FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case no: **1498/2007**

In the matter between:

MARIA MARTHINA VAN DER WALT Applicant

and

VRYSTAAT KOöPERASIE BEPERK Respondent

HEARD ON:	**3 May 2012**
JUDGMENT DELIVERED BY:	**SNELLENBURG, AJ**
DELIVERED ON:	**7 May 2012**

[1] This is an application by the applicant, **MARIA MARTHINA VAN DER WALT**, to set aside the order, made by agreement between the parties by **CHG van der Merwe J** on **19 October 2010,** in terms whereof the Deed of Settlement entered into between the parties was made an order of court.

[2] The Court order was preceded by the following events which are not in dispute:

[3] Respondent issued a simple summons in which it claimed payment of the amount of R541 294.31, with interest calculated at 15.8% per year as from 1 March 2007 up to date of payment (calculated on a daily basis on the balance and capitalised monthly), as well as costs of the suit on the scale as between attorney and client from the applicant. The summons was subsequently, in June 2009, amended to reflect the amount due as being R794 005.23.

[4] The respondent's claim against the applicant arises from a deed of surety wherein the applicant bound herself in favour of the respondent as surety and co-principal debtor for the due and proper compliance by Cornelis Wilhelmus van der Walt, the applicant's son and the principal debtor, for due compliance by him with all obligations and proper and timeous payments of all amounts owing by him to the respondent arising from the granting of credit facilities or arising out of any cause of action whatsoever, including any amounts which the principal debtor owes the respondent in his capacity as surety or co-principal debtor, notwithstanding whether such payments must be made or obligations complied with in connection with a debt or an obligation existing at the time of the conclusion of the deed of suretyship or whether such payment or obligation comes into existence in the future and notwithstanding whether the debt is incurred by the principal debtor in own name or in the name of any business wherein he holds an interest.

[5] It appears from the present application that the applicant, her son (the principal debtor), and his wife instructed the same attorney from Vereeniging to represent them as separate summonses were issued against her in her capacity as surety, against the principal debtor in his capacity as such and against his wife. I will refer to this attorney as attorney A.

[6] Attorney A's advice was to the effect that both the principal debtor and his wife would be sequestrated on the grounds of a debt of approximately R13 000.00 each, whereafter he would finalise the applicant's matter on the basis that she should pay R150 000.00 into his trust account. The applicant does not state when the advise was given, but in the context of the matter it would have been after the initial consultation when the applicant, inter alia, set out her defence against the claim against her.

[7] In an answering affidavit deposed to by the applicant to resist a summary judgment application, she relied on the following defences:

i) The applicant denied that the deed of suretyship complied with the requirements of Section 6 of the General Law Amendment Act, 50 of 1956, due to the fact that she alleged that the deed of suretyship was not completed when she initialled and signed the said document;

ii) The applicant relied on an express oral agreement with a duly authorised representative of the respondent that her obligations as surety would be limited to the amount of R150 000.00, being the limit of the credit facility that the respondent made available to the principal debtor.

iii) The applicant denied that the witness to the suretyship agreement was present when she signed it.

iv) The applicant denied that the principal debtor owed the amount of R541 000.00 (the plea was never amended after the amendment during 2009) to the respondent.

v) The applicant disputed the calculation of the amount on the basis that the Plaintiff made its calculations charging an interest rate of 21%, whilst the agreement between the respondent and the principle debtor only provided for interest at 15%.

vi) The applicant contended in the alternative that the respondent's conduct was prejudicial to her as surety and that she should be released from her obligations in terms of the suretyship agreement as a result of the fact that a notarial bond was registered over certain movable assets of the applicant's daughter-in-law as further security with regards to the principle debtor's credit facility, but that the respondent released a John Deere harvester, worth R500 000-00 from the bond.

[8] The summary judgment did not proceed and the parties reached an agreement that leave be granted to the applicant to defend the action and that

the costs of the application for summary judgment be reserved. The order was duly made by agreement between the parties on 17 May 2007 by P Zietsman, AJ.

[9] In the applicant's plea to the respondent's declaration, the applicant essentially relied on the same defences set out in her answering affidavit. The applicant, in addition, denied the allegations regarding the principal debtor's purchase on credit of goods for the years 2000 to 2006, as well as credit life assurance premiums which the Plaintiff alleges it paid on behalf of the principal debtor; the amount owing in terms of the declaration as at 4 April 2007 being R541 294.31 plus interest at 15.8% per year, calculated from 1 March 2007 to 4 April 2007, both dates included.

[10] On 20 November 2010 the matter was enrolled for hearing on 19, 20 and 22 October 2010.

[11] The respondent made an application to compel the applicant to reply to the request for further particulars, after which the applicant replied and as result of which the applicant was ordered, on 26 August 2010, to pay the respondent's costs occasioned by the application. On 8 October 2009 the respondent furthermore succeeded with an application to compel the applicant to respond to the Notice in terms of Rule 35. The applicant was again ordered to pay the costs of the application.

[12] The applicant, save for requesting and receiving discovery, did not submit any requests in terms of High Court Rule 21 or 37(4).

[13] On 14 October 2010 the applicant's then attorney of record, to whom I shall refer as attorney B, addressed a letter to the respondent's attorneys of record wherein the applicant made an offer to settle the action. In the letter it is recorded that the offer is made after receipt of the file from attorney A and proper consultation with the applicant. The offer entailed that the applicant would settle the matter by paying a capital amount of R200 000.00 and costs of the action over and above the costs orders allready granted in favour of the respondent.

[14] The respondent made a counter offer which in turn resulted in the written agreement (Deed of Settlement) entered into and concluded between the parties on 18 October 2010. The deed of settlement was duly made an order of court by agreement. The order was not granted in absence of the applicant.

[15] The Applicant states in the founding affidavit that the purpose of the application is for rescission due to the fact that she was not aware thereof that the Respondent had already recovered an amount of R2,026,611.77 in respect of the debt allegedly owed by her son (the principal debtor) in the amount of R541,294.31.

[16] The applicant admits that the principal debtor, during 1999 already, defaulted

on payments to the respondent and that, for various reasons, the principal debtor was not able to make payments as per the credit agreement to the respondent.

[17] After the applicant had made a payment of an amount of R200 000.00 on the capital amount owed in terms of the deed of settlement, she was informed by way of letter from the respondent's attorneys that an amount of R276 388.21 was still payable in terms of the deed of settlement.

[18] According to the applicant she then made enquiries from her son with regards to what was paid towards the initial debt and was shocked to learn that an amount of in excess of R2 million had been paid. The result was this application for rescission.

[19] Since the applicant has approached the Court by way of motion proceedings, the application falls to be dealt with on the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[1].

[20] The applicant's counsel submitted that the applicant's case was premised on the following grounds, which accords with the papers:

i) the applicant's lack of knowledge regarding the compilation of the

1 1984 (3) SA 623 (A) at 634E – 635C.

amount claimed by the Respondent which was brought about on the applicant's version as result of the respondent not disclosing the basis for the amount claimed and the payments received; hence, on her version, the fact that the respondent had received, prior to the order, more than what was owing. The applicant submits that by acting in this manner the respondent misled her and her son (the principal debtor);

ii) that, had the applicant and attorney B known of the amounts paid to date (when the settlement agreement was concluded), she would not have entered into the agreement;

iii) that the respondent only disclosed its reliance on the 'second facility/agreement' in its answering affidavit filed in these proceedings. The applicant's case in this regard is that she would not have entered into the settlement agreement (and consented to the judgement) had she known that the respondent's claim included amounts advanced in terms of the second credit facility, as she was only liable as surety in terms of the first credit facility and, secondly, that her obligation was limited to R150 000.00 as set out in her plea and the answering affidavit in the application for summary judgment;

iv) that, under the circumstances and on the basis of justice and fairness she is entitled to rescission of the judgment. The circumstances the applicant relies on, are the conduct of her previous attorneys, attorneys A and B, who, according to her, failed to advise her properly and who, generally, failed or neglected to render services with the degree of skill that can be reasonable be expected from attorneys when acting on behalf of a client in litigation. (For example, the applicant complains that attorney A failed to properly advise attorney B of her case and specifically the payments which had been made.)

[21] High Court Rule 42(1), which provides for rescission of judgments, is not applicable. It is trite that, in terms of the common law, a judgment granted by consent can only be set aside on the basis of fraud or *iustus error*[2i].

[22] As stated, the applicant relies on three grounds for the rescission of the (by consent) order or judgment, namely fraud, *iustus* error and other circumstances based on justice and fairness.

[23] It is apposite to firstly deal with the applicant's reliance on other circumstances based on justice and fairness.

[24] In Groenewald v Gracia (Edms) Bpk[3] Van Zyl AJ (as he then was) held, with

2 Childerley Estate Stores v Standard Bank of SA Ltd, 1924 OPD 163 at 166-8; De Wet and Others v Western Bank Ltd, 1979 (2) SA 1031 (A) at 1039H – 1043A.
3 1985 (3) SA 968 (T).

reference to the following passage in De Wet and Others v Western Bank Ltd[4], that rescission, in terms of the common law, could also be justified on other circumstances based on justice and fairness:

'It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42 (1), and those specifically mentioned in the Childerley case. Those grounds do not, for example, cover the case of a litigant or his legal representative whose default is due to unforeseen circumstances beyond his control, such as sudden illness or some other misadventure; one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief.'

[25] The judgment in Groenewald v Gracia (Edms) Bpk was followed in KR Sibanyoni Transport Services CC v Sheriff, Transvaal HC[5].

[26] As appears from the judgment by Trengove AJA (as he then was), the judge was dealing with and referring to the court's discretion at common law to set aside default judgments. That much is evident from the judgment itself. The judgment and specifically the passage referred to above did not refer to or deal with rescission of judgments granted by consent nor, is there any indication that the court intended to pronounce on grounds for rescission of

4 See footnote 1 supra.
5 2006 (4) SA 429 (TPD) at 431H – 432A

judgments granted by consent at common law.

[27] I, therefore, with respect, disagree with the finding of Van Zyl AJ in the *Groenewald* case that the *De Wet* judgment is authority therefor that a judgment granted by consent can be set aside at common law also on other circumstances and based on justice and fairness.

[28] For the same reasons I respectfully disagree with the findings in the judgments of *KR Sibanyoni Transport and Georgias v Standard Charted Finance Zimbabwe Ltd*[6] in as far as they followed the *Groenewald* case that a judgment granted by consent may be set aside at common law on other circumstances and based on justice and fairness. I am fortified in my view by the judgment of Miller J.A. in Gollach & Gomperts v Universal Mills & Produce Co[7] where the appellate division dealt specifically with judgments by consent and the rescission thereof.

[29] Regarding the applicant's reliance on this ground for rescission of the judgment, the applicant would, in any event, not have been entitled to rescission of the consent judgment even if the principles were applicable.

[30] The mere fact that the applicant was the victim of conduct by her attorneys which fell short of the degree of skill and care that can be expected from an attorney conducting a client's case, and if her version in this regard is

6 2000 (1) SA 126 (Z) at 132G; 1991 (4) SA 17 (ZS)
7 1978 (1) SA 914 at 921A – 923B

accepted for purposes of this application, that circumstance cannot in itself constitute a valid *causa* for rescission of the judgment that she consented to. . The same principle would apply to the agreement she concluded with the respondent. The said attorneys were, after all, her own attorneys.

[31] The respondent cannot be held responsible for conduct or omissions by applicant's attorneys, chosen and instructed by her, whilst conducting her case. The applicant's remedy would be to claim damages on the strength of breach of contract or breach of a duty of care from her erstwhile attorneys.

[32] The applicant's counsel could not advance any basis that would entitle a party to resile from an agreement entered into with an innocent party simply because such party's attorney did not render adequate and professional services, save to submit that it would be 'other circumstances", constituting a basis for justice and fairness. I disagree. Simply evaluated on the basis of fairness and justice it would be manifestly unfair and unjust to the innocent party.

[33] An unilateral mistake as result of the conduct of her attorneys would also not avail the applicant in the circumstances.

[34] What remains is to consider whether the applicant has met the requirements

to prove that her consent to the judgment is vitiated as result of *fraud* perpetrated by the respondent or that the consent was the result of an *iustus error*.

[35] An *iustus* error must vitiate true consent and must not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise (Cf Gollach & Gomperts v Universal Mills & Produce Co. case at 922H – 923A.) In the same judgment at *923C - D* Miller JA cautions that *'Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the Court must bear in mind when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain facts, he would not have entered into the settlement agreement.'*

[36] The nature and purpose of a compromise (transactio) were summarised by Van Zyl J in MEC for Economic Affairs, Environment and Tourism v Kruisenga and another[8] as [it] *"is an agreement wherein the parties have in contemplation a matter or lawsuit, the issue or result whereof is doubtful, and which they agree to settle definitively between themselves There is no need for a compromise to be entered into in a formal manner. It may be judicial (by entering it on the record), or extrajudicial (written or verbal).*

8 2008 (6) SA 264 (Ck) at 274C - H

The purpose of a compromise is not only to bring an end to existing litigation, but also to prevent or avoid litigation. Any kind of doubtful right can therefore be the subject of a compromise. Delictual claims, such as in the present matter, are frequently the subject of a compromise. The claim need not even be prima facie actionable in law. As stated by Mullins J in Hamilton v Van Zyl, a valid compromise 'may be entered into to avoid even a clearly spurious claim, and defendants frequently for various reasons, settle claims which they know or believe a plaintiff will not succeed in enforcing by action'."

[37] The applicant's statement that the respondent for the first time disclosed in the answering affidavit in these proceedings that it relied on the so-called second credit facility, and that her suretyship obligation was limited and to apply only to the first credit facility (and could therefore not apply to monies owed by the principal debtor in terms of the second credit facility) is clearly untenable. It raises serious doubts regarding the applicant's *bona fides* in these proceedings.

[38] In so far as the non disclosure of the second credit facility is part of the basis for the alleged non disclosure when a duty to speak existed, the averments of the applicant is without merit. The respondent specifically pleaded the 'second credit facility' in its declaration and also appended the written application for the facility by the principal debtor, which was granted by the respondent, to the declaration.

[39] The terms of the deed of surety are also self explanatory and contrary to the applicant's averments.

[40] The deed of surety, clearly and unambiguously, provides that the applicant is bound in favour of the respondent for due compliance by the principal debtor with all obligations and proper and timeous payments of all amounts owing by him to the respondent arising from the granting of credit facilities or arising out of any cause of action whatsoever, including any amounts which the principal debtor owes the respondent in his capacity as surety or co-principal debtor, notwithstanding whether such payments must be made or obligations complied with in connection with a debt or an obligation existing at the time of the conclusion of the deed of suretyship or whether such payment or obligation comes into existence in the future and notwithstanding whether the debt is incurred by the principal debtor in own name or in the name of any business.

[41] The applicant relies on fraudulent misrepresentation by the respondent and states that the respondent had a duty to disclose all payments it received to her before she entered into the settlement agreement. The applicant, as stated, relies on the fact that, had she and her attorney known that amounts were included in respect of the second credit facility and of the amounts paid as at date of conclusion of the settlement agreement, she would not have signed (entered into) the agreement. The applicant states that the capital amount claimed, on her calculations and which she made after receipt of the

last letter of demand from the respondent, shows that there has been an overpayment without her paying the outstanding balance still owing in terms of the deed of settlement (and court order).

[42] The evidence of the applicant, however, falls well short to firstly prove any misrepresentation, let alone a fraudulent misrepresentation, by the respondent and, secondly, from proving, even prima facie, that there was indeed such an overpayment. Put differently, the applicant has not made out a proper case that the amount that the respondent claimed was not and could not have been due as at date of conclusion of the agreement. The applicant creates the impression that R2 million was paid on an indebtedness of R541 294.31. The respondent constantly, or frequently, advanced monies to the principal debtor and paid certain premiums on his behalf from 1998 until 2007. Payments made during an extended period over several years amounted to R1 566 642.32. That still left the balance sued for; and which was subject to interest accruing.

[43] The applicant firstly states that any amount still due by the principal debtor, for which the surety is liable, could not attract interest after the principal debtor was sequestrated. That is an untenable contention which does not deserve further consideration.

[44] The applicant's lack of knowledge of the compilation of the amount claimed

from her and whether any amount was due by her must off course be evaluated in the light of the following considerations:

[45] The principal debtor is the applicant's son. They both appointed the same attorney, attorney A, after receiving the summonses. The surety and principal debtor consulted the attorney together. It is undisputed that the principal debtor received statements from the respondent monthly and never disputed any entries on the statements. During what appears to be the first consultation with attorney A, the applicant, the principal debtor and his wife were advised and consented to the manner in which they would proceed further, namely the sequestration of the principal debtor and his wife and payment by the applicant of the R150 000.00. The trustees, in October 2007 already, sold certain movable assets of the principal debtor, of which sale the applicant was aware. The correspondence (on 14 October 2010) by attorney B however contradicts the applicant's averments, as it specifically records that *"Ons het volledig met die Verweerder gekonsulteer nadat ons die leêr vanaf* (attorney B) *ontvang het. Dit blyk uit berekeninge van die eisbedrag toon dat rente op die kapitaal grootliks verantwoordelik is vir die bedrag huidiglik verskuldig"*

[46] The respondent did allocate dividends received from the trustees of the insolvent estate.

[47] The matter was only settled in October 2010. The outstanding amount was still subject to interest accruing. The agreement also provided for interest on

the capital amount until payment thereof in full.

[48] The applicant never availed herself of any of the remedies provided for in the Rules of Court to require either further discovery or to make enquiries regarding debits and credits regarding the principal debtors liability, notwithstanding knowledge, for example, of the fact that the trustees, during 2007 already, sold movable assets and received the proceeds thereof. In this respect the applicant does not state whether the principal debtor had any other creditors, which is off course relevant if she states that the whole of the proceeds from the sale should have been applied against the principal debtor's indebtedness towards the applicant for which she stood surety. The respondent in any event allocated dividends received which still left an outstanding balance of R846 686.36 on 31 August 2010.

[49] The parties were involved in litigation and the indebtedness was always disputed as well as the quantum thereof. The applicant, in her answering affidavit in the summary judgment proceedings, denied the amount claimed by the respondent.

[50] Clearly in these circumstances, should there be any merit in the applicant's arguments that there were errors in the compilation or calculation of the applicant's indebtedness or that amounts paid were not taken into consideration, the applicant cannot now rely on a duty to disclose whilst it is

clear that the applicant never availed herself of any assistance at her disposal such as either a request for further particulars or further discovery if she had any reason to believe that there had been inadequate discovery by the respondent. It has not been proven that the respondent's representatives acting on its behalf did not *bona fide* believe the allegations contained in the summons or regarding the debits and credits on the statements, alternatively that representations were made by representatives on its behalf knowing them to be contrary to what the true belief – or, even, actual facts and figures -was.

[51] The settlement itself came about after an offer from the applicant a mere 4 days prior the date on which the trial was enrolled to commence to which the respondent made a counter offer, as it was entitled to do.

[52] I find that the applicant has not succeeded, even prima facie, to show that any misrepresentation, let alone a fraudulent misrepresentation, was made by the respondent.

[53] The respondent denied having made any misrepresentations and disputed the applicant's averments regarding the compilation and calculation of the amount. In support of its case the respondent appended reconciliations that show that the principal debtor's indebtedness was indeed much more than the applicant averred and that the amount that were claimed was indeed due. The

respondent's version is neither far-fetched nor clearly untenable. It must be borne in mind that the applicant argues that nothing was owed at date of settlement because the respondent had been overpaid by almost a million rand by that time. These statements by the applicant were made without any regard to the allegations in the declaration. I have already found that the applicant's evidence in that respect is clearly untenable and raises serious doubts regarding her *bona fides*. The reconciliations in any event disprove the applicant's case authoritatively.

[54] The incorrect reflection of some of the payments, even if it be accepted, would not alter the position that the applicant was indebted in her capacity as surety in an amount substantially more than the eventual settlement amount to the respondent when the agreement was concluded. That dispute was, as stated, the very issue that the parties seriously intended to settle. The fact that parties disagree with regard to the amount owed does not, and cannot, in itself give rise to the assumption that the one or other is intentionally misleading the other. These kinds of disputes form the basis of actions that are adjudicated in courts daily. The risk of a compromise being more disadvantageous than litigation has already been dealt with. The matter was eventually not settled on what the respondent claimed, but for a substantially lesser amount. That is the purpose and the nature of compromises.

[55] During argument counsel acting on behalf of the applicant pointed out one instance where the sum of certain items in the reconciliation, when added up,

apparently do not correspond with the balance reflected. Save that these allegations were vaguely canvassed in the replying affidavit to which the respondent obviously could not reply, this will, at best, have an influence on the calculation of the amount that always formed part of the initial dispute on the merits that was compromised or settled.

[56] In the circumstances of the case it is clear that only the applicant or her attorney or, possibly, both of them are to blame for any erroneous belief, if any, which she might have laboured under when she entered into the agreement and consented to the judgment. And as I have demonstrated above, that is not enough – at least in the context of this particular matter – to assist the applicant.

[57] I agree with Mr de Wet on behalf of the respondent that the applicant's discontent with the agreement only arose when she realised what the extent of the costs orders were that she was liable for in terms of the agreement. This is also supported by the applicant's averments that the costs are far-fetched and unreasonable. It is, however, clear that the agreement itself provided that the applicant will be liable for costs already taxed and costs still to be taxed where orders were granted against her, including the costs of the action on the scale as between attorney and client. The only manner in which she may obtain some relief in this regard, is by objecting in the proper manner and in the correct forum against fees which the respondent levies. The fact that her attorney failed or neglected to explain the extent of costs orders to the

applicant cannot sustain an order for rescission of the judgment. Her remedy is against her attorney in such instance. Save for the costs regarding the action, the rescission of the judgment will in any event not have any effect on the costs orders that have been granted. The applicant will remain liable to pay the same.

[58] To my mind there is no room for the applicant to rely on an iustus error in the circumstances of this application.

[59] It is also abundantly clear that any error that the applicant relies on merely relates to motive or to the merits of the dispute which it was the very object of the parties to compromise. As such the applicant accepted the risk that the settlement may not have been as advantageous to her as litigation might have been. The defence regarding the validity and the limited extent of the suretyship (the alleged agreement that the surety must be limited to R150 000.00) comes to mind.

[60] The simple fact of the matter is that on the applicant's own version, she in person and/or through her attorney is clearly to blame for any mistake that she might have laboured under regarding any material matter when she entered into the settlement agreement. There are simply no facts which can sustain a finding that the applicant can rely on either fraud or an iustus error.

[61] The respondent also contended that the application must be dismissed as the relief will not be effective in light of the fact that the applicant has not requested any relief regarding the agreement. The respondent's case is that the effect of rescission of the judgment will be that a valid agreement which contain the terms and conditions of the settlement will continue to exist. In light of the findings on the merits of the application it is not necessary to consider this contention.

[62] It is apposite to point out that the applicant, at the outset of the arguments, abandoned the special pleas raised in her affidavits regarding the denial of the authority of the deponent to the answering affidavit to depose to the affidavit on behalf of the respondent as well as certain points based on the provisions of the National Credit Act 34 of 2005.

[63] Based on my findings the application must be dismissed.

[64] The Mr de Wet argued on behalf of the respondent that in the event that the application is dismissed I should order the applicant to pay cost on the scale as between attorney and client. The argument is premised on the fact that the applicant had no prospects of success and the fact the parties agreed in the settlement that the applicant would pay the costs of action on the scale as between attorney and client. Mr Boonzaier on behalf of the applicant argued that no reasons exist for a punitive cost order. Mr Boonzaier submitted that I

must find that the application is *mala fide* or vexatious before I can make such an order as to costs. He strenuously argued that the application is neither vexatious nor *mala fide*.

[65] I am of the view that the application was stillborn. In addition to the afore-mentioned, the founding papers contain evidence which are clearly unfounded. At the very least it burdened the papers unnecessarily i.e. the evidence regarding the fact that the respondent never disclosed that it also relied on the ‘second credit facility’. The respondent not only pleaded the agreement expressly, but also appended the application for a credit facility to the declaration. This in turn clearly negated the applicant’s submission regarding the alleged overpayment and the fact that the debt sued for did not exist. The same goes for the averments regarding the interest that could not be charged and the surety’s obligations for future indebtedness other than from the ‘first credit facility’.

[66] In Nel v Waterberg Landbouwers Ko-operatieve Vereeniging[9] it was held that the purpose of an order that costs be paid on the scale as between attorney and client is for the Court to ensure, more effectively than it can do by means of a judgment for party and party costs, that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. This matter, I believe, justifies a special costs order.

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[9] 1946 AD 597

[67] Counsel on behalf of both parties was in agreement that the costs that were reserved during the postponement of the matter on 22 March 2012 must follow the result.

[68] I therefore make the following order:

The application is dismissed with costs on the scale as between attorney and client. Such costs are to include the costs reserved on 22 March 2012.

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N. SNELLENBURG AJ

7 May 2012

For the applicant: Adv. MG Boonzaier

Instructed by Bezuidenhouts Inc

For the respondent: Adv. PJT de Wet

Instructed by Symington & de Kok

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