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**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: 61063/2013

In the matter between:

NEDBANK LIMITED

PLAINTIFF

And

ILSE VAN DER BERG

1ST DEFENDANT

IDENTITY NUMBER: 6[...]

PETRUS VAN DER BERG

2ND DEFENDANT

IDENTITY NUMBER: 6[...]

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] It is common cause that Plaintiff ("Nedbank") is a successor in title of Imperial Bank Limited ("Imperial Bank") and has lawfully acquired its assets and liabilities. During September 2013, Nedbank instituted action against first and second defendants ("defendants ") for payment of an amount R8 939 201.84, plus interest at Nedbank Limited's prime lending rate which was 8.5% plus 1.00% at the date of issue of the summons calculated from 1 September 2013 to date of payment, calculated daily on the capital balance outstanding from time to time, compounded monthly in arrears. The liability of each defendant is limited to the extent of his her limited surety amount.

[2] The debt arises from loan facilities and loan agreement in terms of which certain amount of monies was advanced to Centro Development CC (now in liquidation) by Imperial Bank.

[3] The defendants are sued in their capacities as sureties and co-principal debtors.

[4] The Defendants filed notice of intention to defend the action; whereafter Nedbank filed an application for summary judgment. The defendants filed an affidavit to oppose and raised certain defences that I will revert to later in this judgment.

[5] The application came before me on 07/02/14 at short notice due to the fact that the Registrar erroneously omitted to enroll and allocate it. Counsel for Nedbank had filed main and also supplementary heads of argument that specifically dealt with the defences raised in the opposing affidavit. I am grateful to Mr Leathern for the heads of argument. They were of great assistance to the court, particularly in view of the fact that the file was handed to me at short notice. Counsel for the defendants, Mr Kruger did not file any heads of argument. I agreed to adjourn the matter for a short while to peruse the papers because a postponement would not have been in the interest of the parties or justice.

THE LOAN FACILITIES, LOAN AGREEMENT AND ADDENDUM THEREOF

[6] It is common cause, (as it appears from the particulars of claim and is not placed in dispute in the opposing affidavit) that in the period between 2007 and 2010, Imperial Bank granted Centro Developments CC various loan facilities under certain conditions that are summarized hereunder.

[6.1] Imperial Bank approved a facility loan of R17 060 304.00 on 21 August 2007¹ for the purchase of land known as Holding 8,

¹ In the particulars of claim it is referred to as Facility letter E.

Waterval Small Holdings as well as payment of bulk contributions.

The loan was granted on amongst other conditions:

[6.1.1] that Centro would register a First Continuing Covering Bond in favour of Imperial Bank for an amount of R90 000 000 .00 plus a 20% cover clause over Holding 8 Waterval Small Holdings.

[6.1.2] First defendant and Snapshot Investments 1036 CC each would sign a limited suretyship jointly and severally for an amount of R10 000 000.00.

[6.1.3] Second defendant would sign a limited suretyship of an amount of R30 000 000.00.

[6.2] A further facility loan in the amount of RR20 000 000.00 was granted to Centro on 22 July 2008². The purpose of the loan was to enable Centro purchase land and to construct 80 residential sectional title units (Phase 2) on the property known as Holding 8 Waterval Small Holdings. The conditions, amongst others were:

² Annexure (Facility Letter) F

[6.2.1] Interest would be capitalized during construction and payment would on transfer of the units by way of a 100% release value.

[6.2.2] that Centro would register a First Continuing Covering Bond in favour of Imperial Bank for an amount of R90 000 000 .00 plus a 20% cover clause over Holding 8 Waterval Small Holdings.

[6.2.3] First defendant and Snapshot Investments 1036 CC each would sign a limited suretyship jointly and severally for an amount of R10 000 000.00.

[6.2.4] Second defendant would sign a limited suretyship of an amount of R30 000 000.00.

[6.2.5] the term of the loan would be 12 months.

[6.3] A third facility³ loan was approved on 16 September 2010 for an amount of R29 979 348.00 for purposes of “*inter alia consolidating various loans*”⁴. The conditions were amongst others;

³ Annexure (Facility Letter) G

⁴ Particulars of Claim, paragraph 10.1

[6.3.1] the loan would be paid in equal monthly installments over a period of 240 months.

[6.3.2] The conditions relating to registration of First Covering Bond and signing of sureties as in the previous facility loans.

[6.3.3] Loan accounts 1[...], 1[...], 1[...] and the shortfall of R451 027.39 would be incorporated into this loan and be settled from the proceeds thereof.

[6.3.4] the net release amount on all the units would be used to permanently reduce the loan.

[6.5] The parties entered into a loan agreement⁵ on 23 September 2010 in terms of which an amount of R29 979 was advanced to Centro on certain conditions, amongst which;

[6.5.1] Centro renounced the benefits that would arise from the legal exceptions *non numeratee pecuniae*, *non causa debiti*, *errore caculi*, revision of accounts and no value received.

⁵ Annexure (Loan Agreement) H

[6.5.2] Registration of First Continuing Bond in the amount of R90 000 000.00 over certain specified units in the Sectional Title “*Scheme known as Villa Primarius in respect of the land and buildings situate at Waterval East Extension 42 Township, Local Authority: Rustenburg Local Municipality*”.

[6.5.3] the full loan amount would be repaid by way of monthly installments over a period of 240 months .

[6.5.4] Demand for immediate payment of all amounts in the event of amongst other things; failure to satisfy a default judgment within 21 days or application for liquidation or judicial management by Centro .

[6.6] On 30 March 2011 , alternatively 04 April 2011 the parties entered into an Addendum to the Loan Agreement⁶. In terms of the Addendum, the Loan Agreement was increased to R32 287 392.12 the loan would “*expire on the 7th March 2012*”. The net proceeds of the sale of the Units or portions of the land would be paid to the lender.

⁶ Annexure I

[7] It is common cause that:

[7.1] Centro accepted the terms and conditions of the loan facilities, the Loan Agreement and Addendum thereof . It is also common cause that a First Continuing Covering Mortgage Bond was registered in favour of Imperial Bank over the property known as Holding 8 Waterval Small Holdings, North West Province for the sum of R90 000 000.00.

[7.2] A breach of any of the provisions of the Bond would entitle Imperial Bank, at its own option, to forthwith demand full payment of all amounts secured by the bond and to institute proceedings to recover the amounts and an order to declare the property executable.

THE BREACH

[8]. Nedbank alleges that Centro has breached the terms and conditions of the facility letters, loan agreement and addendum thereof in that it failed to repay the loan at the agreed date, namely; 07 March 2012. Furthermore, Centro was placed under winding-up in the hands of the Master of the North Gauteng High Court, Pretoria on 26 March 2012.

[8.1] The amount owing, as per certificate of balance⁷ dated 09 September 2013 is indicated as follows:

“ Account Number: 3[...]

Balance owing as at 31 August 2013: R8 939 201.84

Arrears owing as at 31 August 2013 : R8 939 201.84

Plus interest at Nedbank Limited's prime lending rate (currently 8.5%) plus 1.00% at the date of issue of the summons calculated from 1 September 2013 to date of payment, calculated daily on the capital balance outstanding from time to time, compounded monthly in arrears.

SURETIES

[9]. The First Defendant signed two limited sureties⁸ , the first on 11 October 2007 for an amount of R10 000 000.00 and the second on 11 December 2008 for amount of R15 000 000.00.

[10] The second defendant signed a limited surety⁹ for an amount of R30 000 000.00 on 02 October 2007.

CAUSE OF ACTION AGAINST THE DEFENDANTS

[11]. The plaintiff's cause of action is based on the deeds of suretyship agreements referred to above in terms of which the defendants bound

⁷ Annexure L1

⁸ Annexures M1 and M2 respectively

⁹ Annexure N

themselves as sureties and co-principal debtors jointly and severally to Imperial for the due performance of all obligations of Centro in terms of the Facility Letters, Loan Agreement and Addendum thereof as stated in the preceding paragraphs.

[12] I will highlight the relevant terms and conditions of the suretyship agreements when I deal with the plaintiff's submissions on the defences raised by the defendants to resist summary judgment.

LEGAL PRINCIPLES OF SUMMARY JUDGEMENT

[13] In the matter of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**¹⁰ , **Navsa JA**¹¹ restated the origin and principles of summary judgment and cautioned about the labeling of summary judgment as “extraordinary” .

“29] A summary judgment procedure was first introduced into our practice by the Magistrate’s Court Act of 1917. It was based upon a procedure introduced in England by Order XIV under the Judicature Acts whereby a plaintiff was able, by means of a summary proceeding, to obtain a final judgment when there was no bona fide defence to an action.”¹⁶

¹⁰ (161/08) **[2009] ZASCA 23** (27 March 2009)

¹¹ Harms DP, Brand, Mhlanta JJA and Bosielo AJA concurring

[30] In *John Wallingford v The Directors &c. of The Mutual Society* **(1880) 5 AC 685** (HL) at 699-700, Lord Hatherley referred to the objects of the new English procedure as follows:

'I apprehend that from the first the objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.'

[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.¹⁷

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a

sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G-426E.

[14] In the matter of **Di Savino v Nedbank Namibia Ltd** ¹², the appeal court, per Ngcobo AJA considered the principles of summary judgment, in particular the issue of whether the failure of the affidavit to measure

¹² (SA 24/2010) [2012] NASC 3 (21 June 2012)

up to the requirements of the Rule would result in the granting of summary judgment.

Principles governing summary judgment

23. One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3)(b) the affidavit must “disclose fully the nature and grounds of the defence and the material facts relied upontherefor”. Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

24. The enquiry that the court must conduct is foreshadowed in Rule 32(3)(b) and it is this: first, has the defendant “fully” disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.¹³ If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

¹³ *Maharaj v Barclays National Bank Ltd*, 1976(1) SA 418 (A) at 426A-C

25. While the defendant is not required to deal “exhaustively with the facts and the evidence relied upon to substantiate them”, the defendant must at least disclose the defence to be raised and the material facts upon which it is based “with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.”¹⁴ Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule.¹⁵

26. Where the defence is based on the interpretation of an agreement, the court does not attempt to determine whether or not the interpretation contended for by the defendant is correct. What the court enquires into is whether the defendant has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the defendant may succeed at trial, and, if successful, will establish a defence that is good in law.¹⁶ Similarly, where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law.

27. But the failure of the affidavit to measure up to these requirements does not in itself result in the granting of summary judgment. The defect

¹⁴ *Maharaj v Barclays National Bank*, *supra*, at 426C-D

¹⁵ *Arend and Another v Astra Furnishers (Pty) Ltd*, 1974(1) SA 298(C) at 304A-B

¹⁶ *Shingadia v Shingadia*, 1966(3) SA 24(R) at 26A-B; *Tesven CC and Another v South African Bank of Athens*, 2000(1) SA 268 (SCA) at para 26; *Shepstone v Shepstone*, 1974(2) SA 462(N) at 467A; *Marsh and Another v Standard Bank of SA Ltd*, 2000(4) SA 947(W) at 949 para 3

*may, nevertheless be cured by reference to other documents relating to the proceedings that are properly before the court.*¹⁷In *Sand and Co. Ltd v Kollias* the court held that the principle that is involved in deciding whether or not to grant summary judgment is to look at the matter “at the end of the day” on all the documents that are properly before the court.¹⁸

OPPOSING AFFIDAVIT FILED AND DEFENCES RAISED BY THE DEFENDANTS TO RESIST SUMMARY JUDGMENT.

[15] The affidavit filed by the defendants to resist summary judgment and the defences raised therein should be considered in accordance with the above stated general principles.

[16] The following defences have been raised:

[16.1] The plaintiff acted in a prejudicial manner towards the defendants, thereby releasing them from their surety obligations.

[16.2] “*The principle (sic) debt was settled by virtue of the realization of securities held by Centro, alternatively the amount that may be due is in dispute....*”

¹⁷ *Sand and Co. Ltd v Kollias*, **1962 (2) SA 162** (W) at 165; *Maharaj v Barclays National Bank Ltd*, *supra*, at 423H

¹⁸ *Sand and Co. Ltd v Kollias*, *supra*, *id.*

[16.3] The plaintiff has infringed their *constitutional right of freedom of equality as protected in sections 18, 22, 23, 25 and 31 of the Constitution of the Republic of South Africa* . The first defendant allege that she *“was forced to sign a deed of surety with terms and conditions that only benefitted the plaintiff and to which I would not have consented to if I had the opportunity to negotiate on an equal footing”*.

[17] I now deal with how each defence was substantiated in the opposing affidavit as well as in oral argument.

Release from surety

[18] In paragraph 5 , defendants alleged that the following constitutes prejudicial conduct of the plaintiff that entitles them to be released from their surety obligations:

“ [5.2] *More specifically, Nedbank was unreasonable in its requirements for cancellation figures in release of immovable properties that were sold by Centro shortly before the application for business rescue. Nedbank was not prepared to reduce its cancellation figure requirements that would have resulted in a loss of approximately R500 000.00 (Five Hundred Thousand Rand). It did not consult the defendants*

on the decision that ultimately resulted in the alleged loss of R6 000 000.00. I respectfully refer the Honourable Court to Annex "IB1", a series of letters illustrating these developments.

[5.3] Nedbank acted to the detriment of the surety, increase its burden, which resulted in a release of the surety obligation and contrary to its obligations as a banker.

[5.4] Furthermore, at the time of the liquidation of Centro:

[5.4.1]The account with Nedbank was in fact paid up to date and in fact a credit of R40 000-00 (Forty Thousand Rand) was available.

[5.4.2 Nedbank materially breached the terms of the development loan agreement with Centro which was seriously prejudicial to both Centro and eventually the defendants.

[5.5] I respectfully refer the Honourable Court to Annex "IB2", an affidavit filed in the application for intervention and liquidation of Centro which stated the following:

[19] IB2 is a replying affidavit deposited by Petrus Van der Berg (second defendant) under case number NGHC 27922/2011 in the matter between Petrus Van der Berg and Centro Developers CC as first respondent and Nedbank and others as further respondents. The affidavit is incomplete but appears from its contents to deal with the dissatisfaction of the defendants when Imperial Bank refused to pay the full amount as per payment certificate and thus forcing the second defendant to obtain bridging finance from another finance institution called II Incentives. This company subsequently registered a second mortgage bond over the property that the plaintiff held a first bond. The conduct of the plaintiff, according to this extract is alleged to have increased the principal debtor's indebtedness. Failure to grant further funds allegedly caused Centro not to proceed with development for a period of 4 months whilst waiting for bridging finance.

[20] I do not know what the allegations in the founding and answering papers in that case were. However, save for the alleged payment and allegations of unequal bargaining power, the allegations regarding refusal to pay funds and further advances are not denied by the plaintiff. According to plaintiff, it was entitled in terms of the surety agreement to act in the manner it did.

I will revert to this later.

[21] Defendants also aver that in 2009, Nedcor *reneged on their loan account with Centro by paying R6 million short on the development loan.*

[22] Defendants further aver that:

“ 8.1 II Incentives is claiming the profit share to which Nedbank has a first right of cession. The claim is as yet not quantified.

8.2 The potential benefit for Nedbank is at least for an amount of R4,1 million plus mora interest from 2011;

8.3 There is a counterclaim.

[23] Defendants also rely on the alleged discussions between an attorney representing II Incentives and the deponent to plaintiff's affidavit for summary judgment that *“Nedbank had been eager that II Incentives be paid so that their bond could be cancelled.*

Other than this bald statement, there is nothing to substantiate this.

[24] Another allegation made to support the alleged prejudicial conduct relate to a million rand that is being kept in trust pending the finalization of the dispute between II Incentives and Sergovia. This amount would or

should apparently be utilized to realize Nedbank's securities for the indebtedness of Centro.

Payment

[25] In paragraph 13, the first defendant deposed to amongst others the following *".... Since the liquidation of Centro, some 21 months ago, Nedbank or the liquidators have collected rental of approximately R200 000.00 (Two Hundred Thousand Rand) per month. The liquidation and distribution account of Centro makes no mention of this rental, alternatively of occupational interest earned after the property was sold."*

Infringement of constitutional rights

[26] The defendants' complaint is that:

[26.1] They were in an unequal bargaining position because *"the deed of surety contained all standard terms and conditions in favour of the plaintiff. The defendants were simply not in a position to negotiate the terms of the deed of surety and had to consent thereto without reference to an attorney. I was forced to sign the document as presented, on behalf of the defendants, failing of which the plaintiff would not have made the funds available to the principal debtor."*¹⁹

¹⁹ Paragraph 14.3

[26.2] “The banks have a powerbase and negotiate from this position. This is standard, bank practice, and neither the principal debtor nor the defendants was in a position to negotiate with any other financial institution.”²⁰

[26.3] In paragraph 14.5, the first defendant stated that “ *I had no intention to be bound as co-principal debtor*”.

[27] In conclusion, defendants in paragraph 14.7 indicated in their opposing affidavit that they will rely on “*RH Christie, The Law of Contract in South Africa, 5th Edition, Lexis Nexis, op p.18-19 where the following is stated.....*”

The relevant portion of the book deals with amongst others what the author refers to as ‘*weak bargaining position that consent, even if genuine, was at best reluctant*’. The learned author refers to the section 9(1) of the Bill of Rights to support his views that there should be an investigation to determine whether a contract under those circumstances is enforceable.

Defendants place further reliance on legislations such as Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, enacted as required by s9(4) of the Bill of Rights

²⁰ paragraph 14.4

[28] As I have indicated above, defendants did not file heads of argument. In their oral presentation, their counsel argued that the liquidation of Centro (as a result of the prejudicial conduct of the plaintiff) caused problems for the defendants, and as such they were released from their surety obligations.

[29] Mr. Kruger referred to clauses in the surety agreement that are according to him are *contra bonos mores*, oppressive and unreasonable towards the defendants such as :

Clause 13²¹ that reads: *“The surety will not have the right to any cession of action in respect of any payment to the bank made by the surety or on behalf of the surety, nor will the surety be entitled to take any action against the debtor or against any other surety for the debtor in respect thereof unless and until the indebtedness of the debtor to the bank has been discharged in full.....”*

Clause 15 thereof that reads: *“The surety acknowledges that all amounts due and payable by the debtor to the bank shall be recoverable from and paid by the surety. If any dispute arises between the debtor and the bank:*

²¹ Annexure M1

15.1 and the debtor contends that any obligation is not due and owing, or that the debtor has a counter claim against the bank whether liquidated or not, then the surety:

15.1.1 will accept the written contention of the bank that such obligation is due and owing; and

15.1.2 waives any defence or contention which the debtor may raise; and

15.1.3 agree to pay the amount or perform the obligations forthwith.

15.2 The bank shall repay to the surety any amounts paid in terms of paragraph 15.1 to the extent that a court of competent jurisdiction (including any appeal court) finally determines that the contentions of the debtor are correct”

[30] Plaintiff’s counsel had raised an issue about whether second defendant has filed any opposing affidavit in view of the fact that the first deponent in the affidavit filed referred to “I” . In response, Mr Kruger indicated that Annexure IB2 attached to the opposing affidavit was deposed by the second defendant and that they rely on each other for their defences.

I agree with Mr. Kruger in this regard.

[31] **In reply**, Mr Leathern pointed out that clauses 14 and 15 of Annexure M1 do not give the bank a discretion because they are couched in peremptory terms. The bank does not have to consult the surety before making or taking any decision that may affect him or her.

[32] I may at this point turn to the clauses in the surety agreements that according to plaintiff entitle it to act in the manner that it did when refusing to pay funds on presentation of the certificates by Centro and furthermore, refusing to make a further loan amount of R6M available in 2008..

[32.1] The defendants accepted the terms and conditions of the deed of surety agreement²².

[32.2] Plaintiff was entitled to take 100% net release value in accordance with clause 6.20 of the deed of surety agreement. In terms of clause 7²³, the debtor is obliged to pay the net proceeds of the sale of the units on date of release of such unit.

BONA FIDE DEFENCE

[33] The opposing affidavit makes bald vague allegations that are not supported by facts. In some cases, conclusions of law that are not

²² Annexure M1, P.135 and p.157, Annexure M2, p163, Annexure N, P169

²³ p.131

justified by the facts. I am mindful of the fact that I do not have to adjudicate the correctness of the defences, but to consider whether on the facts placed before me , that would still need to be proven at trial stage, the defendants have a defence that is good in law and made in good faith.

[34] I have, as stated in the Maharaj case, taken into account all documents properly placed before me and not just the opposing affidavit in an attempt to have a complete view at the end of the day.

[35] I was however, not able to find prima facie evidence relating to the alleged payment or collection of the rentals of R200 000.00 per month by either the plaintiff or liquidators of Centro. I could also not find support that Centro was not owing plaintiff at the time of its winding up. The fact that the winding up order was made by the court makes this argument not worth pursuing. In any event, a surety may claim against a debtor what he has paid to satisfy the principal debt.

[36] I reject the contention that the conduct of plaintiff entitles defendants to be released from their obligations on two basis; namely, there is a body of legal precedents that there is no such general principle, but that the relationship between surety and the bank is governed by the contract between them. In this case, the signed deeds of sureties are self-

explanatory. If the agreement deed of sureties were silent on prejudicial issues, I would without hesitation refuse to grant plaintiff summary judgment because then the conduct of the plaintiff would need to be judged in a trial court to determine whether they breach “some or other legal duty”

It is not surprising that defendants, in the face of the contracts of suretyship they signed that clearly render the conduct of the plaintiff lawful, now, resort to a defence based on unequal bargaining power. I will deal with this defence later.

[37] In the matter of **Bock and Others v Duburoro Investments (Pty) Ltd**²⁴, Harms JA²⁵, reiterated the principle that prejudicial conduct does not per se release a surety from his/her obligations. The appeal court also placed in perspective the views of the learned author C H Christie on the issue in question.

“[18] I then turn to the next issue, namely that of prejudice. In the 1992 edition of Caney’s The Law of Suretyship,²⁸ there appeared a statement in these general terms:

²⁴ (228/2002) [2003] ZASCA 94; [2003] 4 All SA 103 (SCA) (26 September 2003)

²⁵ ZULMAN, FARLAM, NAVSA JJA and VAN HEERDEN AJA concurring.

'The creditor must do nothing in his dealings with the principal debtor and the other sureties which has the effect of prejudicing the surety; if he does the surety is released.'

This and a similar statement from Wessels Law of Contract in South Africa,²⁹ were quoted in some judgments.³⁰ The latter reads as follows:

'In equity, upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do and the omission proves injurious to the surety, the surety will be discharged.'

These statements, it appears, became in the eyes of some a rule of general application and it is on this rule that the sureties in a sense rely. The problem, however, is that Wessels was not quoted fully and that he was quoted out of context. Wessels was dealing with the effect of the creditor's negligence on the surety (para 4338). He mentioned that it is difficult to lay down a general rule to determine when the personal negligence of the creditor would enable the surety to claim discharge (para 4342). He then hypothesized that the surety might be released

'if by contract there is a duty cast upon the creditor to preserve the surety's rights.'

(Para 4343; my emphasis.) The next four paragraphs illustrate this

proposition and the last of these deals with an 1861 case of Watts v Shuttleworth³¹ where, as Wessels (at para 4346) said,

‘a person became surety for the due performance of a work, on the understanding that the employer would insure against fire. The Court held that a failure to insure discharged the surety.’

Only then the quoted text came. In Watts the building did burn down. The Court there had to consider whether the failure to insure released the surety fully or only pro tanto and, applying the ‘analogy’ of the English rule of equity that if the creditor gives the debtor time to perform, the surety is released (which is not part of our law) the Court held that the surety had been released in toto.

*[19] Probably fearing that he might be misunderstood by future generations Wessels, after the quotation, referred by way of comparison to a judgment of his. That case, Nathanson and Another v Dennill **1904 TH 289** 292, makes his point in no uncertain terms. He held that if*

‘a material alteration is made between the creditor and the principal debtor in an agreement to which there is a surety’

the surety may be released if the surety is thereby prejudiced. The alteration he referred to was one that amounted to a novation of the principal debt.

*[20] This Court, in Absa Bank Ltd v Davidson **2000 (1) SA 1117** (SCA),*

was confronted with the submission that:

‘there is a general so-called “prejudice principle” in our law to the effect that, if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released.’

It came, in the words of Olivier JA, without any mincing to the conclusion that no such principle exists and held (at para 19):

‘As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances.’

[21] This statement of the law was accepted as correct by Griesel J³² and by the Court a quo (at para 19) and somewhat grudgingly by the sureties during argument before us. The problem is that Van Zyl J³³ added an obiter gloss to it in these terms:

‘On the basis of these considerations I would then suggest that the prejudice required for a successful defence of prejudicial conduct justifying release from a suretyship agreement may be described in the following terms. With reference to

all the relevant facts and circumstances, and with due regard to considerations of justice, fairness, reasonableness, good faith and public policy, the alleged prejudice must constitute real and substantial prejudice which has the effect of unduly increasing the contractual burden of the surety.'

*I have to admit that I do not understand how this test will work in practice or why the gloss was necessary. The considerations given may be appropriate where a judicial discretion is involved or a value judgment called for, such as in the case of sentencing or the determination of wrongfulness, but the release of a surety is not a matter of either. In a constitutional democracy the principle of legality applies and making all rules of law discretionary or subject to value judgments may be destructive of the principle. In any event, this gloss is irreconcilable with *Brisley v Drosky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) para 11-24 dealing with the concept of bona fides in the law of contract. Lest there be any misunderstanding, this judgment subscribes to the law as set out in the judgment of Olivier JA³⁴ in spite of the criticism in the current edition of *Caney*.³⁵*

[22] The argument of the sureties amounts to this: the banks were in possession of securities; these had to be realized in a lawful manner at the appropriate time and at a fair value; since this did not happen, they were released. The Court a quo (at para 19.1) saw the law in another way:

'I can see no reason in equity, morality, public policy, principle or law why minimal prejudice should automatically release a surety from all liability for the

principal debt. In an appropriate case there is much to be said for limiting the surety's release to the extent that he or she has been prejudiced by the conduct of the creditor that is in breach of some of some or other legal duty or obligation.'

[23] One can approach the matter from a slightly different angle. The agreement between Nedcor and the principal debtor provided for the take-over of the pledges in a particular manner. Nedcor took them over in a manner contrary to that agreed upon. This breach did not release the principal debtor from its liability but the principal debtor was entitled to have been placed in the position as if the agreement had not been breached, which means in this case that the principal debtor was entitled to be credited with the 'true' value of the shares as at the date of take-over. Why should the position of the sureties, who are also co-principal debtors, be any different? There is no fiduciary relationship between them and the creditor.³⁶ Their indebtedness will not have been increased or changed as a result of Nedcor's breach.

[24] Wessels (para 4345) in the paragraph preceding his discussion of Watts, gave an example that fits this exposition of the law and is particularly apposite to the facts of this case:

'A obtained an advance of money from a loan society and B became his surety. There were certain goods pledged to the society by A. The society sold these goods and claimed on B for the balance. B pleaded as an equitable defence that but for the mismanagement of the agents of the society in selling A's goods they would have realized sufficient to satisfy the whole debt. The Court held this to be a good plea.'

(Emphasis added.)

[25] It would thus appear as if the question of the release of a surety due to the prejudicial conduct of the creditor and the question of the quantum of the principal debt tend to be conflated. These are two distinct inquiries. Properly analyzed, the sureties' defence is about quantum, i.e., the extent of the principal debtor's liability for which they are in solidum liable.³⁷

[26] Nestadt JA³⁸ once referred to a general principle according to which a surety will be discharged if the creditor by his own act makes it impossible for himself to cede his security to the surety. This statement of his may appear to be in conflict with conclusions thus far. The learned Judge, it should be noted, did not deal with the question whether the release is in toto or pro tanto and, additionally, Wessels makes it clear that the release is dependent on the creditor's negligence (at para 4338-4339 and 4352) and is pro tanto (at para 4354). This principle can, in any event, not be applicable where the creditor utilized the securities in order to reduce the indebtedness of the principal debtor.³⁹

[38] In the matter of **Andre Visser and Another v Ereka Kotze**²⁶, a defence of duress was raised in the affidavit opposing summary judgment. The court, per Van Heerden JA²⁷ assessed the facts placed by

²⁶ (519/2011) **[2012] ZASCA 73** (25 May 2012)

²⁷ Heher, Mhlantla, Leach JJA and Ndita AJA concurring

the deponent to assess the defence of duress. It came to a conclusion that the facts placed before the court did not meet the elements necessary to set aside a contract on the ground of duress.

[39] The defendants make bald allegations of having been forced to sign the suretyship agreements and seek to rely on unequal bargaining power that the banks hold as against consumers.

[40] I am inclined to agree with the submissions made by Mr. Leathern on behalf of the plaintiff that:

[40.1] Surety contracts should be complied with.

[40.2] The sureties in question were signed in 2007/2008.

[40.3] The deponent to the opposing affidavit (first defendant) describes herself as a business woman.

[40.4] The defendants did not place any facts before the court on the nature of the unequal bargaining power, such as whether there is any lending institution that would have offered them what they would consider favorable conditions.

[41] I may add that having taken all facts in the documents properly placed before me and not just the opposing affidavit, it is clear that the defendants were involved in some multimillion rand property developments in up market areas. They do not appear to be any simple Jane and Harry who obtained a loan to start a café in a small sleepy town. They welcomed the benefit and were looking forward to reap profits when the bank (rightly so in terms of the deed of sureties) pulled the rug underneath them.

They should have placed real facts before the court to enable it to assess the defence of duress and unequal bargaining power. They do not state what preferable terms they would have agreed to and the basis thereof.

[42] Mr Kruger identified certain clauses in the surety agreements as stated above as oppressive and *contra bonos mores*. This is say so because the defendants, as I have already stated have not laid a basis as to whether anything else is possible in the economic space they operate within.

[43] In the matter of **Napier v Barkhuizen**²⁸ the Constitutional Court per Cameron JA was not able to decide whether the consumer was in a weak bargaining power as against an insurer because there was no sufficient evidence to make such a finding. “*whether the plaintiff in effect*

²⁸ [2007] ZACC 5, 2007 (5) SA 323 CC

*was forced to contract with the insurer on terms that infringed his constitutional rights to dignity and equality in a way that requires this court to develop the common law of contract so as to invalidate the term. But without any inkling regarding the issues set out above, the broader constitutional challenge cannot even get off the ground.”*²⁹

[44] Consequently, the defendants have failed to disclose a bona fide defence based on allegations of infringement of their constitutional right to equality.

CONCLUSION

[45] Having considered all defences put forward by the defendants and having found that none of them discloses a defence that is good in law and made in good faith as envisaged in Rule 32, the plaintiff is entitled to summary judgment.

[46] In the result, I make the following order:

Summary judgment is granted in favour of the plaintiff as follows:

1. Payment of an amount R8 939 201.84.

2. Plus interest at Nedbank Limited’s prime lending rate which was 8.5% plus 1.00% at the date of issue of the summons calculated from 1

²⁹ at para. 16

September 2013 to date of payment, calculated daily on the capital balance outstanding from time to time, compounded monthly in arrears.

3.The liability of the first defendant shall be restricted to an amount of R15 000 000.00 plus legal costs and interest.

4.The liability of the second defendant shall be restricted to an amount of R30 000 000.00 plus legal costs and interests.

5.Costs of suit against first and second defendants on a scale as between attorney and own client to be taxed.

MAKHUBELE AJ

Acting Judge of the High Court.

APPEARANCES:

PLAINTIFF: DM Leathern SC

Instructed by: Van Rensburg Koen & Baloyi Attorneys

Arcadia, Pretoria

DEFENDANT: TP Kruger

Instructed by: Jaco Roos Attorneys

Colbyn, Pretoria