

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2023/022069

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 25 September 2023

SIGNATURE:

In the matter between:

NEDBANK LIMITED

Applicant

and

NONHLANHLA RUTH MAVIE

Respondent

(Identity No: 6[...])

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand down is deemed to be 10h00 on 25 September 2024

JUDGMENT

VAN NIEUWENHUIZEN AJ

Introduction

[1] This matter came to me in the opposed motion court on 16 May 2024. The applicant, which will, for the sake of convenience, hereinafter be referred

to as Nedbank, launched an application for a money judgment in the following terms against the respondent, who will, for the sake of convenience, be referred to as Mavie, for payment of the following:

- “1. The sum of R474 413.61.*
- 2. Interest on the sum of R474 413.61 at the applicable default rate (which rate is currently calculated as the repurchase rate of 7.25% plus 14% plus 21.25%) per annum calculated from 17 February 2023 to date of final payment, both days inclusive, in terms of the current account facility.*
- 3. The sum of R4 210 463.18.*
- 4. Interest on the sum of R4 210 463.18 at the rate of 0.6% below the prevailing prime lending rate as applicable from time to time (currently 10.5%) thus 9.9% per annum calculated from 26 January 2023 to date of final payment, both days inclusive, in terms of the Medium-Term Loan facility.*
- 5. The sum of R11 582 390.49.*
- 6. Interest on the sum of R11 582 390.49 at the rate of 0.75% below the prevailing prime lending rate as applicable from time to time (currently 10.5%) thus 9.75% per annum calculated from 26 January 2023 to date of final payment both days inclusive in terms of the loan agreement.*
- 7. Costs on the scale as between attorney and client.”*

[2] Nedbank relies on the founding affidavit deposed to by one Manusha Ramthol (“Ramthol”), an adult female employed by Nedbank as a legal recovery manager. She states that she is duly authorised to bring and prosecute the application and depose to the affidavit on Nedbank’s behalf. In addition, she alleges that the facts and allegations are within her own personal

knowledge, save where otherwise stated and, to the best of her belief, both true and correct.

[3] It is evident from her affidavit that she has control over, and access to, all the files pertaining to the conduct of Mavie in regard to Mavie's indebtedness to Nedbank and in respect of all agreements referred to in the founding affidavit. On this basis, she alleges personal knowledge of the allegations contained herein.

[4] She also annexed a resolution authorising her to act on behalf of Nedbank, annexed to the founding affidavit as "FA1".

[5] She states that, to the extent that she may rely on hearsay evidence, such evidence may be admitted in the interests of justice, as envisaged in section 3(3) of the Law of Evidence Amendment Act 45 of 1988, and that same is more readily admissible in application proceedings than in action proceedings and she actually invites Mavie to provide some challenge to her personal knowledge should she wish to challenge same. She states that:

5.1 the nature of the evidence is such that the agreement/s, security documents, records of default, communications to client and so on are stored at Nedbank's business premises, enabling relevant officials to peruse them;

5.2 the evidence contained in the founding affidavit is aimed at facilitating a recovery due to the wilful breach of the relevant agreements by Mavie.

[6] It is further alleged that the probative value of certain evidence (should it constitute hearsay evidence) merely corroborates the suite of other evidence which she can "conform" (*sic*) and depose to herself.

[7] It is also submitted that the evidence, should it constitute hearsay evidence, cannot occasion any prejudice as there is no dispute about the material facts and agreement upon which the present application is based. In

this regard, she points out that it is not in dispute that Nedbank granted Keliana Management Company (Pty) Limited (“Keliana”) a current account, home loan account and a medium term loan account, which facilities Keliana enjoyed.

[8] In conclusion to the passages on hearsay evidence, Ramthol submits that the evidence ought to be admitted in the interests of justice to the extent that it constitutes hearsay evidence.

[9] Mavie did not file any answering affidavit on her own behalf, but was represented by counsel, who submitted extensive legal argument to the court why Mavie is not liable to Nedbank, having filed a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court raising certain questions of law only which I will deal with after referring briefly to the most pertinent undisputed facts and Nedbank’s submissions.

The Undisputed Facts

[10] The legal arguments raised and dealt with below must be seen against the backdrop of the following undisputed facts.

10.1 At all material times hereto:

Keliana was a company duly registered and incorporated as such in accordance with the company laws of the Republic of South Africa. November 2019 changed its name to Keliana Group (Pty) Limited. On 11 February 2022, proceedings were instituted in the High Court of South Africa for the liquidation of Keliana, by First Rand Bank Limited (“FNB”);

10.2 On or about 30 July 2018, Nedbank and Keliana, both duly represented, concluded a written agreement in terms of which the Nedbank extended to Keliana the following Borrower Facilities:

“3 FACILITIES

The following are, collectively, the Borrower Facilities:

3.1 An overdraft facility of R1 .000,000.00 (One Million Rand).

3.2 A commercial property mortgage/NedBond loan facility of R4,920,508,00 (Four Million Nine Hundred and Twenty Thousand and Five Hundred and Eight Rand).

3.3 A vehicle and asset finance facility of R392,940.00 (Three Hundred and Ninety Two Thousand Nine Hundred and Forty Rand), which facility includes existing vehicle-and-asset finance agreements currently running down.

3.4 A residential home loan facility of R6,612:514,00 (Six Million Six Hundred and Twelve Thousand Five Hundred and Fourteen Rand)

3.5 A residential home loan facility of R4,550,000,00 (Four Million Five Hundred and Fifty Thousand Rand), subject to the following conditions;

3.5.1 term of loan a 120 (one hundred and twenty) months, with a Maximum loan value of 70% (Seventy percent) at current Prime less 0.75% (zero point seven five) percent.

3.6 Overdraft facilities are subject to review and repayable on demand at Nedbank's discretion in accordance with normal banking practice.

3.7 Subject to the non-occurrence of an Event of Default as defined herein, the duration of any agreement resulting from this Facility Letter will be stated as in the relevant agreement."

10.3 The written agreement is annexed marked "FA5" to the founding affidavit;

10.4 The interest rate would be linked to Nedbank's publicly quoted prime lending rate ("the prime rate"). The maximum penalty interest

rate would be equal to the ruling South African Reserve Bank repurchase rate ("the repo rate") plus 14% (*vide clause 5 of the Facility Letter*);

10.5 Nedbank would be entitled to charge a penalty interest rate in the event of the overdraft facilities being exceeded (*vide clause 5.1.2 of the Facility Letter*):

10.6 Nedbank held and required security for the facilities comprising, *inter alia*, (*vide clause 9 of FA5*), the suretyships (referred to below) (incorporating cession of claims), in favour of itself by Mavie;

10.7 The security would be required as continuing security for all Keliana's facilities of which Keliana availed itself from time to time and for the obligations of Mavie, where applicable;

10.8 Nedbank would be entitled to claim immediate repayment of all amounts owing under the facilities if one or more of the grounds for making demand set out hereunder arose, and Keliana failed to remedy the matter within the period stipulated by Nedbank at such time;

10.9 The following were, in terms of annexure "FA5" *inter alia*, grounds for making demand:

10.9.1 If Keliana defaulted on any amount payable in terms of the facilities;

10.9.2 If Keliana committed a breach of any of the terms and conditions set out in annexure FA5;

10.9.3 If Keliana committed a breach of any of the terms and conditions set out in any agreement entered into between Nedbank and Keliana;

10.9.4 If an application for the winding up of Keliana was issued;

10.9.5 and/or if Keliana is voluntarily or compulsorily wound up;

10.10 The nature and the amount of Keliana's obligation, and the applicable the interest rate, would at any time be determined and proved by a certificate signed by any manager of Nedbank (whose capacity and authority need not be proved), which certificate would on the production thereof, be binding and be *prima facie* proof of the contents thereof and of the fact that such amount is due and payable. The Certificate would be valid as a liquid document, in any competent court or for any other purpose;

10.11 Nedbank complied with its obligations in terms of the overdraft facility and made the funds available to Keliana;

10.12 Keliana, from time to time, drew down on the overdraft;

10.13 A copy of the bank statement in respect of the overdraft facility for the period 24 February 2021 to 16 February 2023 is attached to the founding affidavit marked "FA6". As appears therefrom Keliana utilised the facility and has failed to service the facility;

10.14 Keliana has further breached the written agreement annexure "FA5" in that an application for the winding up of Keliana has been issued and accordingly a material adverse event has taken place entitling Nedbank to call up the current account facility;

10.15 As a consequence Keliana is indebted to Nedbank for the full outstanding balance owing on the overdraft facility in the sum of R474 413.61 as at 16 February 2023 together with interest thereon at the applicable default rate (which rate is currently calculated as the repurchase rate of 7.25% plus 14% thus 21.25%) per annum calculated from 17 February 2023 to date of final payment, both days inclusive;

10.16 A certificate of balance signed by the deponent being a recovery manager in the employ of Nedbank setting out the above indebtedness by Mavie to Nedbank is annexed to the founding affidavit marked “FA7”;

10.17 On or about 12 May 2017, Nedbank and Keliana concluded a loan agreement (“the medium term loan agreement”), in terms of which Nedbank lent and advanced to Keliana the sum of R5 250 000;

10.18 This agreement is attached to the founding papers marked “FA8” and is actually styled “COMMERCIAL LOAN AGREEMENT WITH NEDREVOLVE OPTION”;

10.19 Nedbank undertook to lend the sum of R5 250 000 to Keliana in terms of the aforesaid agreement which were repayable in the sum of 120 equal instalments of R69 157,09 commencing on the date advised of the registration of a mortgage bond registered by Keliana in favour of Nedbank over two portions of the farm Middle Bosch 897 as security for the indebtedness of Keliana;

10.20 All payments in terms of Annexure “FA8” were to be made without set off or deduction of any kind and free of exchange, bank costs and other charges;

10.21 Should Keliana breach any term or condition contained in annexure “FA8”, Nedbank would be entitled, without derogating from any other right which it may have, to claim immediate repayment of the amount so loaned, together with interest and all other amounts owing or claimable by it;

10.22 In addition to the provisions set out in any facility letter (thus including annexure “FA5” which follows later in time) the following would constitute a breach of annexure “FA8” i.e.

10.22.1 pending or threatened litigation, arbitration or administrative proceedings against Keliana, or any of its assets which related in any manner to the agreement, or which would have a materially adverse effect on the financial condition of Keliana;

10.22.2 or a material adverse change in financial or other condition of Keliana since date of its last audited financial statement;

10.23 The nature and the amount of Keliana's indebtedness to Nedbank, in terms of the agreement, as well as the interest rate payable in respect thereof, will at any time be determined and proved by a certificate signed by any manager of Nedbank (whose capacity and authority need not be proved), which certificate would on the mere production thereof, be binding on Keliana and be *prima facie* proof of the contents of such certificate and of the fact that such amount is due and payable In any legal proceedings against Keliana and will be valid as a liquid document against Keliana in any competent court;

10.24 On or about 30 June 2017, a Covering Mortgage Bond was registered by Keliana in favour of Nedbank over the Middle Bosch Property, to secure the indebtedness of Keliana to Nedbank arising from any cause of debt whatsoever;

10.25 A copy of the Mortgage Bond is annexed to the Founding Affidavit marked "FA9";

10.26 The following were express, alternatively implied alternatively tacit terms of the said Mortgage Bond:

10.26.1 the bond constituted continuing covering security for all and any sum or sums of money which would then or in the future be owing to or claimable by Nedbank from Keliana arising from any cause whatsoever;

10.26.2 Keliana agreed that the capital or the balance due in respect of such bond would become due and payable forthwith, and without Keliana first being placed in default in the event of a failure by it to timeously make payment or perform any obligation in terms of such bond or comply with any demand made by Nedbank or in any manner breach any loan facility granted by Nedbank or other obligation owed to Nedbank;

10.26.3 Keliana agreed that the nature and amount of its indebtedness to Nedbank as well as the interest rate payable in respect thereof, would at any time be determined by written certificate purporting to have been signed by a manager or accountant for the time being of any branch or head office of Nedbank whose capacity or authority would not be necessary to prove, and which certificate would upon production thereof be binding on it, and *prima facie* proof of the contents of such certificate and of the fact that such amount was due and payable in any legal proceedings against Keliana, and would be valid as a liquid document against Keliana in any competent court;

10.26.4 Keliana undertook to pay legal expenses and costs incurred by Nedbank in connection with the said Mortgage Bond on the scale as between attorney and client; and selected the immovable property as its *domicilium citandi et executandi*;

10.27 Pursuant to the medium-term loan agreement, Annexure “FA8” Nedbank loaned to Keliana the sum of R5 250 000.00;

10.28 A copy of the statement from 1 May 2020 to 25 January 2023 relating to this account is annexed to the Founding Affidavit marked “FA10”;

10.29 Keliana failed and/or refused and/or neglected to effect payment of the monthly instalments to Nedbank since July 2021, and has

otherwise breached the agreement as the institution of the liquidation proceedings (FA2.2) constitutes a material adverse event and Nedbank is accordingly entitled to claim immediate repayment of the full amount loaned, together with interest thereon, which currently amounts to the sum of R4 210 463.18, together with further interest thereon at the rate of 0.6% below the prevailing prime lending rate as applicable from time to time (currently 10.5%) thus 9.9% per annum calculated from 26 January 2023 to date of final payment, both days inclusive;

10.30 A Certificate of Balance signed by Ramthol being a recovery manager in the employ of Nedbank setting out the above indebtedness of Mavie to Nedbank is annexed to the founding affidavit marked “FA11”;

10.31 On or about 4 October 2013, Nedbank and Keliana concluded a loan agreement (“the loan”) in terms of which Nedbank lent and advanced to Keliana the sum of R7 350 000 and a copy of same is annexed to the founding affidavit marked “FA12” (dated in the top right hand corner as 7/8/2013);

10.32 The express, alternatively implied or tacit terms of annexure “FA12” were *inter alia*, the following:

10.32.1 Keliana would repay the loan amount in 240 equal instalments, the first instalment being payable on the 1st day of the month following the month during which registration of a Mortgage Bond over the property took place;

10.32.2 The capital amount loaned to Keliana would accrue interest thereon at Nedbank’s prime rate of interest from time to time per annum less 0.75%, which rate was variable and linked to Nedbank’s prime rate from time to time;

10.32.3 The full amount of the amount loaned would become due and payable should Keliana breach any of the terms and conditions of the loan;

10.32.4 All outstanding amounts would bear interest at the Nedbank's prevailing prime lending rate from time to time;

10.32.5 A certificate written and signed by a manager of Nedbank (whose status need not be proved) setting out the amount of Keliana's indebtedness to Nedbank in terms of the loan agreement, would be by the mere production thereof be *prima facie* proof of the contents of the amount owing, including, but not limited, to costs and interest due and owing;

10.32.6 The registration of a Covering Mortgage Bond was by Keliana in favour of Nedbank over Portion 2 of Erf 6[...] Hurlingham Township as security for the indebtedness of Keliana;

10.32.7 Should Keliana breach any condition contained in the agreement of loan, or should Keliana breach a condition of any other agreement with Nedbank (which breach would constitute a breach of the loan agreement), Nedbank would have the right, to the extent permitted by the National Credit Act, to claim repayment of the loan or the balance thereof outstanding which would thereupon become immediately due and payable together with interest and all other amounts owing or claimable by Nedbank in terms of the loan agreement and to have the property declared executable; and

10.32.8 All amounts that Nedbank may pay or incur pursuant to the loan agreement or due to Keliana's default, including costs on the attorney client scale, would be payable by Keliana to Nedbank;

10.33 A copy of the statement from 1 July 2021 to 25 January 2023 relating to this account is attached to the founding affidavit marked “FA13”;

10.34 On or about 22 November 2013, a Covering Mortgage Bond was registered by Keliana in favour of Nedbank over the Hurlingham Property, to secure the indebtedness of Keliana to Nedbank arising from any cause of debt whatsoever. A copy of the Mortgage Bond is annexed to the founding affidavit marked “FA14”;

10.35 The following were the express alternatively implied, further alternatively tacit terms of the Mortgage Bond:

10.35.1 the bond constituted continuing covering security for all and any sum or sums of money which would then or in the future be owing to or claimable by Nedbank from Keliana arising from any cause whatsoever:

10.35.2 Keliana agreed that the capital or the balance due in respect of such bond would become due and payable forthwith, and without Keliana first being placed in default in the event of a failure by it to timeously make payment or perform any obligation in terms of such bond or comply with any demand made by Nedbank or in any manner breach any loan facility granted by Nedbank or other obligation owed to Nedbank;

10.35.3 Keliana agreed that the nature and amount of his indebtedness to Nedbank, as well as the interest rate payable in respect thereof, would at any time be determined by written certificate purporting to have been signed by a manager or accountant for the time being of any branch or head office of Nedbank whose capacity or authority would not be necessary to prove, and which certificate would upon production thereof be binding on it, and *prima facie* proof of the contents of such certificate and of the fact that such amount was due and payable

in any legal proceedings against Keliana, and would be valid as a liquid document against Keliana in any competent court;

10.35.4 Keliana undertook to pay legal expenses and costs incurred by Nedbank in connection with the said Mortgage Bond on the scale as between attorney and client; and

10.35.5 Keliana selected the immovable property as its *domicilium citandi et executandi*.

10.36 Pursuant to the loan agreement Nedbank advanced the sum of R7 350 000.00 to Keliana.

10.37 A copy of the statement from 1 July 2021 to 25 January 2023 relating to this account is attached to the founding affidavit marked "FA15";

10.38 In breach of its obligations to Nedbank, Keliana failed to effect payment of the monthly instalments due to Nedbank, since July 2021;

10.39 Keliana has otherwise breached the agreement in that legal proceedings were instituted against Keliana as appears from annexure FA2.2, the service of which indicates a material adverse change to the financial position of Keliana and an indication that it is financially distressed;

10.40 In the premises, the full amount of the loan, together with interest thereon has become due owing and payable by Keliana to Nedbank;

10.41 As at 30 January 2023, Keliana was indebted to Nedbank, pursuant to the loan agreement, in the sum of R11 582 390.49, together with interest at the rate of 0.75% below the prevailing prime lending rate as applicable from time to time (currently 10,5%) thus

9,75% per annum calculated from 26 January 2023 to date of final payment both days inclusive;

10.42 A Certificate of Balance signed by a manager in the employ of Nedbank setting out the indebtedness of Mavie to Nedbank in the (sum) R11 582 390.49 together with interest at the rate of 0.75% below the prevailing prime lending rate as applicable from time to time (currently 10.5%) thus 9.75% per annum calculated from 26 January 2023 to date of final payment both days inclusive is annexed to the founding affidavit marked "FA16".

10.43 Keliana has failed to make payments in terms of the current account, medium term loan and the loan agreement and it is clear that Keliana can no longer fulfil its payment obligations in terms of the aforesaid agreements;

10.44 An event of default has taken place in that an application for the winding up of Keliana has been issued on or about 25 February 2022 when FNB instituted an application for the winding up of Keliana, and, accordingly, a material adverse event has taken place, which entitles Nedbank to immediate payment of all amounts outstanding in terms of the overdraft facility, the medium term agreement and loan agreement, which amounts are due and payable by Keliana;

10.45 Nedbank has assessed a material deterioration of Keliana's financial position as a consequence of the liquidation application;

10.46 Annexures FA5, FA8, and FA12, are not subject to the provisions of the National Credit Act, No 34 of 2005 ("the Act"), in that in accordance with Section 4(1)(b) of the Act, the Act does not apply to large agreements as described in Section 9(4) of the Act, and where the consumer is a juristic person;

10.47 Keliana is a juristic person and Section 9(4) of the Act provides that a credit agreement is a large agreement if it is a mortgage

agreement or any other credit transaction and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of Section 7(1)(b) of the Act;

10.48 The higher of the threshold established in terms of Section 7(1)(b) of the Act (per GN713 of 2006 published in Government Gazette No 28893 dated 1 June 2006) is R250 000,00;

10.49 The principal debts, as defined in the Act exceeds the aforesaid threshold of R250 000,00 and Annexures FA5, FA8, and FA12, are therefore large Agreements as described in Section 9(4) of the Act;

10.50 On or about 4 October 2013 and 13 May 2017, respectively, Mavie executed suretyships in favour of Nedbank, in terms of which she bound herself jointly and severally as surety and co-principal debtor *in solidum* for the obligations of Keliana to Nedbank (“the suretyships”).

[11] Before I deal with the questions of law raised by Mavie’s counsel it is necessary to state that the underlying and recurrent theme is that even where a surety signs a suretyship in which he binds himself as a *co-principal debtor and surety* in respect of the principal obligations of another the obligation of the surety remains *accessory* to that of the principal debtor and our Courts have over many years made it clear that in such a case the surety does not become liable as a *principal debtor to the creditor*. For this reason the surety cannot be cited as if he is a co-principal debtor and all that can ever be claimed of the surety is the performance of the obligations, he took upon himself to the extent that same are *accessory* to that of the principal debtor. The aforesaid is trite and hardly requires authority or any debate.

The questions of law raised and assessment of the merits thereof.

[12] The first question of law raised by Mavie’s counsel is whether the claim against Mavie is flawed and premature because the indebtedness of Keliana is unknown at this stage. In paragraph 1.4 of the Notice in terms of Uniform

Rule 6(5)(d)(iii) this question is further refined to a complaint that no judgement has been obtained against Keliana and no claim has been proved against Keliana's insolvent estate.

[13] In paragraph 1.11 of the said notice it is submitted that the insolvency of the Keliana does not make the surety immediately liable as though debt had become payable against Keliana.

[14] Hence it is submitted the claim against Mavie is premature and no cause of action is disclosed.

[15] In Mavie's heads of argument it was submitted that the suretyships are ancillary contracts and only binds Mavie to perform if and so far as the Keliana fails to do so.

[16] It is further submitted that the claim for indemnity against the surety can only arise once there has been a fixed and quantifiable loss which is currently unknown.

[17] The above approach is fundamentally flawed and ignores the fact that the question as to whether the amount owed by Keliana is due and payable will depend on whether it is in breach of its obligations to Nedbank or not. In the present case the factual allegations in this regard are undisputed given the fact that no answering affidavit has been filed asserting the contrary and that the debts are *ex facie* the founding papers due and payable based on Keliana's breaches and failure to perform. In addition the various debts due are capable of being established from Keliana's bank statements annexed to the founding affidavit and the various certificates of balances due as certified by Ramthol.

[18] The fact that FNB has launched liquidation proceedings are only relevant to the extent that same also operates as a trigger event entitling Nedbank to accelerate payment in respect of the loans and the overdraft. Even if there were no liquidation proceedings Keliana's default in making no

payments in terms of its obligations to Nedbank would have rendered each and every debt due and payable in full.

[19] There is thus no basis to assert that the claim is premature and cannot be quantified.

[20] The next question to be addressed is whether a judgment should first be obtained against Keliana in separate or in these proceedings. before the extent of its obligations to Nedbank are quantified and enforceable against Mavie.

[21] Clause 11 of the limited suretyship annexed to the founding affidavit marked “FA3” and the unlimited suretyship marked “FA4” make it clear that Mavie renounced the benefit of excussion. She signed same and must be taken to be bound by the *caveat subscriptor* rule. The effect of the renunciation of this benefit is clear from the said clause. She must be taken to have known that she can no longer insist that Nedbank first claims what it can recover from Keliana before commencing recovery against her. To that extent her position differs from a surety who in the absence of any renunciation could in the common law insist that the principal debtor first be excused to the fullest extent.

[22] The aforesaid submission also ignores that she bound herself jointly and severally as surety and co-principal debtor. The effect of this was discussed in Union Government v van der Merwe¹ where Wessels JP (as he then was) held that:

“The legal scope of the surety’s contract is identical with that of the principal debtor - accessorium sui principalis naturam sequitur. The surety undertakes the same obligation as the debtor and undertakes to perform this same obligation so soon as the debtor, when called upon, fails to perform it. Troplong Caut 46. It is true there are two contracts, the one between the creditor and the debtor and the other between the

¹ 1921 TPD 318 at 321

creditor and the surety. But the contract between the creditor and the surety is not an independent contract with an obligation of its own but an accessory contract with the very same obligation that exists between the principal debtor and the creditor. Although it is true that the suretyship contract may be entered into by an agreement different to that of the principal contract, yet immediately the surety agrees to become such, whether by a written or a verbal agreement, then his contract with the creditor is of the same nature as that of the principal debtor, because it becomes accessory to it, or is, as it were, absorbed by it.”

and at p 322 said that:

“The present case is, however, stronger for the surety has signed as surety and co-principal debtor. We must give some meaning to the words 'co-principal debtor'. That the addition of these words operate as a renunciation of the benefits of the surety is clear, but they have a still greater force. The addition of these words shows that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor.” (my underlining).

[23] Counsel for Nedbank relied on the above case in dealing with the first question of law as well as Kilroe-Daley v Barclays National Bank Ltd ² where Galgut AJA quoted the aforesaid passages. In Kilroe he had to decide as to the effect of a confirmed liquidation and distribution account and whether or not the bank's claim against the surety had prescribed due the principal debt becoming prescribed. Kilroe is only authority for the proposition that if the principal debtor's claim would have prescribed by the time the claim against the surety is enforced the claim against the surety falls away given the fact that the principal debt is extinguished by prescription.

² 1984 (4) SA 609 (A)

[24] It is not authority for the proposition that the creditor has to sue the principal debtor before it can sue the surety.

[25] Respondent's counsel's assertion that applicant's counsel relied on Kiltroe for the proposition that the creditor do not have to sue the principal debtor whilst the exact opposite happened in Kilroe, is simply incorrect.

[26] Applicant's counsel clearly relied on Kilroe to demonstrate that the principles set out in Union Government is still good law.

[27] In addition applicant's counsel relied on Millman and Another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (Under Curatorship) and Others³ where the court per Friedman JP and Farlam J held that the obligation of the surety and the co-principal debtor becomes enforceable at the same time as that of the principal debtor.

[28] After a thorough analysis of the Roman Law and the Roman Dutch authorities the learned judges expressed themselves as follows:

"In our view, the legal position was correctly stated by Professor J G Lotz in Joubert (ed) The Law of South Africa vol 26 para 161, where the following statement appears:

*'Unless the parties have agreed otherwise, a surety's debt normally becomes enforceable as soon as the principal debtor is in default subject, however, to the surety's right to claim that the principal debtor first be excused. If a surety has bound himself also as co-principal debtor, his debt becomes enforceable at the same time as the principal debt.'*⁴

[29] The notion that the bank by citing Mavie and not Keliana displaced the principal obligation is wrong in law once the authorities referred to above are taken into account.

³ 1997 (1) SA 113 (C)

⁴ See bottom of p122 and top of p123

[30] A further argument put forward by Mavie's counsel is that no findings can be made *vis-à-vis* Keliana in its absence. The fact that in calculating the liability of the surety one has to regard to the liability of Keliana is of no consequence. It will always remain open for Keliana to argue that such a finding is not binding on it.

[31] Mavie's counsel's reliance on the decision in Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron⁵ is also misplaced. Two discrete actions were at stake and the ultimate question was whether the previous action interrupted prescription. In the previous action the appellant sued respondent in his personal capacity for payment of the R627 in the Johannesburg magistrate's court. The summons was served on him on 1 April 1970. The precise cause of action relied on therein is important, since appellant maintained that this action interrupted the running of prescription. The particulars of the claim in the summons alleged that *appellant and respondent (not Benam, it should here be noted) had entered into the lease*, and that, in terms thereof, respondent hired the neon sign on the conditions mentioned in para. 1 above, that respondent was in arrear with the rentals in the sum of R627, that upon payment of that amount appellant tendered the use of the sign for the remainder of the unexpired term of the lease, and that the Johannesburg magistrate's court had jurisdiction, inter alia, because respondent had consented thereto. Respondent defended the action. On 11 December 1972, at the end of the trial, appellant's claim was dismissed on the ground (it was common cause) that respondent had been *incorrectly sued on the lease as the lessee and not as surety and co-principal debtor in terms of his own undertaking*. In the present matter the Mavie is sued qua surety and not as if she is the principal debtor.

[32] It is also alleged that the fact that the amounts owed by Keliana are due and payable is a bald allegation that does not entitle Nedbank to harass Mavie on the basis that the fact that same is due and payable, does not tie the Court's hands. It is asserted that the Court should make a finding as to the

⁵ 1978 (1) SA 463 (A)

amount that is due and payable by Keliana. I am of the view that a finding can be made as to the extent of Mavie's liability on the undisputed facts coupled with the certificate of balances provided.

[33] In the present matter Nedbank relies on Annexure "FA7" in respect of the overdraft and the certificate relates to Mavie's liability as surety for Keliana. It also relies on Annexure "FA11" for Mavie's liability as surety in respect of the medium term loan and Annexure "FA16" in respect of Mavie's liability for the loan. All the certificates are clearly based on the provisions of clause 6 in the suretyships.

[34] Mavie's counsel also sought to rely on the decisions in Shraga v Schalk 1994(3) SA 145 (N) and Magic Eye Trading 77 CC v Santam Limited 2019 JDR 2471 (SCA). I have read them and am of the view that they are distinguishable on their facts.

[35] The notion that certificates of balance can only be utilised where Keliana is a party to the proceedings and that there is no legal precedent for the use of same is in my view ill-conceived. I have studied the certificates in question and do not find them draconian at all. All Mavie had to do is to engage with the facts and in particular the content of the bank statements and establish a bona fide dispute. Her failure to do so is incomprehensible. The assertion that there is no legal precedent for the use of such documents is incorrect. On the contrary they are used on a frequent basis by banks to prove outstanding balances⁶ and have only attracted the opprobrium of the Courts where same purport to establish conclusive proof of its content,⁷

[36] In the matter of Senekal v Trust Bank of Africa Ltd⁸ the bank only sued the surety. The principal debtor Luna Clocks Ltd was not even cited. Nedbank has the right to ignore Keliana and recover what Keliana owes it, from Mavie.

⁶ See Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A)

⁷ See Sasfin (Pty)Ltd v Beukes 1989 (1) SA 1 (A) and specifically the judgment of Smalberger JA at the bottom of p14 and top of p15

⁸ See fn 6 above.

[37] There is simply no room to argue that no cause of action is disclosed as Mavie seeks to do in paragraph 1.12 of the notice and also in the heads of argument.

[38] Against the backdrop of the above the first legal issue can be seen for what it truly is – an unmeritorious defence displaying a complete lack of bona fides.

[39] In the said notice the second question of law raised is formulated as follows: Whether Mavie is a co-principal debtor with Keliana in such a way that Nedbank is entitled to sue Mavie independently of Keliana.

39.1 In para 10 Nedbank alleges that Mavie is “*sued in her capacity as co-principal debtor and surety*”

39.2 In Para 15 Nedbank alleges that the respondent “*(b)ound herself, jointly and severally as surety and co-principal debtors (sic) in solidum with Keliana, (for) the repayment on demand of all amounts which Keliana might then or from time to time thereafter owe to the applicant or for which Keliana might be indebted to the applicant*”.

39.3 In para 52 Nedbank alleges that “*(b)y virtue of the deed of suretyship executed by the respondent as aforesaid, the respondent is indebted to the applicant jointly and severally, with Keliana, the one paying the other to be absolved, for the full amounts outstanding in respect of annexures “FA5”, “FA8”, “FA12” which amounts are now due and payable by the respondent*”

39.4 The obligations of the surety and co-principal debtor become enforceable at the same time as that of the principal debtor.

39.5 However, the surety does not undertake a separate independent liability as a principal debtor, she remains a surety.

39.6 The significance of undertaking liability as a co-principal debtor is that *vis-à-vis* the creditor the surety thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and she becomes jointly and severally liable with the principal debtor.

39.7 Without the applicant proving its claim in the insolvent estate of Keliana, it is premature to speak of joint and several liability.

39.8 The respondent will have an obligation to indemnify the creditor so soon as the principal's obligation has fallen due.

39.9 Moreover the use of the words "co-principal debtors *in solidum*" does not make the applicant a co-principal debtor.

39.10 In the premises, the respondent is not a co-debtor with Keliana. Suing the respondent independently of Keliana shows that the applicant has failed to establish a cause of action against the respondent.

39.11 In the heads of argument the aforesaid is addressed under the heading "The surety is being sued independently of Keliana."

39.12 The question then becomes whether it is legally tenable to sue Mavie independently of Keliana, where no money judgment has been obtained from Keliana first or a claim being proved in Keliana's insolvent estate. The question is then dressed up as follows: "The issue here is the meaning of co-principal debtor."

39.13 The meaning of "co-principal debtor" has been fully analysed under the first issue of law raised above and to my mind the second issue as set out in the notice as read with the heads of argument adds nothing new to the debate. It most certainly does not mean that the surety in the present case cannot be sued independently. It is also not a case of the principal debtor gaining an extension of time to pay

merely because it is in liquidation and as a consequence the surety should also receive the benefit of an extension. Nothing in the authorities suggest that liquidation is tantamount to an extension of time. Liquidation is a *specie* of excussion in itself in accordance with the relevant part of the Companies Act 61 of 1973 as read with the relevant parts of the Insolvency Act 24 of 1936. Far from equating an extension of time it is aimed at the winding up of the company and ultimately terminates it as a corporate body.

39.14 By not suing Keliana it cannot be inferred that the surety is now turned into a principal debtor.

39.15 The reliance on Maasdorp v GraaffReinette Board of Executors 3 Buch A.C.482 is entirely misplaced and of no assistance.

39.16 The whole of the second issue of law was effectively dealt by counsel for the applicant by her reliance on Absa Bank Ltd v Lowting⁹ where the Court held that:

“The renunciation of the 'benefit' has the effect of permitting the creditor to proceed directly against the surety, before excussing the principal debtor, should he so wish. It should be noted that in law a surety who binds himself as co-principal debtor is taken to have tacitly renounced this benefit.”

[40] The second question of law thus fails.

[41] Ultimately, and as a third question of law, it was submitted that the agreements in respect of which the sureties operate are void.

[42] In paragraph 19.4 of the founding affidavit Nedbank alleges that:

⁹ 2013 JDR 1826 (GNP)

“The conditions set out in clauses 7 and 8 of Annexure “FA5” and clause 2 of the terms and conditions for overdraft facilities were stipulated in favour of the applicant who could waive same. Notwithstanding the foregoing, if the applicant advance any funds to Keliana, before the conditions were fulfilled, such funding could not be regarded as a waiver of by the applicant;s right in obtaining fulfilment of such conditions”.

[43] In para 20 of the founding affidavit Nedbank alleges that:

“As all conditions set out in Annexure “FA5” were duly fulfilled, the facilities set out therein came into full force and effect, and the applicant made the facilities available to Keliana, and Keliana on utilising such facilities became indebted to the applicant in terms thereof”

[44] Although the applicant alleges that all conditions were duly fulfilled, Mavie’s counsel submits that no evidence is provided to substantiate this important allegation. He contended that the failure to provide evidence that the suspensive conditions were fulfilled indicates that there is no cause of action against Mavie. I now turn to the relevani clauses referring to the conditions.

[45] The heading of clause 7 is “CONDITIONS PRECEDENT (TO BE FULFILLED PRIOR TO MAKING FACILITIES AVAILABLE)”

[46] Clause 7.1 provides that:

“The Borrower facilities will not be made available to the Borrower unless and until the terms and conditions set out in this clause, in clause 9 below and clause 2 of the Standard Terms and Conditions have been met to the satisfaction of Nedbank (which terms and conditions will be of immediate effect on signature by the Borrower of this Facility Letter). The Conditions Precedent in this clause, in clause 9 below and in clause 2 of the Standard Terms and Conditions have

been stipulated for the benefit of Nedbank, and Nedbank will therefore be entitled to waive fulfilment of all or any part of such conditions. Notwithstanding the aforesaid, if Nedbank advances any funds to the Borrower(s) before the conditions precedent have been met, such funding must not be regarded as a waiver of Nedbank's right in obtaining fulfilment of the conditions precedent. The relevant conditions are:

7.1.1 Acceptable and updated valuation to be obtained over portion 2 of Erf 6[...] Hurlingham. Minimum market value required is R16 000 000.00

7.1.2 FNB account to be closed no later than 31 October 2018, failing which the Nedbank overdraft, per clause 3.1, will be repriced at Prime +8%

9.1.2 A security cession of all present and future debtors.

9.1.5 A security cession of Nedbank Group fire policy 00151996 002 required in terms of the covering mortgage bond referred to in clause 9.1.3....

9.1.6.1 Security cessions in favour of Nedbank of Momentum life Assurance number 2[...] by Miss Nonhlanhla Ruth Mavie with a minimum life cover of R12 800 000 000. Proposed: Minimum life cover to be increased to R 17 500 000.00 ”

[47] The heading of clause 2 is “ADDITIONAL CONDITIONS PRECEDENT”. Clause 2 provides that:

“2.1 The Borrower must provide Nedbank with the security described in this Facility Letter, which security must be perfected to the satisfaction of Nedbank.

2.2 *If applicable, the Borrower must comply with section 44 (financial assistance to buy shares), section 45 (loans or other financial assistance to directors and/or related entities) and section 112 (disposal of all /greater part of assets) of the Companies Act, 71 of 2008 (“the Act”), and section 40 (financial assistance to buy member’s interest) and section 52 (loans or other financial assistance to other legal entities/member’s) of the Close Corporations Act, 69 of 1984.*

2.3 *The Borrower must confirm that any financial interests, as contemplated in section 75 of the Act have been disclosed or, if it is established that interests were not disclosed, that a ratified extract of the relevant minutes will be obtained from all the shareholders,*

2.4 *The Borrower must confirm that there has been compliance with the conditions of the memorandum of incorporation (“the MOI”) of the Borrower.*

2.5 *If section 112 (disposal of all/greater parts of assets) of the Act is applicable, the auditor(s) of the selling company must provide a certificate confirming:*

2.5.1 *that he/she/they is/are a duly registered auditor(s); and*

2.5.2 *that the financial statements have been drawn up in compliance with generally accepted accounting practice or international financial reporting standards.*

2.6 *If the Borrower Facilities, or part thereof, will be utilised to finance the purchase of a going concern, compliance with section 34 of the Insolvency Act, 24 of 1936, is required.*

2.7 *Where an RF Borrower is involved, Nedbank must be satisfied that there are no conditions prejudicial to Nedbank in the Borrower’s MOI.”*

[48] It was thus argued that since Nedbank has failed to prove that the conditions precedent were complied with the principal obligations are void and of no force and effect.

[49] Since the principal obligations are invalid, it was submitted there is no valid contract of suretyship.

[50] It is trite law that the fulfilment of a suspensive condition must be alleged and proved by the party relying on the contract. For this, reliance was placed on *Resisto Dairy (Pty) Limited v Auto Protection Insurance Company Limited*.¹⁰

[51] The argument further proceeds that, in this case, there is neither a waiver nor fulfilment of the conditions precedent.

[52] An agreement subject to suspensive conditions comes into effect immediately after signature thereof. A suspensive condition suspends the full operation of the obligation and renders it dependent on the uncertain future event. I have no difficulty with the latter proposition as a statement of law.

[53] All of the aforesaid, however, ignores that, irrespective of the fulfilment of these conditions, the money was advanced to Keliana, a fact which is not placed in dispute by Mavie. The denial by Nedbank in argument that the agreements were subject to suspensive conditions is alleged to be frivolous and vexatious because, in the founding affidavit, Nedbank pleaded that all conditions were fulfilled.

[54] In paragraph 20 of the founding affidavit, Nedbank alleged that, as all conditions set out in annexure "FA5" were duly fulfilled, the facilities set out therein came into full force and effect and Nedbank made the facilities available to Keliana and Keliana, on utilising such facilities, became indebted to Nedbank in terms thereof.

¹⁰ 1963 (1) SA 632 (AD), at 644G-H

[55] It should be noted that the facilities in this matter in chronological sequence started with the loan agreement, then the medium term loan agreement and only then the Facility Letter accepted on 30 July 2018. The aforesaid loans were already made available before the facility letter "FA5". There was no substantiation for the fulfilment of the conditions precedent (merely the allegation in paragraph 20 of the founding affidavit stating that same was fulfilled, with no date specified).

[56] It was argued that the allegation that the conditions were fulfilled is in line with what is required by law from Nedbank, which agreement Mavie's counsel contends are subject to suspensive conditions.

[57] It is then submitted that Nedbank would not have made the allegation in paragraph 20 which is required by *Resisto Dairy*, if it did not appreciate that the agreement contained suspensive conditions. The argument then continues that there is a fundamental problem with the allegation in paragraph 20 of the founding affidavit, in that *Resisto Dairy* does not only require a party to allege fulfilment of the conditions, but there must also be proof of that fulfilment. Because no proof has been provided by Nedbank, reliance was placed on the case of Du Coudray v Watkins¹¹ where the court dealt with the failure of the respondent to allege fulfilment of suspensive conditions in his particulars of claim. It was said by Swain J, in paragraph 13, that:

"Even if the respondent were to prove all of the facts alleged by the respondent in the particulars of claim, the respondent would still not succeed for the simple reason that no evidence could be led to prove the fulfilment of the suspensive conditions, and that a binding agreement of sale eventuated."

[58] It is then alleged that Nedbank, in this case, is on the opposite side of the Du Coudray v Watkins case but with the same fateful consequences, in that Nedbank has alleged compliance with the suspensive conditions without

¹¹ 2010 JDR 0381 (KZP)

any proof. Nedbank's position is in my view not analogous to the aforesaid position.

[59] It was argued that it is a general rule in our law that Nedbank must stand or fall by the founding affidavit and the facts alleged in it. The failure to prove compliance with the suspensive conditions indicates that the application is ill-conceived and ill-advised. Reliance is placed on SA Diamond Workers Union v Master Diamond Cutters Association of SA,¹² where Millin J said the affidavit should "*contain any evidence and set out all that would be necessary in a trial*".

[60] Based on the further trite principle that the affidavits are both the pleadings and the evidence which has to be led to establish liability, it is then submitted that, because no proof of the fulfilment of the suspensive conditions is put forward, there is no case to be met.

Conclusion

[61] I am not persuaded that all the conditions relied upon are simply suspensive. The use of the term "condition precedent" does not axiomatically make it a suspensive condition.¹³ I will, however, assume in Mavie's favour that the conditions are suspensive.

[62] It is clear that prior to the date of Annexure "FA5" the loan and medium term loan were implemented by all parties (presumably in terms of earlier facility agreements which were fulfilled or in terms of which Nedbank waived compliance) until the alleged breach occurred and hence there is room to infer as between paragraphs 19.4 and 20 of the founding affidavit that the fulfilment of the suspensive conditions would only pertain to the *new overdraft facilities*. I will however assume that the failure of the assumed suspensive conditions on the facts in this matter will permit all the agreements entered into to fail (even if it does so retrospectively.)

¹² 1948 (2) PH A83 (T), at 283

¹³ See Amlers, Precedent of Pleadings 9th Edition p111-p114

[63] The question remains whether Mavie's counsel's argument in respect of all the agreements is valid given that fulfilment of the suspensive conditions were pleaded (see paragraph 20 of the founding affidavit) but allegedly not proved (or substantiated).

[64] On Mavie's counsel's own argument the founding affidavit constitutes both the pleadings and evidence.

[65] The ultimate question is what weight and meaning I should attach to the content of paragraph 20 which alleges that the conditions were fulfilled.

[66] I consider the following observation made by Cameron JA in Boxer Superstores Mthatha and Another v Mbenya¹⁴ important:

"[2] The employer in response raised a point of law in terms of Uniform Rule 6(5)(d)(iii), contending that the High Court –

'lacks jurisdiction to entertain the application for the relief as sought in the notice of motion in that the provisions [of] the Labour Relations Act 66 of 1995 dictate that the High Court does not retain jurisdiction to adjudicate on a dispute of the nature alleged by the applicant'.

[3] In her founding affidavit the employee asserted that her dismissal was substantively unfair (there being no grounds for it), as well as procedurally unfair (in that at the disciplinary hearing, where she appeared with a shop steward representing her, she was not asked to plead guilty or not guilty, and was put on her defence, and cross-examined, without any evidence being proffered against her). For these reasons, she claimed, her dismissal was 'unlawful'. She added that 'my rights have been violated' by the respondents, submitting that 'everyone is equal before the law and has the right to equal protection of the law', and noting that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public

¹⁴ 2007 (5) SA 450 p452

hearing before court', and that she had been advised that the High Court has jurisdiction to hear the matter.

*[4] The employer's objection to the application challenges its viability in the forum the employee has chosen. **As yet there is no answering affidavit, and we must at this stage take the allegations in the founding affidavit to be established facts**, determining whether, if they are true, the High Court has jurisdiction". (my emphasis)*

[67] Although Cameron JA was dealing with jurisdiction the context was what the court should accept in an applicant's founding affidavit when a party files no answering affidavit and relies on Uniform Rule 6(5)(d)(iii).

[68] Based on the above I should be able to accept that paragraph 20 of the answering affidavit *asserts as a matter of pleading and evidence* that all the suspensive conditions were fulfilled. If Mavie challenged this on oath Nedbank would no doubt in reply have dealt with the fulfilment of every condition in detail and attached documentary proof of such fulfilment (or waiver if any particular condition was waived) to rebut any challenge.

[69] Should I hold that there is no proof of fulfilment of the conditions I will be ignoring the full evidential meaning of paragraph 20 of the founding affidavit. As it stands it also proves the fulfilment of the assumed suspensive conditions.

[70] The position before me in this matter can be equated with the position where in a matter on trial the briefest evidence of the fulfilment of the conditions are given and is not challenged by the defendant in cross-examination, and upon the close of the plaintiff's case absolution of the instance is sought.

[71] In the above analogy the plaintiff would have been able to rely on the dictum in President of the Republic of South Africa and others v South African Rugby Football Union and Others¹⁵ where the following was said:

“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.

[62] The rule in Browne v Dunn is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”

[72] In the premises I make the following orders:

¹⁵ 2000 (1) SA 1 (CC)

1 The respondent is ordered to effect payment to the applicant the:

1.1 Sum of R474 413.61;

1.2 Interest on the sum of R474 413.61 at the applicable default rate (which rate is currently calculated as the re-purchase rate of 7.25% plus 14% thus 21.25%) per annum calculated from 17 February 2023 to date of final payment, both days inclusive. in terms of the current account facility;

1.3 Sum of R4 210 463.18;

1.4 Interest on the sum of R4 210 463.18 at the rate of 0.6% below the prevailing prime lending rate, as applicable from time to time (currently 10.5%), thus 9.9% per annum, calculated from 26 January 2023 to date of final payment, both days inclusive, in terms of the medium term loan facility;

1.5 Sum of R11 582 390.49;

1.6 Interest on the sum of R11 582 390.49 at the rate of 0.75% below the prevailing prime lending rate, as applicable from time to time (currently 10.5%), thus 9.75% per annum, calculated from 29 January 2023 to date of final payment, both days inclusive in terms of the loan agreement.

2 The respondent is to pay the applicant's costs on the scale as between attorney and client.

S. VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

Date of judgment: 25 September 2024

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