

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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

17/9/2024
DATE

SIGNATURE

CASE NO: 2022/027451

In the matter between:

BEST DRIVE HOLDINGS (PTY) LIMITED

First Applicant/ Plaintiff

NV CAPITAL (PTY) LIMITED

Second Applicant/ Plaintiff

and

MARTIN HENRY LEWIS

Respondent/Defendant

JUDGMENT

GRAVES AJ:

[1] The Applicants / Plaintiffs apply on motion for leave to amend their particulars of claim dated 21 September 2022. The amendment is sought following an exception delivered by the Respondent/Defendant during January 2023. In response, the Plaintiffs during June 2023 delivered a notice of intention to amend their particulars of claim in certain respects. This, in turn, elicited an objection by the Defendant dated 17 July 2023. The application to amend before me is brought in terms of Rule 28(4) supported by a founding affidavit. The Defendant has filed an answering affidavit reiterating his opposition to the amendment and the Plaintiff has replied.

[2] It is necessary to traverse the pleadings and notices in some detail to reveal the contested features of the proposed amendment. The unamended particulars of claim plead this background to the cause of action against the Defendant: ¹

[2.1] On 25 June 2019 a company presently named Masimong Resources Solutions Mining (Pty) Limited ("the principal debtor") concluded a written loan agreement (hereafter "the 2019 agreement") with these relevant terms:

[2.1.1] the Plaintiffs would lend R9 000 000 to the principal debtor for a period of 12 months from 1 July 2019;

[2.1.2] the loan would be repaid in equal monthly instalments of R1 000 000 per month, commencing on 30 September 2019;

¹ The italicised portions reflect the *ipsissima verba* of the original pleading. My own interpellations are added in parenthesis, viz [...]

[2.1.3] interest would be payable monthly in equal instalments of R1 000 000 per month for nine months, commencing on 30 September 2019.²

[2.2] The principal debtor would be in default if it failed to pay any amounts owing in terms of the loan agreement on due date.

[2.3] Preceding the conclusion of the [2019] agreement the principal debtor had approached the Plaintiffs requesting the roll-over of R7 000 000 (representing the unpaid sum *in terms of an extant preceding loan contract concluded between the plaintiffs and the principal debtor on or about 2 August 2018*³), and for an additional advance of R2 000 000.

[2.4] The Plaintiffs performed their joint obligations in terms of the [2019] agreement by advancing the additional R2 000 000 to the principal debtor on or about 30 June 2019.

[2.5] On 25 July 2018, the Defendant executed a written deed of suretyship in favour of the Plaintiffs, whereby:

[2.5.1] he bound himself as surety and co-principal debtor, jointly and severally with the principal debtor in favour of the Plaintiffs for due

² This is the manner in which the interest provision is pleaded. However, the term "*loan interest*" is defined in the 2019 agreement as being the proportion of the loan that is charged as interest, determined by "*each respective deal sheet addendum payable monthly in equal portions, starting at the end of month 3*". No such deal sheet addenda are attached to the pleading.

³ It is not without significance that the italicized portion is found in a footnote to the pleading.

performance of all of that party's obligations in terms of the 2019 loan agreement;

[2.5.2] he accepted his liability for proper and timeous payment by the principal of all amounts owing in terms of *the loan agreement*;

[2.5.3] he renounced the benefits including excussion and division available to him.

[2.6] The principal debtor was finally liquidated on 27 January 2021.

[2.7] The principal debtor breached the terms of *the extant preceding loan contract*, as a result of which the Plaintiffs obtained judgment against the Defendant based on his suretyship obligation, on 8 September 2022 for payment of the sum of R7 000 000 due *under the extant preceding loan agreement*.⁴

[2.8] *The sum payable by the principal debtor to the plaintiffs is R11 000 000 (comprising the R2 000 000 additional advance, and R9 000 000 interest payable in terms of the extant [2018/2019??] loan agreement)* and in the premises the Defendant is jointly and severally liable for payment of this sum.

[3] The Defendant excepted, pleading the following:⁵

⁴ The judgment was granted in the Gauteng Division, Johannesburg, under case number 55647/2021.

⁵ The *ipsissima verba* are similarly rendered in italics and my own interpellations are added in parenthesis, viz [...].

[3.1] the deed of suretyship records that the Defendant binds himself for due performance of the principal debtor for all of that party's obligations in terms of the loan agreement concluded;

[3.2] the loan agreement referred to in (in a footnote to) the particulars of claim is *the extant [2018] preceding loan contract between the Plaintiffs and the principal debtor*, concluded on 2 August 2018;

[3.3] the Plaintiffs' claim relies upon the suretyship, but is in respect of the loan agreement concluded in June 2019;

[3.4] because the 2018 and the 2019 loan agreements are distinct and separate agreement and the suretyship is not a continuing suretyship, but is in respect of the 2018 agreement, the particulars of claim do not disclose a cause of action.

[4] This elicited an application to amend by the Plaintiff, the essential elements of which are these: ⁶

[4.1] *the [2019] loan agreement was a written amendment of a preceding loan agreement concluded between the parties on 2 August 2018 [viz the 2018 agreement];*

⁶ Rendered as in the footnote above.

[4.2] the amendment of the 2018 loan agreement by the conclusion of the 2019 loan agreement was in accordance with the clause 12.3 of the 2018 loan agreement [and arose in the circumstances detailed immediately below];

[4.3] the principal debtor approached the plaintiffs *requesting the roll-over of R7 000 000,00 which was due and payable under the initial [2018] agreement (prior to its amendment as aforesaid) on 30 January 2019...and for the additional advance of R2 000 000,00... on the basis that the roll-over amount of R7 000 000,00 and the additional amount of R2 000 000.00 would make up the amended loan amount under the [2018] loan agreement;*

[4.4] the principal debtor did not repay the R7 000 000 on 30 January 2019⁷ since the sum was rolled-over to the loan agreement [apparently the 2019 agreement is here referenced] as agreed and the repayment date and repayment terms, amongst others, of the initial [2018] agreement were amended in accordance with the terms of the [2019] loan agreement.

[4.5] the Plaintiffs advanced the additional R2 000 000 to the principal debtor, thereby increasing the total amount of indebtedness to R9 000 000;

[4.6] in accordance with the suretyship, the Defendant agreed that the Plaintiffs and the principal debtor may at all times vary the terms of the initial [2018] loan agreement and that these variations would vary the obligations of

⁷ This being the due date on which the loan amount and interest was to be paid in full in accordance with the 2018 agreement].

the Defendant to the Plaintiffs in accordance with clause 4.3.3 of the suretyship;⁸

[4.7] by reason of clause 4.3.3 of the suretyship and the subsequent amendment of the initial [2018] loan agreement, the Defendant has remained bound as surety and co-principal debtor for the due performance of the principal debtor under the loan agreement;

[4.8] the Defendant is jointly and severally liable to the Plaintiffs for payment of the sum of R9 000 000, plus interest payable in terms of the [2018] loan agreement, interest and costs.⁹

[5] In response the Defendant delivered a notice of objection in terms of Rule 28(3) advancing these principal points in support of the contention that the amended pleading discloses no cause of action:

[5.1] the 2019 loan agreement is a separate agreement which is materially different from the 2018 agreement, and is not an amendment or variation of the 2018 agreement;

⁸ This clause provides that the creditors and the debtor may at all times "vary the terms and conditions of the loan agreement as they deem necessary without prejudice to any of the rights of the creditors against the surety, and any such variations shall vary the obligations of the surety to the creditors accordingly."

⁹ In the amended payer (i) the Plaintiffs ask for payment of R9 000 000,00 "*plus R9 000 000,00 interest payable...*" I will assume this to be an editing error.

[5.2] the 2019 agreement is a novation of the 2018 agreement, does not make reference to a suretyship and contains clause 11.6 which declares that this (2019) agreement is the entire agreement;

[5.3] the Plaintiffs instituted a separate action against the Defendant based on the 2019 agreement and a valid special plea of *lis pendens* can be raised.¹⁰

[6] The Plaintiffs then delivered the Rule 28(4) application.

DISCUSSION

[7] This traverse of the pleadings and documents reveals that the Plaintiffs' amended case is that (i) the 2018 loan agreement has been amended by the 2019 loan agreement and (ii) that the accessory liability of the Defendant under the suretyship, remains. The heads of argument submitted by Mr Steyn, who appeared with Mr Pretorius contains the following contentions:

[7.1] *"The intended amendment seeks to supplement and clarify the existing cause of action to the effect that the 2019 loan agreement was a continuation of the initial loan advance under the initial loan agreement, being a restatement of the only loan agreement between the parties albeit on a different document with minor differences in terms, while the majority of the terms remained exactly the same ..."*

¹⁰ Default judgment that is said in the objection to have been granted against the Defendant was subsequently rescinded.

[7.2] *“Simply put, the intended amendment aims to make it clear that the 2018 document embodying the initial loan agreement has been amended through the 2019 document embodying the 2019 loan agreement. However, it remained a single continuous and existing loan throughout of R7 000 000, with an additional advance of R2 000 000.”* [Emphasis added]

I should mention that the original particulars of claim show no indication of being drafted by counsel who appeared for the Applicants.

[8] During argument I put to Mr Steyn that the general structure of the 2019 loan agreement was not that of an amendment, but was rather a self-standing commercial agreement, which includes clause 11.6 titled *“Entire Agreement”* in these terms:

*“This Agreement contains the entire agreement between the Parties concerning the subject matter recorded herein and no Party shall be bound by undertakings, representations, warranties, promises or the like not recorded in this Agreement. This Agreement supersedes all prior agreements, representations, communications, negotiations and understandings between the Parties concerning the subject matter of this Agreement.”*¹¹

[Emphasis added]

His response, as I understood was that the process of establishing the intention of the parties from the respective documents should not be restricted to this clause alone, but needed to consider the both the 2018 and the 2019 agreements. I now do so.

¹¹ The 2018 agreement contains an identical clause.

The subject matter of the transaction referred to in clause 11.6 of the 2019 agreement is that found in clause 4.1, which declares that the lender (the Plaintiffs) lends to the borrower (the principal debtor) with effect from the effective date, "*the Loan Amount*". The Loan Amount is found in the "Deal Sheet, Addendum no. 1: Imbabala Colliery" attached to the 2019 agreement, separately signed by the Plaintiffs and the principal debtor and is reflected as R9 000 000.00. Clause 4.2 of the loan agreement provides that the Loan Amount is to be paid in a single instalment into the borrower's bank account, details of which are provided. The Deal Sheet provides for a repayment term of 12 months payable in equal instalments from month 3 over the repayment period, starting on 30 September 2019.

[9] Despite certain clauses common to both the 2018 and the 2019 loan agreements I do not agree that the documents are the same, with minor differences in terms as submitted by the Plaintiffs' counsel. I also have doubts about the submission made in the Plaintiffs' heads of argument that the R7 000 000 forming part of the 2019 loan agreement is the same R7 000 000 that was due and payable under the initial (2018) agreement, increased by R2 000 000 due to a further advance. This is primarily because the Loan Amount recorded in the 2018 agreement is R5 000 000, which is recorded as being payable at the end of the six months loan period (clause 3.1 *sv* "Definitions"). Adding to the confusion is that the definition of "*Interest*" within the definitions clause of the 2018 agreement refers to "*that proportion of the loan which is charged as interest to the borrower, which amounts to a total of R3 000 000 (three million rand) payable in equal monthly portions*".

[10] The potential ambiguity is reinforced later in the 2018 loan agreement which states that the interest in the sum of R3 000 000 attached to the loan value of R5 000 000 makes up the total value to be repaid in the sum of R8 000 000.¹²

[11] Whilst the paragraph of the pleading quoted in paragraph 4.3 above (which refers to the roll-over of R7 000 000 payable under the 2018 loan agreement) is arguably sustainable from the perspective of pleadings, this does not resolve the contradictions when seeking to reconcile the amended pleading with the 2019 loan agreement, which is claimed to be no more than an amendment of the 2018 loan agreement:

[11.1] the import of that portion of the pleading referenced immediately above, charitably interpreted, must mean that the R7 000 000 represented a combination of the loan amount and interest payable under the 2018 loan agreement;

[11.2] clause 4.2 of the 2019 agreement specifies that the Loan Amount (defined in the Deal Sheet as R9 000 000,00) will be paid in one single instalment into the borrower's bank account. This clause must, on the Plaintiffs' approach replace/amend clause 4.2 of the 2018 agreement (which refers to a loan amount of R5 000 000,00 which sum does not include interest);

[11.3] but this conflicts with the pleaded amendment captured in paragraph 4.3 above, which relies upon a "roll-over" of the R7 000 000,00 due and payable

¹² Provision is made for interest to be paid monthly in equal instalments of R500 000 for a six months period, commencing on 30 September 2018 (clause 6.3). The Loan Amount as indicated above was payable not later than at the end of the six months loan period, presumably calculated from the effective date, being 25 July 2018. Nothing is said in the particulars about payments made.

under the initial (2018) agreement, and the combination of this initial sum with a further R2 000 000,00 advance. As presently formulated the pleading, read with the two loan agreements does not support an interpretation of R9 000 000,00 being paid by the Plaintiffs to the principal debtor's nominated bank in a single instalment, in accordance with the 2018 agreement as amended;

[11.4] further on the amendment sought to be introduced, the rolled-over portion forming part of the Loan Amount as defined in the 2018 agreement must be assumed to have been factually paid to the Defendant under the unamended version of that agreement; this is the necessary implication of the pleaded allegation above that this sum represents "*the unpaid sum in terms of the extant preceding loan contract*". But as stated above the Plaintiffs' amendment cannot be read as alleging that the Loan Amount (R9 000 000,00) as defined under the 2019 agreement was paid in a single instalment to the principal debtor. The amendment would thus create a contradictory tension between the pleading and the 2018 agreement;

[11.5] lest the point that I make be misunderstood I add this: generally speaking, the manner in which parties seek to perform reciprocal contractual obligations is within their control and limited only by the requirement that this be lawful and not prohibited by their agreement. However, when parties in the position of the present Plaintiffs advance a claim based upon an amendment of a preceding written agreement by a subsequent written agreement, they cannot rely on a contractual mechanism for amendment that conflicts with the other pleaded facts, or with the agreement itself. And neither may they

advance a case that contemplates or requires those parties to lead evidence at a trial that would contradict the terms of a written agreement (a theme that I return to below).

[12] There are further provisions of the 2019 agreement which cast considerable doubt on the status of this document as an amendment of the 2018 agreement. I have already alluded to and quoted clause 11.6 of the 2019 agreement, which records the consensus of the parties to that instrument that it “*supersedes all prior agreements, representations, communications, negotiations and understandings between the Parties concerning the subject matter of this Agreement*”. As recently affirmed by the Supreme Court of Appeal the parol evidence rule is an important principle that remains part of our law. This rule requires that, save in exceptional circumstances such as fraud or duress, where the parties to a contract have reduced their agreement to writing and assented to that writing as a complete and accurate integration of the contract, extrinsic evidence is inadmissible to contradict, add to or modify the contract.¹³

[13] This *dictum* must be read with the earlier judgment of the Constitutional Court in **University of Johannesburg v Auckland Park Theological Seminary and Another**¹⁴ in which that apex court provided clarity as to the circumstances in which extrinsic evidence would be admissible in the interpretation process. It was there pointed out that whilst evidence regarding context and purpose was admissible whether or not the words in the contract were ambiguous or not, it was cautioned

¹³ **Capital Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Limited and Others**, 2022 (1) SA 100 (SCA), at para [38].

¹⁴ 2021 (6) SA 1 (CC).

that the court's recourse to extrinsic evidence is not limitless because interpretation is a matter of law and not of fact, consequently being a matter for the court and not for witnesses.¹⁵ The Court in **Capitec Bank** helpfully provides a reconciliation between the continued recognition of the parol evidence rule and the statements of the Constitutional Court in **Auckland Park**:

*"Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects chose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."*¹⁶

I have referenced these important judgments on the path to considering the submissions quoted in paragraph 7 above, as supplemented by the further submission in the Plaintiffs' heads that the determination of whether the 2019 agreement is an amendment of the 2018 agreement, is a question of fact to be established by evidence at the trial, having regard *inter alia* to its factual matrix and purpose.

[14] As I have already noted the subject matter of the 2019 agreement differs materially from the subject matter (*i.e.* loan) that was dealt with in the 2018 agreement. To amend a document generally results in a correction, an

¹⁵ **Auckland Park**, at para [68].

¹⁶ **Capitec Bank**, para [51].

improvement or a removal of faults.¹⁷ This is not what is textually represented by the 2019 agreement, when compared to the 2018 agreement. What is before me is one (2018) agreement followed chronologically by another (2019) agreement which contains some identical (“boilerplate”) clauses, but also some material differences including a different loan amount, interest provisions, and in the case of the 2019 agreement a deal sheet with further terms not found in the 2018 agreement. In the case of the 2018 agreement there is a clause recording simultaneous conclusion by a suretyship by the defendant; this latter clause is not found in the 2019 agreement. This is a significant feature; the Plaintiffs’ amended cause of action is only sustainable if the 2018 agreement containing clause is the “*single continuous and existing loan*” as contended by the Plaintiffs. Whilst I generally accept that an amendment to this type of commercial agreement of loan can alter the loan amount, a materially different structure and form of the underlying premise and purpose of an original agreement, as in the instant case does not convince me that this no more than a restatement of the only loan agreement between the parties, albeit in a different document with minor differences in terms, as contended above.

[15] Further, to accept that there was no more than an amendment to the 2018 agreement would require some mechanism to deal with the clear recordal in clause 11.6 of the 2019 agreement that it superseded all prior agreements. The dictionary definition of “supersede” includes: *discontinue; render superfluous or unnecessary; take the place of*.¹⁸ For the 2018 agreement to remain extant notwithstanding clause 11.6 of the 2019 agreement, and not be superseded requires clause 11.6 to

¹⁷ **Shorter English Dictionary on Historical Principles** (6th ed, Oxford University Press, 2007), sv “amend”, “amendment”.

¹⁸ *Id*, sv “supersede”.

be read as *pro non scripto*. Although the Plaintiffs did not in terms contend for such a consequence either in their application to amend or in argument this is the consequence of their amended claim; the amendment that they seek to introduce to the 2018 agreement must deal with the impact of clause 11.6 of the 2019 agreement. If this clause of the 2019 agreement remains operative then its clear language determines that the 2018 agreement is superseded. Courts have no discretion to refuse to enforce a valid contractual provision, this being an incident of *pacta sunt servanda*.¹⁹

[16] The 2018 agreement was signed by three of the parties on 25 July 2018 and by the last signatory on 2 August 2018. The suretyship was signed by the Defendant and the First Plaintiff on 25 July 2018 and by the Second Plaintiff on 2 August 2018. The suretyship in various clauses refers to the obligations of the debtor / respondent in terms of “*the loan agreement concluded*”. Unmistakably, at the date of conclusion of the suretyship these references to the loan agreement can only refer to the 2018 agreement. The 2018 agreement contains this clause:

“10. **SURETY**

The representative of the Borrower and co-principal Debtor, Martin Lewis (identity number ...) will conclude a suretyship agreement simultaneously with this Agreement, thereby binding himself as Surety and co-principal debtor to the Lenders for the proper compliance of the Borrower with all its obligations in terms of and resulting from this Agreement or the cancellation thereof. ...”

[Emphasis added]

¹⁹ **Brisley v Drotsky** 2002 (4) SA 1 (SCA) at paras [12], [14] and [93]. There the clause in question was an entrenchment clause, but the principle articulated is of general application.

[17] For completeness I have considered whether I am required to infer that there is some evidence that could be led by the Plaintiffs to avoid the consequence of the clear wording of clause 11.6 of the 2019 agreement. This cannot easily be inferred and certainly not without some basis being laid. The Plaintiffs have not in their application to amend dealt with the difficulty arising from clause 11.6, nor suggested evidence that could be adduced (which I deal with below) to manage this. Without any acceptable manner of dealing with clause 11.6 of the 2019 agreement the amended cause of action which relies upon the amendment of the 2018 agreement by the 2019 agreement, is rendered excipiable. This is so because the amended pleading relies on the continued existence of the 2018 agreement, which agreement has been superseded by the 2019 agreement. The revised indebtedness as pleaded relies upon the 2019 agreement, but this agreement does not contain any reference to the suretyship concluded by the parties simultaneously with the 2018 agreement. Consequently, any reliance on the suretyship concluded by the Defendant for the claimed liability of R9 000 000.00 is bad in law. Save in limited circumstances not here present the parol evidence rule precludes extrinsic evidence being led to contradict, add to or modify the contract.²⁰

[18] The Defendant's stance in its notice of objection (also advanced in heads of argument) is that the 2019 agreement novated the 2018 agreement. Voluntary novation occurs when parties intend to replace a valid contract with another valid contract.²¹ Novation is essentially a matter of intention which in the absence of express declaration by the parties, can only exist by way of necessary inference

²⁰ **University of Johannesburg** para [92].

²¹ **Swadif (Pty) Ltd v Dyke** 1978 (1) SA 928 (A) at 940G-H.

from all the circumstances of the case.²² On what is before me I am unable to find that there has been a novation; this must be determined through evidence. What I do find is that there are two separate, consecutive agreements dealing with similar subject matter; there is an overlap of terms which is not exact; the respective contractual mechanisms for performance differ in some material respects; and specific clauses in the second (2019) agreement on a plain reading, preclude a finding, even *prima facie*, that the 2019 agreement is an amendment of the 2018 agreement.

[19] The issue that a party proposes to introduce by an amendment must *prima facie* be a triable issue, namely an issue (a) which if it can be proved by the evidence foreshadowed in the application for amendment, will be viable or relevant; or (b) as a matter of probability, will be proved by the evidence so foreshadowed.²³ Further, such a party cannot place on the record an issue for which he has no supporting evidence, where evidence is required.²⁴ The Plaintiffs' founding affidavit in support of its application the amend asserts that a determination of whether the [2019] loan agreement is an amendment or a novation is a question of fact to be determined at trial, established by evidence. This, it is said, will depend on the proper interpretation of the agreements having regard to the factual matrix, its purpose, the circumstances leading up to its conclusion and the knowledge of those who negotiated the contract.; this is a matter for the trial court. What I set out in the

²² **National Health Laboratory Service v Lloyd-Jansen van Vuuren** 2015 (5) SA 426 (SCA) paras [15], [16]. The case *a quo* was determined on a stated case.

²³ **Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty Ltd en 'n Ander** 2002 (2) SA 447 (SCA) para [34].

²⁴ **Trans-Drakensberg Bank Limited (Under Judicial Management) v Combined Engineering (Pty) Limited and Another**, 1967 (3) SA 632 (D), at 640 H - 641 C, quoted with approval in **Caxton Limited and Others v Reeva Forman (Pty) Limited and Another**, 1990 (3) SA 547 (A), at 565 G-I.

preceding sentence is the high watermark of the Plaintiffs' foreshadowing of its evidence at the trial.

[20] The Court in **Capitec** warned against **Endumeni** becoming "*a ritualised incantation ... often used as an open-ended permission to pursue undisciplined and self-serving interpretations*".²⁵ As I read the **Ciba-Geigy** and **Trans-Drakenstein** judgments referenced above, parties seeking an amendment such as the present Plaintiffs, must place more before the Court than statements of legal principle. The challenges facing the Plaintiffs that I have identified above called for it to foreshadow (in the sense of indicate, warn of) the evidence that it intends to adduce regarding its amended cause of action. They have failed to do so. The Plaintiffs are no doubt alive to the difficulty that confronts them in their cause of action based on the suretyship: their ability to rely on the suretyship for the expanded obligation set out in the 2019 agreement is invariably compromised as explained above.²⁶ However, any difficulty that may confront them cannot, in and of itself, serve as the foundation for their wish to amend their particulars of claim

[21] Clause 3.2 of the 2018 agreement deals with interpretation and my attention was directed to clause 3.2.10 during argument. This provides that references to "*this Agreement*" shall include "*this Agreement, as amended, varied, novated or substituted in writing from time to time*". As indicated above the Plaintiffs seek to

²⁵ At para [20]. The genesis of this part of the Plaintiffs' founding affidavit can be traced to a sentence from **Endumeni**: "*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.*" See at para [18] *in fin*.

²⁶ I deliberately refrain from making any decision as to whether a cause of action would exist on the suretyship if it were to be found that the 2019 agreement novated the 2018 agreement, as contended by the Defendant. I so refrain because this is not what the Plaintiffs seek to achieve through their amendment.

plead that the 2019 agreement was a written amendment to the 2018 agreement. Based on the information before me I am not satisfied that this is a sustainable cause of action or a triable issue, on the proposed amendment. An amendment which would render a pleading excipiable should not be allowed.²⁷

[22] In their heads of argument the Plaintiffs characterise the Defendant's objections as extremely technical. I do not agree for the reasons that I have already given. But if this is indeed a technical approach, then I take comfort from the statement by COLEMAN J (with whom DE VILLIERS J concurred) who said that:

*"(t)he needs of procedure or of substantive law which are sometimes characterised as 'technical' are no less binding upon litigants and the Courts than the rules whose manifest equity is apparent even to the uninstructed layman. For the existence of procedural rules relating to pleadings there are good, practical reasons. ..."*²⁸

[23] Counsel for the Plaintiffs made a final submission which I deal with briefly. The Plaintiffs contend that even if I were to find that the amendment would result in the particulars of claim being excipiable, this was not a basis for me to refuse the amendment. This contention was made notwithstanding the Defendant's notice of objection which takes the point (correctly, on the present pleaded facts) that the 2019 agreement is a separate and distinct commercial agreement and which does not incorporate the deed of suretyship by the Defendant. I understand the position differently to that advanced by the Plaintiffs: where there is an objection to a proposed amendment on the ground that the amended pleading would be

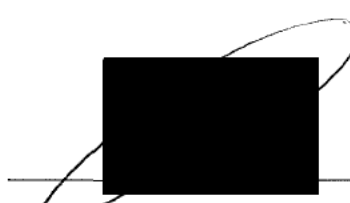
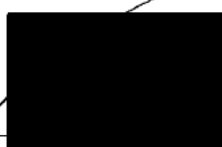
²⁷ **De Klerk and Another v Du Plessis and Others**, 1995 (2) SA 40 (T), at 43 I – 44 A, followed in **Nxumalo v First Link Insurance Brokers (Pty) Limited**, 2003 (2) SA 620 (T), at 623 B-D.

²⁸ **Dinath v Breedts**, 1966 (3) SA 712 (T), at 717 G-H.

excipiable, ordinarily the Court will decide on the question and if its decision is that the pleading, as amended would be excipiable, the Court will refuse the application for an amendment.²⁹ Whether a pleading would or would not be excipiable is a matter of law, which should be decided by the Court hearing the application for amendment. It would be incorrect to hold that it is arguable that the amendment would not render the pleading excipiable, allow it and send the parties away to prepare for another battle on exception on the same point.³⁰ I find that the amendment would render the pleading excipiable.

[24] The following order will issue:

1. The Plaintiffs' application dated 28 July 2023 to amend their particulars of claim, is dismissed with costs.
2. Costs are payable as follows:
 - (a) on the party-and-party scale up to 11 April 2024;
 - (b) from 12 April 2024 on scale C in accordance with Rule 69, read with Rule 67A.



N.J. GRAVES

Acting Judge of the High Court of
South Africa
Gauteng Local Division Johannesburg

²⁹ **R.M. van de Ghinste and Co. (Pty) Limited v Van de Ghinste**, 1980 (1) SA 250 (C), at 258 H – 259 A.

³⁰ **De Klerk and Another v Du Plessis and Others**, 1995 (2) SA 40 (T), at 43 I – 44 A.

APPEARANCES:

Date of hearing: 1 August 2024

Date of judgment: 17 September 2024

Counsel for Applicants/Plaintiffs: J W Steyn (with W G Pretorius)

Instructed by: **L M Du Toit Inc**
Mr M Du Toit

Counsel for Respondent: S L P Mulligan
Instructed by: **Nixon & Collins Attorneys**
S D Collins