Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (AD) at 503B-D, citing with approval a *dictum* of De Villiers JA, and *Tesven CC and another v SA Bank of Athens* 2000 (1) SA 268 (SCA) at para [18]. Mr De Koning relied on rectification and submitted that applicant, who was not a party to the original documents, could apply for rectification in the absence of prejudice to the contracting parties. I agree, but point out that there was no formal application for rectification. In my view the documentation, context, surrounding circumstances and evidence are sufficient proof of what the parties intended. Therefore a formal application for rectification is not required.

[38] At worst for applicant the trustees granted ostensible authority (as mentioned by Harms JA in *Vrystaat Mielies)* to Cronjé to act on their behalf as the authorised representative of the Trust. As Harms JA said, it is a question of fact and not law. Respondents had to prove lack of authority. See: *Moraitis Investments (Pty) Ltd and others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at paras [21] and [34]. I am satisfied that the dispute should be adjudicated in favour of the applicant based on the evidence presented to the court. The defence of lack of authority is rejected. A referral of the dispute for oral evidence or to trial is unnecessary.

[39] In amplification of my finding in the previous paragraph I need to emphasise that it is apparent from the evidence that the trustees of the Trust ratified the signing of the Deed of Suretyship, either expressly, or through acquiescence. All three trustees signed the documents referred to as resolutions prior to the passing of the mortgage bonds and all three must have been aware of the sale of the one property and the negotiations to release it from the mortgage bonds. No one cried foul at any stage prior to institution of the litigation. In the final instance I also agree with Mr De Koning that, based on the admitted and common cause facts, the Trust is estopped from denying Cronjé's authority to have represented the Trust. See: *Amler's Precedents of Pleadings,* 9th ed at 188 and authorities quoted.

XII 5th RESPONDENT'S DEFENCE

[40] Zeni, the 5th respondent, half-heartedly tried to avoid personal liability as surety. She was at all relevant times in a relationship with Cronjé

and used to stay on the Trust's farm, Jeanette, but apparently not anymore. She denied that she was informed by either Cronjé or Suidwes that she was to bind herself as surety upon signing several documents handed to her for signature. Her former lover's representation, if that could be found to be the case, can never relieve her from liability towards applicant. Mr EJ Kleynhans dealt with Zeni's allegations. He made it clear that he acted as Suidwes' Manager: Relations at the time and that Zeni signed three Deeds of Suretyship, two on 23 April 2014 and one on 15 September 2014, all three in his and Cronjé's presence and after he had explained the contents to them. She initialled each page alongside the inscription "borg" and signed in full on the last page. The heading of the documents, "Borgakte", is typed in upper case and bold. The *caveat subscriptor* principle is applicable. This cannot be a case of *iustus error* and no reliance is placed on misrepresentation by any of Suidwes' personnel. The matter is clearly distinguishable from the facts and result in *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) at paras [2]-[4] and [11].

XIII **<u>THE COUNTER-APPLICATION</u>**

[41] In the counter-application 2nd to 4th respondents seek an order in terms whereof the aforesaid two mortgage bonds be declared null and void and set aside.

[42] I agree with Mr De Koning that the counter-application is still-born based on the respondents' approach to the litigation. They deny the sale and cession agreement between Suidwes and applicant.

Suidwes is not a party to the litigation and no relief can be granted against it.

[43] Mr Sander did not make any further submissions, save those already considered *supra*. Thus, even if it is accepted that these respondents could possibly obtain relief as prayed for, I am satisfied that no case has been made out on the merits for any relief in terms of the counter-application. The trustees duly bound the Trust as surety for the CC's debts and lawfully passed the two surety mortgage bonds against its properties.

XIV <u>CONCLUSION</u>

[44] I conclude in stating that applicant has proved its monetary claim against the CC, that the Trust, 5th and 6th respondents have bound themselves as sureties and that they are jointly and severally liable for payment of the outstanding debt and interest. Although Mr Nagel has provided the court with an updated certificate of balance dated 27 September 2018, I intend to make an order in terms of the notice of motion. There can be no prejudice to anyone.

[45] Applicant did not initially seek an order declaring the Trust's properties especially executable. However, it without objection applied for amendment of the notice of motion, which application was granted. There is no reason why the properties shall not be declared especially executable. The properties are in essence utilised in the business of farming operations and although Cronjé, already 60 years old, apparently still live in the homestead on the farms, no reasons have been advanced to persuade the court not to grant the

particular orders. I accept that Cronjé is an elderly gentleman and that the farms are family assets for many decades. Applicant is a financial institution that has to account to its shareholders and other stakeholders, whilst Cronjé and his entities entered into at arms' length business transactions, well-knowing the risky business that farming has become in this country.

[46] The credit agreement, Deeds of Suretyship and mortgage bonds provide for costs on an attorney and client scale in the event of default and consequent institution of legal steps. Applicant seeks costs on such scale. There is no reason to grant costs on any other scale.

XV <u>ORDERS</u>

[47] The following orders are issued:

1) The rule *nisi* of 5 July 2018 is confirmed.

2) Judgment is entered for the amount of R7 859 024.86 against 1st to 6th respondents, jointly and severally, the one to pay the other to be absolved.

3) Interest shall be payable on the amount of R7 859 024.86 at the rate of 11.5% *per annum* from 1 April 2018 to date of payment.

4) As against 2nd, 3rd and 4th respondents, it is declared that the following properties are especially executable:

4.1 Portion 2 of the farm Jeanette 216, district Parys, Free State Province, in extent 176,8739 hectares and held by Deed of Transfer T21941/1998;

4.2 Portion 3 of the farm Jeanette 216, district Parys, Free State Province, in extent 171,3064 hectares and held by Deed of Transfer T21941/1998.

5) Costs of the application, including the costs of 5 July 2018 and 30 August 2018, against 1st to 6th respondents on the scale as between attorney and client.

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J P DAFFUE, J

On behalf of applicant: Adv L W De Koning SC
Instructed by: Mcintyre & Van Der Post
BLOEMFONTEIN

On behalf of 2nd – 6th respondents: Adv A Sander
Instructed by: Blair Attorneys
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