



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE Number: 63387/2020

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES:
YES/~~NO~~
(3) REVISED: YES/~~NO~~

24 July 2024

In the matter between:-

DEVELOPMENT BANK OF SOUTHERN AFRICA LTD

Applicant

and

HOFMANN PRINSLOO

First Respondent

PIETER DU PLESSIS

Second Respondent

DR CORNELIUS PAPENFUS

Third Respondent

DIRK CONRADIE

Fourth Respondent

MASHUPYE MATLALA

Fifth Respondent

JUDGMENT

SNYMAN, AJ

Introduction

- [1] The current matter concerns an application brought by the applicant on 15 May 2023 to make an arbitration award handed down in its favour, and against the respondents, an order of Court as contemplated by section 31 of the Arbitration Act (AA)¹. In turn, and in a counter application filed on 14 July 2023, the respondents have prayed for either the dismissal of the applicant's application, alternatively the stay of the proceedings until a further claim the respondents have instituted in the High Court against the applicant has been decided.
- [2] From the outset, it must be stated that the arbitration award, which was handed down by retired Judge C Pretorius on 12 April 2023 (*the award*) is uncontested. The respondents have received the award, are fully familiar with its contents, and have elected not to further challenge such award on review to this Court in terms of section 33(1) of the AA. The award thus stands. There is accordingly no reason why the award cannot be made an order of Court by virtue of section 31 of the AA, and the applicant be afforded the relief sought in its notice of motion.
- [3] The only issue that can possibly stand in the way of the award being made an order of Court is the counter application brought by the respondents against the applicant in these proceedings, referred to above. The particulars and basis of this counter application will be dealt with in full later in this judgment.
- [4] I now turn to deciding this application and associated counter application, by first setting out the relevant background facts, which facts were, fortunately, largely common cause and / or undisputed.

The relevant background facts

- [5] In the course of 2009, the applicant agreed to advance funds to Proline Trading 60 (Pty) Ltd (*Proline*), for the purpose of funding, by way of a loan, a property

¹ Act 42 of 1965 (as amended).

development being conducted by Proline. This agreement was reduced to writing, and was contained in a document known as a Loan Facility Agreement (LFA). There were also several further addenda to the LFA,² which together with the original agreement, encompassed the entire loan agreement between the parties, and all together constituted the LFA. When I refer to the LFA in this judgment, it must be taken to include the addenda.

- [6] In terms of the LFA, the applicant advanced a total capital amount of R125 million to Proline, payable in tranches as the development progressed. As part of the entire transaction, the applicant required that all five the respondents provide personal surety for at least part of the capital amount advanced by it to Proline, as they were the five directors of Proline. As a result, and on 16 January 2009, all five respondents concluded individual suretyship agreements in favour of the applicant, for a collective total amount of R12.5 million (*the suretyships*). In terms of the suretyships, the respondents bound themselves as sureties and co-principal debtors with Proline for all amounts owing by Proline to the applicant from time to time under the LFA, obviously to the limit of R12.5 million.
- [7] The LFA provided for private arbitration to resolve any disputes that may arise out of the LFA, between the applicant and Proline. However, the suretyships concluded between the applicant and the respondents did not provide for dispute resolution by way of private arbitration.
- [8] A dispute arose between the applicant and Proline with regard to a breach by Proline of the LFA. According to the applicant, Proline defaulted on its prescribed payment obligations under the LFA. Proline in turn contended that the applicant had breached the LFA, because it had failed to make funds available to Proline when it was required to do so, thereby causing Proline to suffer significant damages.
- [9] Because Proline did not dispute that it owed the applicant the amounts demanded by the applicant as being due under the LFA, the applicant issued summons out of the High Court in Johannesburg under case number 30282 /

² These addenda were concluded on 3 March 2009, 24 August 2011, and 5 September 2011.

20 against Proline, in terms of which the applicant claimed the outstanding sum of the capital amount it advanced to Proline under the LFA, plus interest.³ This amounted to the sums of R147 990 239.95 and R101 728 020.92 respectively. Where it came to the respondents *in casu*, as personal sureties for the debt owing by Proline, and again considering that Proline did not dispute that the debt was owing to the applicant, the applicant also issued summons out of the High Court in Pretoria on 2 December 2020 under case number 63387 / 20, claiming the combined sum under the suretyships of the respondents, amounting to R12 500 000.00, from the respondents.

[10] Both Proline and the respondents contested the claims brought by the applicant against them. Proline on 8 December 2020 filed its plea to the applicant's particulars of claim, wherein it raised a defence that the applicant breached the LFA in material respects when it failed to make the agreed funds available when actually required by Proline during the various stages of the development. According to Proline, it suffered material damages as a result of not being favoured with the funds by the applicant when due, resulting in Proline also instituting a counterclaim against the applicant for damages, in the sum of R133 400 000.00. Proline raised a further defence of rectification of the LFA and the suretyships. As to the respondents, they in essence raised the same defences as Proline, by way of a plea filed on 13 July 2021. They also instituted the same counterclaim, and contended that these alleged material breaches by Proline absolved them from their suretyships. As to the rectification pleaded, the respondents contended that the rectification, if granted, would also cause them to be absolved of their liability in terms of the suretyships.

[11] Because the determination of the defences raised by Proline in its plea would be susceptible to private arbitration under the LFA, the applicant brought an application in the Johannesburg High Court to stay the High Court litigation and to have these disputes decided by a private arbitrator under the LFA. This application was opposed by Proline, but ultimately an order was granted on 5

³ There were also legal proceedings by the applicant against Cranbrook (Pty) Ltd, being the shareholder of Proline, and who had also concluded a suretyship agreement with the applicant in terms of which it bound itself as surety and co-principal debtor with Proline for the debt owing by Proline to the applicant in terms of the LFA from time to time. These legal proceedings are of no concern *in casu*.

September 2022 by Strydom J, directing that the litigation pending between the applicant and Proline in the High Court be stayed, pending the outcome of private arbitration to be conducted between the two parties. At this point the respondents, who were not parties to the arbitration agreement under the LFA, that formed the basis of the Court order, contended that the evidence in the arbitration will be relevant to their disputed claim as well, and expressly requested to be joined in the arbitration.

[12] As a result of all of the aforesaid, a formal arbitration agreement was concluded on 19 and 20 October 2022 (being the dates when signed on behalf of the parties) between the applicant, Proline, and the respondents, in terms of which all the disputes between the parties arising from the LFA and the suretyships would be resolved by way of private arbitration (*the arbitration agreement*). It was specifically said that all actions between the parties would be resolved simultaneously and that separate orders would be granted by the arbitrator for each of the actions.⁴

[13] As to the specific salient terms of the arbitration agreement, it was agreed that the disputes to be determined in the arbitration were those disputes as articulated in the pleadings filed by the parties in the High Court cases referred to above.⁵ It follows that the pleadings filed by the parties in the High Court proceedings were considered the pleadings in the arbitration, and also determined the issues the arbitrator would be called on to decide. It was further agreed that the Uniform Rules of the High Court would apply to the conducting of the arbitration proceedings, and this would include the entitlement of the arbitrator to make an order of absolution from the instance.⁶ The parties agreed to retired Judge C Pretorius as arbitrator.⁷ Several procedural issues, relating to discovery, further particulars and a pre-arbitration conference were regulated in the arbitration agreement.⁸ It was agreed that the arbitration would be final and binding on the parties with no right to appeal.⁹

⁴ Clause 6 of the arbitration agreement.

⁵ Clause 7 of the arbitration agreement.

⁶ Clause 9 of the arbitration agreement.

⁷ Clause 10 of the arbitration agreement.

⁸ Clause 11 of the arbitration agreement.

⁹ Clause 17 of the arbitration agreement.

- [14] The arbitration took place on 20 to 24 February 2023, as agreed between the parties. As to what evidence was presented in the arbitration, and considering that the award is unchallenged and stands, I will simply defer to the findings of fact as made by arbitrator retired Judge Pretorius and recorded in the award. Further, I will only refer to those factual findings the arbitrator had made which are of relevance to deciding the case *in casu*, and not all the findings of fact.
- [15] As already said, it was undisputed that Proline received the capital amount of R125 million in terms of the LFA from the applicant, and that it failed to replay this debt plus interest as prescribed in the LFA. It was common cause that Proline and the respondents had the onus to prove the breach of contract and rectification defences, which they relied on to defeat the applicant's claim.
- [16] Only two witnesses testified in the arbitration. Mr B B Berry (Berry) testified for the applicant, whilst the first respondent (Hofman Prinsloo) testified for Proline and the respondents. Considering the testimony led, the arbitrator concluded that the applicant had proven its claim against Proline. The arbitrator was then presented with an application by the applicant for absolution from the instance where it came to the claims by Proline and the respondents of alleged breach of the LFA by the applicant in failing to make funds available, the associated counterclaim, and the rectification sought. After considering argument by the parties, the arbitrator upheld the applicant's application for absolution from the instance. As far as the current proceedings are concerned, this put paid to any case of breach of contract alleged to have been perpetrated by the applicant, as well as the counterclaim, and this need not be considered further.
- [17] Where it came to the rectification case, the respondents contended before the arbitrator that when the LFA and the suretyships were concluded, there were '*certain mistakes*' that were made, which mistakes were *bona fide* and arose in the course of the drafting of the various agreements. According to the respondents, these mistakes in the course of the drafting of the agreements resulted in the agreements not reflecting the true intention of the parties. The first respondent, as witness for the respondents, sought to present evidence as

to what these mistakes were, how the same came about, and what the rectified provisions would be. Needless to say, this was disputed by the applicant when presenting its own evidence.

- [18] The arbitrator was referred to the specific clauses in the LFA and the suretyships that were the subject matter of the rectification case. First, clause 1.2 in the suretyships as it stands reads: *'It is specifically recorded that ... notwithstanding anything to the contrary in the suretyship, our liability under this deed of suretyship, shall lapse immediately upon the debtor receiving the Shareholder Equity Contribution, as defined in the loan agreement, as specified in clause 6.1(aa) of the loan agreement.'* The respondents contended that the words *'or the creditor'* be added after the word *'debtor'* in this clause 1.2.
- [19] The loan agreement referred to in clause 1.2 of the suretyships is the LFA, which contains a specific definition of what constitutes the *'Shareholder Equity Contribution'* referred to in the suretyships. This definition, as it stands in the LFA, reads: *'an amount of not less than R12 500 000.00 (twelve million five hundred thousand rand) to be injected by Cranbrook into the Borrower⁹ as Equity, which amount could either be injected as cash into the Borrower, alternatively be received by the Borrower as proceeds from the sale of Extension 7 (or any other extension approved by the DBSA) to ASA Metals and accounted for as Equity in the Borrower's books of account'*. The LFA further provides in clause 6.1(n)(aa) that *'... It is agreed that the Individual Sureties shall be released from their respective liabilities under the Individual Surety Documents upon receipt by the Borrower of the Shareholder Equity Contribution'*.
- [20] Despite these terms in the LFA being quite clear as they stand, the first respondent testified in the arbitration that changes had been proposed to the original draft agreement that had been prepared in October 2008. These changes were proposed in various e-mails and meetings, and the testimony relating to such interactions are recorded in the award and need not be repeated in this judgment. The upshot was that according to the respondents, the definition of *'Shareholder Equity Contribution'* in the LFA should have read: *'means an amount of not less than R12 500 000.00 to be received by either the*

borrower or the lender, from the proceeds of the realisation of any of the properties which constitute phase 3, 4, 5, 6 or 7 of the envisaged development.' This is clearly markedly different from the definition of '*Shareholder Equity Contribution*' as actually contained in the LFA.

- [21] It was specifically recorded in the LFA that Proline would repay its debt to the applicant out of the proceeds of properties sold in the course of the property development forming the subject matter of the loan by the applicant to Proline. In this context, and in the addendum of 5 September 2011 to the LFA, it was required that Proline repay the debt owed to the applicant by utilising a prescribed 70% of all amounts paid into its revenue account from the proceeds of sale of properties, until all principal amounts and interest on the loan is repaid in full. The percentage of 70% was later further increased to 80%. As further security, all the immovable properties owned by Proline were encumbered in favour of the applicant with a covering mortgage bond.
- [22] It was common cause that in 2016, Proline requested the applicant to release a specific property it intended to sell, from the covering mortgage bond held by the applicant over that property. In exchange, Proline promised the applicant that it would receive R14 400 085.00 from the proceeds of the proposed sale. The applicant agreed to the proposal, on the basis that the promised payment of R14 400 085.00 would exceed the 80% repayment threshold in terms of the LFA, and accordingly approved the requested release. The transaction then proceeded, the property was sold, and upon registration of transfer, the applicant was paid a sum of R14 400 085.00 on or about 31 March 2016. Importantly, this sum was attributed to the payment of Proline's debt to the applicant as prescribed by the LFA.
- [23] It is the aforesaid events relating to the sale of the property in 2016 and the consequent payment of R14 400 085.00 to the applicant that was the factual basis for the respondents' contention that they had been released from the suretyships, once the rectification of the LFA and suretyships is considered and should this claim be approved by the arbitrator. This is because, in terms of rectified clauses thereof as propagated by the respondents, such payment

would then qualify as the payment of the Shareholders Equity Contribution, as it was proceeds from a sale of one the identified properties received by the lender / creditor, being the applicant.

[24] This all featured prominently before the arbitrator. In short, the arbitrator was called on to decide whether rectification should be granted, because if it was granted, then the respondents would be released from their suretyships by virtue of the payment of the sum of R14 400 085.00 to the applicant. The arbitrator comprehensively dealt with the evidence relating to the suggested rectification, and the exchanges that took place between the parties that led to the conclusion of the LFA and the suretyships. The arbitrator was especially critical of the fact that the alleged '*common mistake*' was only raised for the first time in response to the letters of demand from the applicant, which was more than 11 years after these agreements had been concluded. The arbitrator, having considered all the evidence, consequently decided that: '*I cannot find that prima facie a "common mistake" has been proved ...*'. It follows that the rectification claim failed.

[25] In the award delivered on 12 April 2023, and in particular relating to the claim by the applicant against the respondents, the arbitrator held that absolution from the instance be granted, and that the respondents were ordered to pay, jointly and severally, the one paying the other to be absolved, the sum of R12 500 000.00 to the applicant. It is common cause that despite being ordered to do so in the award, the respondents refused to pay the sum of R12 500 000.00 million to the applicant. This led to the current application to make the award an order of Court, for the purposes of execution thereof against the respondents.

[26] However, the respondents were not done yet. In opposition to the application to make the award an order of Court, the respondents on 14 July 2023 filed a counter application and answering affidavit. In the counter application, the respondents pray that the application to make the award an order of Court be dismissed, alternatively be stayed pending the final adjudication of an action instituted by the respondents, now acting as plaintiffs, against the applicant as

defendant, for a declarator seeking confirmation that the respondents have been released from their suretyships because the necessary '*Shareholder Equity Contribution*' triggering such release had been fulfilled by the payment of the sum of R14 000 085.00 to the applicant on 31 March 2016.

- [27] With the claim for rectification having been disposed of by the arbitrator in the award against the respondents, the respondents now change tack, and contend that rectification is not necessary. It is now contended, in the founding affidavit to the counter application (which also serves as the answering affidavit to the applicant's application), that when applying the relevant clauses in the LFA and suretyships as they stand, the respondents would be released from their suretyships by the payment of R14 000 085.00 to the applicant on 31 March 2016. This is described as a new defence that was not before the arbitrator to decide, and therefore, according to the respondents, they are entitled to raise such a defence now.

Analysis

- [28] I must confess that I find the conduct of the respondents in this case lamentable. For the reasons ventilated below, it is my view that not only is this new defence raised by the respondents a bad one, but it is not even competent to have raised this defence in the first place, considering all that has transpired before. What happened in this case flies squarely in the face of what is sought to be achieved by way of private arbitration proceedings, which is to finally resolve all disputes between the parties and bring a final end to the litigation in an expeditious manner. As said in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*¹⁰:

'.... Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. ...'

¹⁰ 2009 (4) SA 529 (CC) at para 236.

[29] The first problem the respondents face, in my view, is that they are in essence returning to Court to litigate an issue that was agreed by them be submitted to private arbitration for final resolution. Even accepting for the purposes of argument that it is competent to now raise the so-called new defence, the undeniable reality is that all the facts giving rise to this defence and the consequential relief sought based on that defence, was agreed to be subjected to arbitration. In my view, it does not matter if the respondents seek release from the suretyships on the basis of clause 1.2 of the suretyships and clause 6.1(n)(aa) of the LFA as they stand, or on the basis of these clauses being rectified. The broad issue in both instances, is that the release of the respondents from their suretyships based on the terms of the LFA and suretyships and as a result of the payment of R14 400 085.00, was agreed to be arbitrated, and not be continued to be litigated. The respondents simply cannot do a volte face and return to litigation in the High Court again. After all, they did not have to agree to arbitration, and could simply have persisted with the litigation against them. They must be held to their bargain, which entails an abandonment of any litigation on this issue in the High Court. In *Canton Trading 17 (Pty) Ltd v Hattingh NO*¹¹ the Court held as follows:

‘... When parties agree to refer a matter to arbitration, unless the agreement provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the high court under s 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. ...’

[30] The second problem faced by the respondent is, in my view, the application of the principle of *res judicata*. In *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another*¹² the Court said that: ‘*The expression 'res iudicata' literally means that the matter has already been decided. The gist of the plea is that the matter*

¹¹ 2022 (4) SA 420 (SCA) at para 55. See also *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169.

¹² 2014 (5) SA 297 (SCA) at para 10. See also *Kgekwanane v Department of Development Planning and Local Government, Gauteng* (2015) 36 ILJ 1247 (LAC) at para 26; *Du Plessis v Public Protector and Others* (2020) 41 ILJ 919 (LC) at para 32.

or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again ...'. In *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*¹³ the Court summarized the requirements for the successful application of *res judicata* as being the following:

'... *idem actor, idem reus, eadem res* and *eadem causa petendi*. This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is 'demanding the same thing on the same ground' ...; or which comes to the same thing, 'on the same cause for the same relief' ...; or which also comes to the same thing, whether the 'same issue' had been adjudicated upon ...'

And in *Yellow Star Properties v MEC Department of Development Planning and Local Government*¹⁴ the Court added the following:

'.... it is necessary to stress not only that the parties must be the same but the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.'

[31] *In casu*, and conducting a comparison between the proceedings before the arbitrator and then the proceedings before this Court, it clear that the parties to the dispute remain the same, and the facts remain the same. The consequential relief demanded (sought) is also the same. The only question that remains is whether the cause of action remains the same. On face value, it does appear to be the same, because the respondents in both instances advance a case that in terms of clause 1.2 of the Suretyships and clause 6.1(n)(aa) of the LFA, that they were absolved from their sureties as a result of the payment to the applicant of the sum of R14 400 085.00 on 31 March 2016. The arbitrator decided in the end that the respondents had failed do make out even a *prima*

¹³ 2001 (2) SA 232 (SCA) at para 2 of the majority judgment. See also *SA National Defence Union and Another v Minister of Defence and Others*; *SA National Defence Union v Minister of Defence and Others* (2003) 24 ILJ 2101 (T) at 2109H-J; *Yellow Star Properties v MEC Department of Development Planning and Local Government* 2009 (3) SA 577 (SCA) at para 21.

¹⁴ 2009 (3) SA 577 (SCA) at para 22. See also *Gauteng Shared Services Centre v Ditsamai* (2012) 33 ILJ 348 (LAC) at paras 13 – 14.

facie case that they were absolved from the suretyships in terms of these contractual provisions. Whilst the respondents in the arbitration did seek the rectification of the definition of ‘*Shareholder Equity Contribution*’ in the LFA as part of this defence (case), and that not being the case in the claim now brought by the respondents, this distinction in my view changes nothing. It must be remembered that rectification, if successful, does not introduce a new agreement, and simply confirms the terms of the existing agreement reflecting the common intention of the parties. It is thus all the same thing. In *Boundary Financing v Protea Property*¹⁵ the Court held:

‘ ... Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement. It is a declaration of what the parties to the agreement to be rectified agreed. For this reason a defendant who contends that an agreement sued upon does not correctly reflect the agreement between the parties may raise that contention as a defence without the need to counterclaim for rectification of the agreement ... ’

- [32] Undeniably, and before this Court, the so-called new defence offered by the same respondents is based on the same facts that featured in the arbitration concerning them being absolved from their suretyships as a result of the payment to the applicant of the sum of R14 400 085.00 on 31 March 2016. This new defence also relates to the same provisions in the very same agreements. The same relief is sought, being release of the respondents from the suretyships. The only difference, being the fact that rectification is no longer sought, because that has been disposed of, simply does not matter. All the requirements for the application of *res judicata* have in my view been satisfied. This principle has been specifically relied on by the applicant in opposition to the respondents’ counter application, and in my view, the point is well made, and this should in reality be the end of the matter for the respondents.

¹⁵ 2009 (3) SA 447 (SCA) at para 13. See also *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 824A–C.

[33] But even if it is accepted that a distinction can be drawn, in the context of seeking to defeat *res judicata*, between the reality that in the arbitration proceedings, rectification of the LFA and suretyships was relied upon, whilst in the current proceedings before this Court the relevant clauses of the LFA and suretyships are relied on as they stand, this still does not exclude the application of another form of *res judicata*, for the want of a better description. This is because, in my view, what is commonly known as the ‘once and for all’ principle is brought into play. In *MEC for Health and Social Development, Gauteng v DZ obo WZ*¹⁶ the Court held that this principle: ‘... *still forms part of our law ...*’. This principle is a manifestation of *res judicata*,¹⁷ even though it is not exactly the same.¹⁸ The current operative exposition of this principle is found in *Smith v Porritt and Others*¹⁹, where the Court held:

‘Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J – 671B, this is not to be construed as implying an abandonment of the principles of the common-law in favour of

¹⁶ 2018 (1) SA 335 (CC) at para 15.

¹⁷ In *DZ (supra)* at para 16, the Court said that: ‘... *It is buttressed by the res judicata principle, the purpose of which is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation ...*’. See also *Du Plessis (supra)* at para 36.

¹⁸ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) at para 28, the Court held: ‘... *the ‘once-and-for-all’ rule preclude the institution of the second action? Whilst that rule and the defence of res judicata have the same rationale they are different ...*’.

¹⁹ 2008 (6) SA 303 (SCA) at para 10. See also *Caesarstone (supra)* at para 28; *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669F–G.

those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. ... Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. ...'

And in *Evins v Shield Insurance Co Ltd*²⁰, the Court described the 'once and for all rule' as follows:

'... the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action (see *Cape Town Council v Jacobs* 1917 AD 615 at 620; *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 591; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330; *Custom Credit Corporation (Pty) Ltd v Shembe* (*supra* at 472). it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions and to ensure that there is an end to litigation.'

[34] As to when the cause of action would be considered to be the same for the purposes of the application of the 'once and for all' principle, the Court in *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others*²¹ said:

'The cause of action is the same whenever the same matter is in issue: *Wolfaardt v Colonial Government* 16 SC 250 at 253. The same issue must have been adjudicated upon. An issue is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought: *Horowitz v Brock & others* 1988 (2) SA 160 (A) at 179F-H. The reason for the rule is to prevent difficulties arising from discordant or mutually contradictory decisions due to the same action being aired more than once in different judicial proceedings: Voet 44.2.1. The object of the rule is that of public policy which requires that there should be an end to litigation and that a litigant should not be harassed twice upon the same cause: *Boshoff v Union*

²⁰ 1980 (2) SA 814 (A) at 835C-E. See also *Janse van Rensburg NO and Others v Steenkamp and Another*; *Janse van Rensburg and Others v Myburgh and Others* 2010 (1) SA 649 (SCA) at para 27.

²¹ (1999) 20 ILJ 82 (LAC) at para 7.

Government 1932 TPD 345 at 350; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-E.'

[35] Applying the above principles, what is really the situation *in casu*, if it is considered what was before the arbitrator, as opposed to what would be the case before the Court in terms of the respondents' '*new defence*'? First, the defence the arbitrator had to decide, as articulated by the respondents themselves in their plea, was whether they had been absolved from their suretyships by virtue of the requirements of the Shareholder Equity Contribution having been fulfilled. Considering the particulars of claim in respect of the claim the respondents now wish to pursue against the applicant, the articulated claim is exactly the same. Second, the facts serving as basis for this defence before the arbitrator was that the payment of R14 400 085.00 to the applicant on 31 March 2016 constituted the payment as contemplated by clause 1.2 of the suretyships and clause 6.1(n)(aa) of the LFA necessary for release from the suretyships, considering that it meant that Shareholder Equity Contribution was fulfilled. Turning to the respondents' new particulars of claim, these are the exact same facts forming the basis of the new defence from which is drawn the exact same conclusion. In particular, the respondents have not added any new or further facts to the equation, because there are none. And third, what the respondents sought from the arbitrator and would now again seek from the Court is nothing more than declaratory relief that they are absolved from their suretyships. Overall considered, it is simply the same case that was brought before the arbitrator and which was decided by him, being brought again.

[36] It follows that the only difference between the case before the arbitrator and the case now articulated in the respondents' new particulars of claim, is the issue of rectification. In my view, the distinction is of little consequence when considering the facts and the legal principles that have to be decided. It is, in essence, the same case. In any event, once the arbitrator effectively declined rectification as prayed for, what was before him was the clauses in the LFA and suretyships as they stood, and when applying the facts relating to the payment of the R14 400 085.00 in 2016 as basis for absolving the respondents from the suretyships, the arbitrator in essence found that the respondents have failed to

make out a *prima facie* case in this regard. It is irrelevant whether the arbitrator's conclusion is right or wrong.²² In the end, and all the above considered, it is undeniable that the same ultimate question based on the same facts and the same legal principles leading to the same relief, would be need to be decided by this Court in terms of the new particulars of claim, and this is not allowed. This conclusion is in line with the following *dictum* in *Democratic Alliance v Brummer*²³, where the Court dealt with what should be considered when determining whether the same issue had already been decided, and had the following to say:

'Where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about and what ...'

[37] I also wish to make reference to a number of pertinent examples of how the 'once and for all' principle has been applied by the Courts. In *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others*²⁴ the Court conducted a comparison between what had to be decided in two different proceedings, on what the Court considered to be the same issues, and had the following to say:

'In para [11] supra I described the central issues that will have to be determined in both the Israeli and these proceedings. If those issues are determined in favour of Caesarstone it will be entitled to the declaratory order it seeks that the agency agreement has either lapsed or been cancelled and to such consequential relief as may properly flow from that. If they are determined against Caesarstone it seems necessarily to follow that WOMAG and the Sachs

²² *Democratic Alliance v Brummer* 2022 JDR 3159 (SCA) at para 16.

²³ 2022 JDR 3159 (SCA) at para 15.

²⁴ 2013 (6) SA 499 (SCA) at para 24. See also the conclusion reached by the Court at para 28 of the judgment.

family can legitimately claim that there was a repudiation of the agency agreement and recover from Caesarstone any damages they may have suffered as a result. While the form in which those issues arise and the relief that is claimed consequent upon them differ in the two actions the central issue remains essentially the same. While there is not strict compliance with the requirements for *res judicata* this is in my view a proper case to relax those requirements in accordance with the approach in *Kommissaris van Binnelandse Inkomste v Absa Bank Beperk ...*'

- [38] The next reference as an example is to *Brummer supra*, which case concerned a claim by the respondent party for reinstatement of his party membership of the appellant political party. The respondent did not raise all the grounds upon which he could apply to declare the termination of his membership unlawful, and sought to add an additional ground in later proceedings. The Court reasoned as follows:²⁵

'Counsel for the appellant argued that in order to succeed in obtaining orders for re-instatement (whether interim or final) Brummer had to establish that the termination of his membership was unlawful on one or more bases. He set out to establish that case before Traverso DJP. He was required to advance his case upon every ground available to him. He did not do so. He therefore sought to introduce a further ground, i.e., the constitutional invalidity ground, at the hearing but was not permitted to do so when the amendment was refused. Since he pursued the relief, he must be bound by the outcome notwithstanding that he did not advance every ground available to him. Once the question of lawfulness of the termination of his membership is decided, he is not at liberty to seek to advance another ground not considered by the court. This, it was submitted, is the essential rationale for the *res judicata* principle. It applies equally in relation to the *exceptio* in the form of issue estoppel.

The argument is sound. ...'

- [39] Another apposite example can be found in *Manana and another v Manana and Others*²⁶. In that case, the applicants had brought an application asking for relief

²⁵ Id at paras 28 – 29.

²⁶ 2024 JDR 0311 (GJ).

that a title deed pertaining to immovable property registered in the name of one of the respondents be cancelled and the Registrar of Deeds be authorised to bring about such a cancellation. However, and in earlier proceedings, the same applicants brought an application against the same respondents pertaining to the same immovable property, in which application the remedy sought was that the sale in execution of that property be declared null and void. This earlier application was however dismissed. The Court held as follows in this context:²⁷

‘It is clear from the above that the lawfulness of the sale in execution of the property and the transfer thereof to the sixth respondent has been ventilated in court before. The matter is therefore *res judicata*. The *res judicata* rule states that a matter that has been finally determined by a court of competent jurisdiction cannot be re-litigated by the same parties or their privies in a later suit. The previous and current litigation involves the same parties, for the same relief or the same cause of action ...’

[40] I next refer to *C3 Shared Services (Pty) Ltd v Grange*²⁸. This case concerned a restraint of trade. In earlier private arbitration proceedings, the applicants sought to enforce a monetary penalty payable in terms of a non-complete clause in the restraint agreement, which claim was unsuccessful. However, and in later proceedings before the High Court, the same applicants then sought to enforce the same non-complete clause by way of specific performance in the form of an interdict. The Court had the following to say about this:²⁹

‘What is clear from the arbitration award is that both Cowley and C3 sought as claimants to enforce the same non-compete clause as is the subject matter of these proceedings before me. The difference is that in the arbitration proceedings, Cowley and C3 sought to enforce the monetary penalty payable following upon a breach of the non-compete clause, as provided for in clause 7.2 of the Sale of Shares Agreement. In the present matter, C3 seeks to enforce the non-compete clause by way of specific performance in the form of interdict proceedings. But whether the remedy is payment of a penalty or specific

²⁷ Id at para 16

²⁸ 2022 JDR 0987 (GJ).

²⁹ Id at para 69.

performance, both are dependent upon the same clause, namely clause 7.1, and which includes a finding of who the beneficiary is of the undertaking in that clause. That the issue was decided in the context of different causes of action does not, in the circumstances of this case, prevent issue estoppel from operating ...'

[41] In *Du Plessis v Public Protector and Others*³⁰ the applicant had referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) seeking relief that his dismissal be declared to be unfair, and he be reinstated. The referral was however out of time,³¹ and the applicant applied for condonation. The CCMA refused condonation, thereby finally disposing of the unfair dismissal dispute. The applicant sought to challenge this decision of the CCMA on review to the Labour Court, which was unsuccessful. An attempt to appeal to the Labour Appeal Court was also unsuccessful. The applicant was unphased and brought a complaint relating to his dismissal to the office of the Public Protector, contending that his dismissal constituted maleficence by his employer, being an employer in the public service, and that the Public Protector direct he be reinstated. The Public Protector however refused to entertain the complaint, *inter alia* because his case had been disposed of by the CCMA. The applicant then sought to review the decision of the Public Protector not to entertain his complaint, and as consequential relief sought a declaration that his dismissal was unlawful, and he be reinstated. The Court held as follows, all the above considered:³²

'Applying the most generous approach to the applicant, it can perhaps be said that the applicant's notice of motion contemplates a prayer that his dismissal be reviewed and set aside, and that he be reinstated, which would of course be something the Labour Court has the power to decide. Even accepting this is so, and considering it in isolation, the applicant faces an insurmountable obstacle. That obstacle can be found in the fact that the applicant already pursued an unfair dismissal dispute to the CCMA and lost. He then challenged the matter

³⁰ (2020) 41 ILJ 919 (LC).

³¹ In terms of section 191(1) of the Labour Relations Act 66 of 1995 (as amended), a referral to the CCMA must be made within 30 days of the date of the dismissal, and if not, good cause must be shown to allow a late referral (section 191(2)).

³² *Id* at paras 31 and 33. See also the final conclusion in the judgment at para 42.

further to the Labour Court and Labour Appeal Court, and also lost. It simply does not matter on what basis he lost. What matters is that his unfair dismissal case is finally disposed of, and therefore, it is simply not competent to afford the applicant any relief setting aside his dismissal and affording him reinstatement. ...

... In short, the parties are the same, the cause is the same, and what is ultimately demanded as consequential relief is the same. The Labour Court has already decided all of this. The LAC declined leave to appeal. The case is thus disposed of, and cannot be revisited under a new guise.'

[42] I refer as a final example to the judgment in *Fidelity Guards Holdings supra*.³³ In that case, the court dealt with two different applications to declare a strike unprotected in terms of sections 64 and 65 of the Labour Relations Act (LRA).³⁴ The parties, the facts, and the ultimate interdictory relief sought in both matters were the same. However, the cause of action in the two applications were based on different grounds flowing from the aforesaid sections of the LRA. The Court described the issue as follows:³⁵

'The enquiry in this matter is whether the cause of action in the first application (heard by Revelas J) was the same in the second application which is the subject-matter of this appeal. In both applications the contention was that the strike was unprotected. What differed was the basis for that contention. In my view, the cause of action was nevertheless the same, namely, that the strike was unprotected for want of compliance with the provisions of the 1995 Act.'

The Court then concluded:³⁶

'... In an application for a declaratory order and an interdict on the basis that a strike is unprotected, the employer is obliged to raise all its contentions in that application. It is not entitled to litigate piecemeal with the union and its members. ...

³³ Id fn 21.

³⁴ Act 66 of 1995 (as amended).

³⁵ Id at para 5. The court held that a strike could be considered unprotected for various reasons under the LRA, as contained in sections 64 and 65, and on either substantive or procedural grounds, or both.

³⁶ Id at paras 11 and 13.

What the appellant did in the present matter, however, was to attempt to circumvent these provisions of the law by launching new proceedings on the same issue, albeit on a different basis. That it cannot do.'

[43] I am satisfied that *in casu*, the respondents are seeking to do nothing else, where it comes to instituting the new claim and associate purported new defence against the applicant, other than instituting further proceedings between the same parties relating to the same cause of action and seeking the same outcome.³⁷ It is, simply put, the same case. It follows that the respondents cannot keep litigating by just changing the grounds of their claim (or defence). The '*once and for all*' rule must find application, bringing matters to an end. Such continued piecemeal litigation is equally contrary to public policy. As held in *Du Plessis supra*:³⁸ '*... It is entirely undesirable that a litigant brings one claim after another based on in essence the same lis between the same parties, simply by rotating different possible causes of action to justify the same ultimate relief. ...*'. Even if it can be said that the respondents would be prejudiced by this, I believe this prejudice is insufficient to detract from the application of the principle, considering all that transpired in this case and the fact that the respondents were throughout represented by senior legal representatives. All said, I thus conclude that the application of the '*once and for all*' rule renders the respondents' new defence and / or new claim they seek to raise and bring against the applicant as incompetent, and it must fail on this basis as well.

[44] But even if I am wrong where it comes to the application of *res judicata* and / or the '*once and for all*' rule, and that it may be feasible or competent for the respondents to pursue their new defence / claim against the applicant, the respondents still face another formidable obstacle. This obstacle is found in the doctrine of election (acquiescence). In *Hlatshwayo v Mare and Deas*³⁹ the

³⁷ In *Boshoff v Union Government* 1932 TPD 345 at 350 – 35, the Court said that: '*... Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms ...*'. See also *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 179A-D; *Aon South Africa (Pty) Ltd v Van den Heever NO and Others* 2018 (6) SA 38 (SCA) at para 22.

³⁸ *Id* at para 36.

³⁹ 1912 AD 242.at 259.

Court said: ‘... *Whether then we base the doctrine of acquiescence on the consent which is implied or the choice which is exercised, or call it waiver makes no difference. At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approbate and reprobate*’. Applying this doctrine, the Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁴⁰ held:

‘... The principle of the right of election is a fundamental one in our law. ... When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte-face is prejudicial or is unfair to another ...’

[45] Examples of exactly how this doctrine works is perhaps once again the best manner in which to illustrate its application *in casu*. Virtually in point is the judgment in *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC*⁴¹. The Court in that case considered a rectification defence, relating to a particular paragraph in an agreement. The defence was that the presence of the relevant paragraph in the agreement was as a result of a ‘*bona fide mistake*’ and did not represent the common intention of the parties.⁴² The Court however found that there was no such common mistake proven, on the facts.⁴³ Importantly however, the respondent party relied on that very same clause in support of its main defence, whilst the rectification defence was the alternate defence. The Court concluded:⁴⁴

‘... Moreover, the respondent relied on the relevant paragraph in support of its main defence. But relying on the provision for the purposes of its main defence, and seeking to escape it for the purposes of its alternative defence, is mutually

⁴⁰ 2009 (1) SA 390 (CC) at para 54. See also *Chamber of Mines of SA v National Union of Mineworkers* 1987 (1) SA 668 (A) at 690D-E, where it was said: ‘... *One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application* ...’.

⁴¹ 2020 (2) SA 419 (SCA).

⁴² In terms of the rectification sought, the clause was to be removed.

⁴³ *Id* at para 21.

⁴⁴ *Id* at para 23.

incompatible. '(N)o person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.'

- [46] In fact, where the doctrine of election most often comes into play is in the instances concerning an innocent party's rights relating to a material breach of contract, constituting repudiation of the contract. It is trite that in such a case, the innocent party has an election. It can either cancel the agreement and claim damages, or it can enforce the agreement and claim specific performance. These remedies are mutually exclusive and inconsistent, and once one remedy is elected, a party cannot change its mind and revert to the other.⁴⁵ As said in *Thomas v Henry and Another*⁴⁶:

'It has often been said that if an innocent party is entitled to cancel a contract, whether on the ground of misrepresentation or breach of contract, he must exercise an election between two inconsistent remedies, ie whether to cancel or to abide by the contract; that the election of one remedy necessarily involves the abandonment of the other and that he therefore cannot both approbate and reprobate. In *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698 TROLLIP JA said that election generally involves a waiver in the sense that one right is waived by choosing to exercise another right which is inconsistent with the former, and pointed out that election and waiver have been equated as being species of the same general legal concept.'

- [47] *In casu*, I have little hesitation in concluding that the doctrine of election scuppers the ability of the respondents to now seek to rely on the definition of 'Shareholder Equity Contribution' as it stands in the LFA, unrectified. I must confess that considering the gist of the rectification proposed by the respondents, I find it difficult to comprehend how the unrectified provisions could ever sustain the respondents' defence. Nonetheless, where it came to the arbitration proceedings, the respondents had to make a choice between to

⁴⁵ See *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* (2) 2005 (6) SA 23 (C) at para 32; *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 542F-G; *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA) at para 14; *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 (5) SA 420 (SCA) at para 23; *Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 (6) SA 91 (C) at para 51.

⁴⁶ 1985 (3) SA 889 (A) 895J-896C.

mutually exclusive and inconsistent remedies. On the one hand, the remedy pursued was that the said definition needed to be rectified to sustain the defence that the payment of R14 400 085.00 on 31 March 2016 absolved the respondents from their suretyships. But on the other hand, the remedy would be that the said definition as it stands, would sustain the defence that the payment of R14 400 085.00 on 31 March 2016 absolved the respondents from their suretyships. To put it simply, it surely cannot be said that a change to the agreement is needed to win, but when the proposed change fails, it then be said that no worries, a change is not needed to win. In my view, and obviously, both cannot be applied as remedies sought in one single case on the same facts. It takes little insight to appreciate that these remedies cannot exist side by side or even in the alternative. It is either the one or the other, with the one applying to the exclusion of the other.

[48] The above being said, and in the arbitration, the respondent consequently made their choice. They elected to pursue the remedy based on rectification. When they first filed their defence, it was open to the respondents to plead a case based on the provisions of the LFA and suretyships as they stood, without relying on rectification. But instead, they only pleaded a case and remedy based on rectification. They stuck with this choice when concluding the arbitration agreement. Based on this choice made up to this point, they cannot now reprobate, and now decide to pursue the contradictory remedy.

[49] But it is even more than just the choice made as described above. It appears undisputed from the affidavits before me that in the course of conducting the arbitration, the respondents actually suggested to the arbitrator that she could decide whether they were absolved from their suretyships based on the definition of '*Shareholder Equity Contribution*' as it stood, without rectification. The applicant raised an objection in this regard, as such a case was never pleaded, and the arbitration agreement provided that only the cases of the parties as contained in the pleadings were before the arbitrator to decide. The arbitrator upheld this objection, and determined that she had no jurisdiction to

decide the case on this basis.⁴⁷ The respondents suggest that this indicates that the issue of absolving them from their suretyships without rectification was expressly excluded from the arbitration, and thus they would be able to raise it now. But what respondents seem to completely ignore is that the arbitration agreement specifically provided that the arbitration would be conducted in terms of the Uniform Rules. It is trite that in terms of Rule 28(1) of the Uniform Rules, a party would be entitled to amend its pleadings at any time prior to judgment.⁴⁸ With the arbitration agreement providing that the issues to be decided are determined by the pleadings, all that was needed was an amendment of the respondents' plea. There was nothing standing in the way of the respondents seeking to amend their plea, but they elected not to do so, and persisted having the arbitrator decide the matter based on the plea as it stood. They must be held to the outcome resulting from this election, even if it is to their detriment.⁴⁹

- [50] In the end, the respondents cannot approbate, and rely on rectification, but when that does not turn out well for them, reprobate, and rely on the very same contractual provisions without seeking rectification. In fact, a logical conclusion would surely be that if rectification is necessary to sustain a claim, then the unrectified contractual provision cannot sustain the claim. The respondents must be held to their choice, which also puts paid to the new defence sought to be raised now. As held in *Pitelli v Everton Gardens Projects CC*⁵⁰: ‘... A litigant cannot expect to blow hot and cold depending upon which is most advantageous at the time ...’.

⁴⁷ This approach of the arbitrator would be correct – see *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd* 2008 (2) SA 608 (SCA) at para 30; *Close-Up Mining and Others v Boruchowitz NO and Another* 2023 (4) SA 38 (SCA) at para 13.

⁴⁸ In *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at para 30, the Court held: ‘In terms of Rule 28(10) the court may, at any stage before judgment, grant leave to amend any pleading or document. The defendant in this matter was clearly entitled to amend his plea at any stage of the proceedings before judgment ...’. Also compare *Phoenix International Logistics (Pty) Ltd v QD Cellular (Pty) Ltd* 2021 JDR 3230 (GJ) at para 30; *Estate Agency Affairs Board v Pasco Risk Management (Pty) Limited* 2017 JDR 1618 (GJ) at para 4; *Minister of Police v Phalafala* 2015 JDR 0447 (GP) at para 37; *Generaal Hendrik Schoeman Laerskool v Bastian Financial Services (Pty) Ltd* 2013 JDR 1663 (GNP) at para 11.

⁴⁹ Compare *Boverhoff v Aldes Business Brokers (Pty) Ltd* 2023 JDR 2654 (GP) at para 54.

⁵⁰ 2010 (5) SA 171 (SCA) at para 34.

- [51] The conclusion I have reached as summarized above should really be the end of the matter where it comes to the respondents' counter application, as a whole. The claim / defence proffered in the counter application is not competent, either because it had been disposed of in the arbitration proceedings and thus being hit by the application of *res judicata*, or by way of the application of the '*once and for all*' rule, or because the respondents had made an election to which they must be held bound. The counter application falls to be dismissed for these reasons alone.
- [52] For the sake of being complete, I will nonetheless touch on the merits of the respondents' counter application, which would obviously now be based on the definition of '*Shareholders Equity Contribution*' in the LFA as it stands. As already said, the facts remain the same, namely whether the payment of R14 400 085.00 on 31 March 2016 to the applicant, which payment emanated from the sale of certain property in the development, constituted payment of the Shareholders Equity Contribution, thus absolving the respondents from their suretyships.
- [53] Where it comes to interpreting the LFA and the suretyships, the principles to be applied in doing so are trite. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵¹ the Court held as follows:

'... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or

⁵¹ 2012 (4) SA 593 (SCA) at para 18.

unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[54] The approach established in *Endumeni supra* has been consistently applied since.⁵² In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*⁵³ the Court had the following to say:

... I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined ...'

And in *University of Johannesburg v Auckland Park Theological Seminary and Another*⁵⁴ it was held:

'... The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract ...'

⁵² See *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12; *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) at para 21 and all the authorities cited there; *Nel v De Beer and Another* 2023 (2) SA 170 (SCA) at paras 22 – 23.

⁵³ 2022 (1) SA 100 (SCA) at para 25.

⁵⁴ 2021 (6) SA 1 (CC) at para 66.

- [55] In my view, the terms of the LFA and suretyships, where it comes to the issue at stake in this case, are clear, unambiguous, and interpreting the same is relatively simple. As to context, it appears from the evidence that the affording of the suretyships by the respondents was initially a contentious issue, but it was ultimately agreed to, as it stands, as an essential component of the entire transaction. It was also agreed that the suretyships be limited to R12.5 million, and provision was specifically made for the discharge of the same if a specific condition was met. There can be nothing contentious in any of this. And added to this, there is a binding finding by the arbitrator that there is no evidence that the LFA, as it stands, does not accord with the true intention of the parties. So, and considering the definition of '*Shareholder Equity Contribution*' as the agreed basis for discharge of the suretyships, what is needed? The answer is not just simply the payment of a sum of money. First, the sum of R12.5 million must be injected by Cranbrook into Proline as equity. Second, the injection must either be made in cash, or from the proceeds of the sale of extension 7 (or any other extension approved by the applicant) to ASA Metals. And thirdly, the payment must be accounted for as equity in Proline's books of account. Added to this, clause 1.2 of the suretyships require this payment to be made to the '*debtor*', which is Proline.
- [56] Did the above happen *in casu*? Surely not. First and foremost, a proper consideration of what is intended by clause 1.2 of the suretyships is the release of the sureties once Proline had received a capital injection of R12.5 million to be held as equity. This cash equity would obviously be in exchange for the security in the same amount provided by the suretyships of the respondents. It is the exchange of one form of security for another, and does not contemplate any payment to the applicant. The applicant receives its payments from Proline by virtue of entirely different provisions of the LFA. Therefore, the payment to the applicant of the sum of R14 400 085.00 simply cannot qualify as a '*Shareholder Equity Contribution*'.
- [57] But even more, further context clearly indicates that what happened is that Proline defaulted where it came to its payment obligations under the LFA. Various addenda to the LFA were concluded to accommodate Proline,

culminating in an agreement that Proline repay the debt owing to the applicant utilising 80% of all amounts paid into the revenue account of Proline from the proceeds of sale of stands in the development, until all principal amounts and interest on the loan was repaid in full. The applicant also had the added security of all the immovable properties owned by Proline being encumbered with a covering mortgage bond. In this context, Proline then sold a specific property to a third party (not ASA metals). It needed the applicant's agreement to do this, as a result of the covering mortgage bond. Out of the proceeds of this sale, the applicant was then paid R14 400 085.00, and this met the 80% requirement of the proceeds of sales of properties being attributable to the applicant in settlement of the debt owing to it. This is clearly a transaction in line with what is contained in the LFA where it comes to Proline settling the debt owing to the applicant, and nothing else.

[58] In sum, I am convinced that on the facts, the payment of the R14 400 085.00 to the applicant was not payment of the Shareholder Equity Contribution as contemplated by the suretyships and the LFA, and had nothing at all to do with it. It was a part payment towards the capital debt owing by the applicant to Proline, in the manner prescribed by the LFA. And in any event, the payment was not the result of a sale of a property to ASA Metals, and Cranbrook did not inject the proceeds of the sale as equity into Proline which was recorded in the books of Proline as such, which is also required to exist in order for the payment to qualify as the Shareholder Equity Contribution contemplated by the LFA. On the merits, the respondents' claim / defence has zero substance.

[59] In my view, the conduct of the respondents *in casu* constitutes nothing else but pure opportunism. They opportunistically seized upon what was simply a payment by Proline dating back some seven years ago, towards the debt it still owed the applicant as already in arrears, to extract themselves from the suretyships they had given. This is undoubtedly a contrived defence, all facts considered. Since Proline does owe the debt, as has been found by the arbitrator to be the case, the respondents must be held to their bargain, and come to the party to at least make the limited contribution they had agreed to

make if matters went south. The counter application must therefore equally fail because of the complete lack of substance thereof.

Conclusion

[60] For all the reasons set out above, I am satisfied that the applicant is entitled to the declaratory relief sought in the notice of motion, to the effect that the arbitration award of the arbitrator, retired Judge C Pretorius, handed down on 12 April 2023, be made an order of Court in terms of section 31 of the AA. The respondents simply have no defence to such relief, for the reasons elaborated on in full, above. In *Cool Ideas 1186 CC v Hubbard and Another*⁵⁵ the Court held:

‘... Courts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute. ...’

[61] Where it comes to the respondents' claim / defence as contained in their counter application, it falls to be dismissed in its entirety, as the claim / defence raised therein is simply not competent, and in any event lacks substance, as I have also discussed in full above. The counter application must therefore be dismissed.

[62] This only leaves the issue of costs. The applicant was successful. In the notice of motion, the applicant did not seek costs, but this was subject to the proviso that the application to make the arbitration award an order of Court was unopposed. The application turned out to be far from unopposed. And not only that, it was opposed on a basis that in my view is nothing but contrived and undermines the objective of the finality of arbitration awards, without any justification for such conduct. This justifies a costs award against the

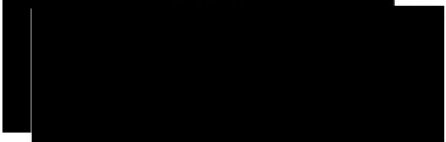
⁵⁵ 2014 (4) SA 474 (CC) at para 56.

respondent, including the costs of two counsel, at scale C. I am also satisfied that the matter is of sufficient complexity to justify such a costs award.

[63] In all the circumstances as set out above, the following order is made:

Order

1. The arbitration award delivered by arbitrator retired Judge C Pretorius, on 12 April 2023, is made an order of Court.
2. The respondents' counter application is dismissed.
3. The respondents are ordered to pay the applicant's costs on a party and party scale C, the one paying the other to be absolved, which costs shall include the costs of two counsel.


SNYMAN AJ

Acting Judge of the High Court of South Africa
Gauteng Division, Pretoria

Appearances:

Heard on:	5 June 2024
For the Appellant:	Advocate J Vorster SC together with Advocate B Ramela
Instructed by:	Norton Rose Fulbright (SA) Attorneys
For the First and Second Respondent:	Advocate A Els SC
Instructed by:	Couzyn Hertzog & Horak Attorneys
Date of Judgment:	24 July 2024