



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

CASE NO: 2255/2024

REPORTABLE: YES / NO	
OF INTEREST TO OTHER JUDGES: YES/NO	
REVISED: YES/NO	
<u>14 April 2025</u>	
DATE	SIGNATURE

In the matter between:

TRENCON CONSTRUCTION (PTY) LTD

Applicant

and

BLUE CLOUD INVESTMENTS 227 (PTY) LTD

First Respondent

ALKARA 238 (PTY) LTD

Second Respondent

BAY BREEZE TRADING 197 (PTY) LTD

Third Respondent

FERRIS WHEEL TRADING 37 (PTY) LTD

Fourth Respondent

WESLEY TENDAUPENYU

Fifth Respondent

RANGEWAVE TRADE AND INVEST 14 (PTY) LTD

Sixth Respondent

JUDGMENT

MONTSHO-MOLOISANE AJ

- [1.] This is an application for a money judgment launched by the Applicant against the First to Fifth Respondents, arising out of a written Loan Agreement concluded by them on 31 May 2018 and 05 June 2018.
- [2.] The Applicant is a private company duly registered and incorporated in terms of the company laws of the Republic of South Africa.
- [3.] The First to Fourth Respondents are private companies, duly registered and incorporated in terms of the company laws of the Republic of South Africa, all of which have the chosen *domicilium citandi et executandi* at the same address in Nelspruit, Mpumalanga.
- [4.] The Fifth Respondent is cited in his capacity as the director of the First to Fourth and Sixth Respondents.
- [5.] The Sixth Respondent is a private company duly incorporated in terms of the company laws of the Republic of South Africa. No relief is sought against the Sixth Respondent, as it has been cited merely to the extent that it might have an interest in the subject matter of the litigation.

- [6.] The money judgment sought by the Applicant is for payment of the sum of R 22 112 336.70c, together with interest on the said amount, calculated daily and compounded monthly in arrears, at the rate of prime plus 6% (six percent) per annum a *tempore morae*, from 1 May 2024 to date of final payment and costs of suit on the scale of attorney and own client.
- [7.] The Applicant's Founding affidavit was deposed to by its director, Garth Warren Robinson, whilst the Fifth Respondent deposed to the Answering affidavit on behalf of the First to Fourth Respondents, in his capacity as the director of each of them, and in his personal capacity, opposing the relief sought by the Applicant.
- [8.] For ease of reference, the Applicant shall be referred to as Trencon, and the First to Fourth, and Sixth Respondents shall be referred to interchangeably as Blue Cloud, Alkara, Bay Breeze, Ferris and Rangewave respectively.

Factual background

- [9.] The cause of action in this application arises mainly from two written agreements concluded between the Applicant, represented by the aforementioned director and the First Respondent, who was represented by its director, the Fifth Respondent. The two documents are:

9.1. the written agreement titled "CONTRACT OF LOAN", signed and concluded by Mr... as the director of Trencon, on its behalf and Blue Cloud, duly represented by the Fifth Respondent, as its director, on 31 May 2018 at Bryanston, and 05 June 2018 at Eastleigh ("the Loan

Agreement”), in terms of which Trencon would advance an amount of R 20 000 000.00 to Blue Cloud as contemplated in Clause 3 of the said contract; and

9.2. the written agreement titled “CONTRACT OF GUARANTEE, CESSION AND PLEDGE”, (“the Guarantee Agreement”), signed and concluded on 31 May 2018 at Bryanston, and on 05 June 2018 at Eastleigh, by Trencon, duly represented by its director, and the Second to Fourth Respondents, duly represented by the Fifth Respondent as the director thereof, guaranteeing and undertaking as co-principal sureties *in solidum* to pay to Trencon on demand, any amounts which Blue Cloud is obliged to pay to Trencon in terms of the Loan Agreement, in the event of default by Blue Cloud.

[10.] The third document is the Deed of Suretyship, (“the Suretyship”), which was signed by the Fifth Respondent in his “*personal capacity*”, on 31 May 2018. In this document, the Fifth Respondent bound himself “*jointly and severally and in solidum*” to Trencon, referred to therein as “*the Creditor*”, and “*its successors in title, as limited surety for and co-principal debtor*” with the First to Fourth Respondents, for the due and punctual payment of all amounts owed by these Respondents, limited to a maximum of R 40 000 000.00 (Forty Million Rand).

[11.] The First Respondent however defaulted with the repayments as stipulated in the Loan Agreement. The Second to Fourth Respondents also failed to honour the terms of the Guarantee Agreement. Likewise, the Fifth Respondent failed

to honour the commitment he made in the Suretyship, which necessitated the launching of this application.

The Applicant's case

[12.] The deponent to the Founding affidavit relies on the terms of the Loan Agreement, read together with the Guarantee Agreement and the Suretyship signed by the Fifth Respondent.

The Loan Agreement

[13.] The material terms of the Loan Agreement as pleaded in the Founding affidavit are inter alia the following:

- 13.1. Trencon would advance an amount of R 20 000 000.00 (Twenty Million Rand) to Blue Cloud in terms of Clause 3, read with Clause 1.1.3.12.1;
- 13.2. Trencon advanced an amount of R 6 000 000.00 (Six Million Rand) of the Loan Amount to Blue Cloud on 23 April 2018 as stated in Clause 5.1.1;
- 13.3. Trencon advanced the balance of the Loan Amount to Blue Cloud on 30 May 2018 as stated in Clause 5.1.2, and 1.1.3.1;
- 13.4. Interest would accrue upon the Loan Amount, from 30 May 2018 to date final payment (both dates inclusive), at the prime rate plus 2%

nominal (Applicable Interest Rate), calculated daily and compounded monthly in arrears as provided for in Clauses 6.1 and 1.1.3.1;

- 13.5. Blue Cloud would use its best endeavours to repay the amounts due to Trencon under the agreement as soon as possible after 30 May 2018 in in terms of Clauses 7.1 and 1.1.3.1;
- 13.6. After 30 May 2018 Blue Cloud would, on a monthly basis make payment of at least the monthly interest which accrued on the Loan Amount, which payment was to be received by Trencon on or before the last business day of each month in terms of Clauses 7.2 and 1.1.3.1;
- 13.7. An additional amount of R 10 000 000.00 (Ten Million Rand), referred to as the Loan bonus would be payable by Blue Cloud to Trencon in terms of Clauses 1.1.3.12.2 and 1.1.3.13;
- 13.8. All amounts due to Trencon under the Loan Agreement, being the Loan Amount, the Loan Bonus, interest and costs (Loan Outstanding) would be settled in full by no later than 30 May 2021 as provided for in Clause 7.3;
- 13.9. Interest would accrue upon the Loan Bonus, from the Final Repayment Date to the date of repayment in full (both dates inclusive), nominal, calculated daily and compounded monthly in arrears in terms of Clause 6.1.2;

- 13.10. In terms of Clause 7.7, the nature and amount of Blue Cloud's indebtedness under the Loan Agreement, would at any time be deemed to be adequately proven by a written Certificate by any director of Trencon, whose appointment and designation it would not be necessary to prove, and which would, in the absence of manifest error, be binding on Blue Cloud, and still constitute *prima facie* proof in any legal proceedings against Blue Cloud, and constitute *prima facie* proof, of the indebtedness of the Borrower, Blue Cloud, and would constitute a liquid document for the purpose of any litigation by the Lender, which is Trencon;
- 13.11. If Blue Cloud failed to settle any amount owing to Trencon in terms of the Loan Agreement on the due date for settlement thereof, then interest would accrue upon the Loan Agreement from 30 May 2018 to the date of final payment (both dates inclusive), at the prime rate plus 2% nominal, calculated daily and compounded monthly in arrears in terms of 7.8 read with Clauses 1.1.3.3 and 1.1.3.5 of the Loan Agreement;
- 13.12. All payments made by Blue Cloud to Trencon in settlement of the amounts due to Trencon, would be applied first towards costs, then towards interest, and finally towards the capital of the Loan Amount, as contemplated in Clause 7.11;
- 13.13. In terms of Clause 19.3, the persons signing the Loan Agreement in a representative capacity warranted their authority to do so; and

13.14. Each of the Parties to the Agreement acknowledged and agreed that all of the provisions of the Loan Agreement and the restrictions are fair and reasonable in all the circumstances and are in accordance with the Parties' intentions in terms of Clause 20.1.2 of the Loan Agreement.

The Guarantee Agreement

[14.] The Applicant's Founding affidavit further relies on the terms of the Guarantee Agreement, the material terms of which are *inter alia* as follows:

14.1. Clause 2.1.4 refers to Blue Cloud as the Borrower, and the 'Guarantors' as the Second, Third and Fourth Respondents, jointly and severally, Clause 2.19 specifies that Trencon is the "Lender" and the "Loan Agreement" is the Contract of Loan concluded between Trencon and Blue Cloud;

14.2. With effect from 05 June 2018, until the date that all of Blue Cloud's obligations under the Loan Agreement are discharged, Blue Cloud pledged in *securitatem debiti*, all of its rights, title and interest in and to 27 ordinary shares in Rangewave, representing 27% of all of the issued ordinary shares in it, in terms of Clause 2.1.12 read with Clause 2.1.13;

14.3. In terms of Clause 3.1, Trencon agreed to enter into the Loan Agreement with Blue Cloud, subject to each of the Guarantors

undertaking (as principal and primary obligation), to pay to Trencon all amounts which Blue Cloud is obliged to pay under the Loan Agreement.

- 14.4. Clause 4.1 of the Guarantee Agreement provides that each of the Guarantors (that is the Second, Third and Fourth Respondents), guarantees and stands as co-principal surety *in solidum* to pay to Trencon, on demand, any amounts which Blue Cloud has agreed to pay to Trencon under, and in terms of the Loan Agreement, and which Blue Cloud fails to pay timeously to Trencon;
- 14.5. Clause 4.2 unequivocally stipulates that the Guarantee Agreement constitutes a separate primary obligation enforceable against each Guarantors jointly and severally, on the terms and conditions contained in the Agreement, and the terms of surety (the Deed of Suretyship);
- 14.6. In terms of Clause 5.1, Blue Cloud pledged and ceded in *securitatem debiti* with effect from the signature date and terminating on the Final Discharge date all of its rights, title and interest in, and to the Pledged and Ceded Rights to Trencon, as continuing general covering security for the due, proper and timeous performance and discharge of the Secured Obligations;
- 14.7. In terms of Clause 5.6, Trencon shall accept the benefit of the Pledge and Cession contemplated in Clause 5.1, and the cession in

securitatem debiti operates in respect of all rights, powers and privileges attaching to the Pledged and Ceded Rights;

14.8. An event of default would occur under the Guarantee Agreement if:

14.8.1. an event of default occurred under the provisions of the Loan Agreement, and such event of default was not remedied within the time period specified under the Loan Agreement;

14.8.2. if any of the First to Fourth Respondents breached a provision of the Guarantee Agreement and, if such breach was capable of remedy, failed to remedy such breach within seven days of written notice, from Trencon to do so, as provided for in Clause 5.7.2 of the Guarantee Agreement; and

14.8.3. save as contemplated under the Loan Agreement, the Second to Fourth Respondents waived any rights that they may have to first require Trencon to make any demand of Blue Cloud to proceed against or claim payment from Blue Cloud or any third party to take action or obtain judgment in any Court against Blue Cloud, to make, file or prove any claim in the business rescue, liquidation or winding-up of Blue Cloud, or to enforce any security granted by Blue Cloud or any third party, before making payment under the Guarantee Agreement, in terms of Clause 9.1.

- 14.9. The First to Fourth Respondents further acknowledged and agreed that their obligations under the Guarantee Agreement, are absolute, and that upon the date of signature of the Guarantee Agreement, they remain bound to the full extent thereof, in terms of Clause 13.1 thereof.

The Deed of Suretyship

- [15.] The Applicant's affidavit further relies on the contents of the Suretyship signed by the Fifth Respondent the material terms of which are that:

- 15.1. the Fifth Respondent unequivocally bound himself *"jointly and severally and in solidum"* to Trencon and its successors in title, as limited surety for, and co-principal debtor with the First, Second, Third and Fourth Respondents, for the due and punctual payment by them to Trencon, limited to a maximum of R 40 000 000.00 to (Forty Million Rand), for all amounts owing to Trencon, in terms of the Loan Agreement and the Guarantee Agreement;
- 15.2. the amount of the indebtedness of the First to Fourth Respondents to Trencon, shall at any time be determined and proven by a Certificate signed by a director or the attorneys of the Creditor, as provided for in Clause 5; and
- 15.3. in terms of Clause 3, the Suretyship remains in force until the indebtedness of the Respondents to Trencon has been paid in full.

The admitted indebtedness of Blue Cloud

[16.] The Applicant, in its Founding affidavit, further relies on the Respondent's letter to Trencon dated 26 March 2021, wherein the Fifth Respondent acknowledges the indebtedness of Blue Cloud, to Trencon. The gist of the indebtedness of Blue Cloud as pleaded, appears from the said letter, where the following appears:

"The above loan agreement dated 30 May 2018 has reference. According to the agreement, full repayment of the loan of R20 million (plus interest) and a loan bonus of R10 million are due on 30 May 2021.

Blue Cloud has maintained the interest payments which are currently up to date. However, due to the following factors, Blue Cloud will not be in a position to repay the loan and bonus by the agreed date..."

[17.] The ensuing paragraph further states:

"It is proposed that capital repayments be made as follows:

- 1. R10 million by 31 August 2021*
- 2. R10 million by 31 January 2022, and*
- 3. R10 million by 30 May 2022*
- 4. Interest payments to be maintained until the loan has been fully repaid.*

Trencon currently holds security in the form of 27% shares in Rangewave Trade and Invest 14 (Pty) Ltd, the company that owns Mbombela Square, personal securities from the director of Blue Cloud (myself) and from associated companies".

[18.] Blue Cloud's letter was responded to by the Applicant's attorney, on 18 May 2021 wherein it is stated that Trencon was amenable to the proposed payment plan and some documents were requested from Blue Cloud to compile a legal audit, so as to be able to exercise due diligence by Trencon.

[19.] It is further averred that:

19.1. Blue Cloud failed to repay the Loan Amount due on 30 May 2021, as proposed in the letter of the Fifth Respondent, dated 26 March 2021;

19.2. On 03 March 2022, Trencon's attorney dispatched a Letter of demand to Blue Cloud, demanding payment. In the Letter of demand, Trencon demanded that the Second, Third and Fourth Respondents make payment in the sum of R 32 350 527.70 to it, failing which Trencon would pursue litigation;

19.3. On 14 March 2022, the parties held a "without prejudice" meeting at the offices of the attorneys of record of the First to Fifth Respondents in Saxonwold, Johannesburg, where it was agreed that Trencon would hold over further action against the Respondents;

19.4. On 19 March 2022, Trencon's attorneys of record dispatched a further letter to the First to Fifth Respondents' attorneys of record, drawing

their attention to the fact that the amount owing was incorrectly stated previously, and that the correct amount of the debt was actually R 32 635 917.37;

- 19.5. That the above stated amount was never paid by Blue Cloud;
- 19.6. That between March 2022 and March 2024, the parties continued to engage with one another with a view of reaching an agreement regarding the payment of the debt due by Blue Cloud to Trencon;
- 19.7. The parties were however unable to come to a suitable arrangement, this despite the fact that Blue Cloud made various payments towards the reduction of its indebtedness to Trencon during the period of the negotiations.
- 19.8. That on 02 May 2024, the Applicant's attorneys dispatched a Letter of demand, wherein it was recorded that as at 30 April 2024, Blue Cloud was indebted to Trencon in the sum of R 22 512 236.70c, and that it remained in default of the Loan Agreement;
- 19.9. That on 03 May 2024, after the Letter of demand dated 02 May 2024 was dispatched to its attorneys of record, Blue Cloud paid an amount of R 400 000.00 to Trencon;
- 19.10. On 08 May 2024, Trencon's attorneys dispatched a letter to the Second to Fourth Respondents' attorneys, indicating that of the amount R 22 512.70c, Blue Cloud had only paid R 400 000.00,

with the amount of R 22 112 236.70c still owing under the Loan Agreement; and

19.11. Certificates of balance were issued on 15 May 2014, reflecting the amounts owing by the Respondents to Trencon *ex facie* the Loan Agreement.

Respondents' case

[20.] The responses in the Answering affidavit are generally sparse, as the material allegations made by the Applicant regarding the indebtedness of Blue Cloud to Trencon have been left unchallenged.

[21.] The Fifth Respondent admitted that it is his signature that appears on each of the three documents relied on in the Applicant's Founding affidavit but contends that the Loan Agreement is unenforceable.

[22.] The Answering affidavit however fails to furnish facts or place evidence that challenges the enforceability of the Loan Agreement. All that is pleaded by the deponent is that he "*puts the Applicant to the proof thereof*".

[23.] In addition to the bare denials pleaded, the Fifth Respondent avers that the letter he wrote to the Applicant on behalf of Blue Cloud on 26 March 2021, constitutes a Settlement negotiation, which cannot be used in civil proceedings as it is privileged.

[24.] It is further pleaded that Blue Cloud is not indebted to Trencon, and on that ground, the application ought to be dismissed with costs.

Issues for determination

- [25.] Having regard to the facts pleaded in the affidavits before Court, what needs to be considered is whether the Loan and Guarantee Agreements, read with the Deed of Suretyship, are enforceable, thus imputing liability for payment of the debt owed, on the First to Fifth Respondents.

Evaluation

- [26.] It is common cause that the Applicant's cause of action is premised on the Loan Agreement, the Guarantee Agreement and the Suretyship, the material terms of which are referred to above.

- [27.] It is trite that in evaluating the Applicant's application, it is incumbent on me to assess the evidence, as appears from the facts pleaded in the Founding and Answering affidavits. From the papers filed in this case, it appears that the Answering affidavit does not respond to every fact pleaded in the Applicant's Founding affidavit.

- [28.] In the premises, this Court aligns itself with the *obiter dictum* in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*¹, where it was held that:

“... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted”.

- [29.] It is important in this regard to point out that the Fifth Respondent, being the director of all the corporate Respondents, admitted in the Answering affidavit

¹ Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at p 235 E-G

that it is his signature that appears on all three documents and does not challenge the validity of the Loan Agreement. The authenticity thereof is therefore unchallenged and is deemed to be admitted.

[30.] The Fifth Respondent more importantly does not dispute the terms of the Loan Agreement, in particular, Clause 5.1.1 thereof, where it is stated that "*On 23rd April 2018, (the Lender) advanced R 6 000 000.00 (Six Million Rand) of the Loan Amount to the Borrower*". All that the Fifth Respondent contends regarding the payment by Trencon of an amount of R 6 000 000.00 (Six Million Rand) on 23 April 2018, and R 14 000 000.00 (Fourteen Million) on 30 May 2017, is that it constitutes hearsay evidence, despite his signature.

[31.] Furthermore, the Fifth Respondent has not, in his Answering affidavit, disputed the terms of the Loan Agreement, the applicable interest rate payable, the Loan bonus payment of R 10 000 000.00 (Ten Million Rand), the compounded monthly interest payable, as well as the Final Repayment Date, as set out in the Founding affidavit of Trencon.

[32.] I also need to emphasize that there is no doubt whatsoever, that the Fifth Respondent duly signed the Loan Agreement, the contents of which are unambiguous regarding the terms of the agreement, and the Loan amount.

[33.] The contents of the Guarantee Agreement are also unambiguous, and as already stated herein, the Fifth Respondent duly signed the said document in acknowledgement of the contents and terms thereof.

[34.] More importantly, the contents of the Deed of Suretyship that the Fifth Respondent, signed and bound himself therein as a surety for, and co-

principal debtor with the First to Fourth Respondents for the due and punctual payment due to Trencon, limited to a maximum of R 40 000 000.00 (Forty Million Rand), have not been controverted by any evidence pleaded in the Answering affidavit.

[35.] Lastly, it is quite evident from the letter dated 26 March 2021 sent by the Fifth Respondent to Trencon, that no dispute had been declared by the Applicant at that stage. The dispute only arose after the first Letter of demand as dispatched by the Applicant's attorney of record to Blue Cloud, on 3 March 2022. The same applies to the provision for the Certificate of balance in the Laon Agreement which is not in issue.

Legal principles

[36.] It is appropriate to remark that in considering whether the Applicant has established the indebtedness of Blue Cloud, regard has to be had to the case pleaded by the parties, and the applicable legal principles.

[37.] Before I consider the application and the issues raised therein, I find it appropriate to remark that as a principle, the affidavits in motion proceedings serve not only to define the issues between the parties, but also to place essential evidence before the Court.

[38.] In this regard, the Applicant's Counsel correctly referred this Court to the case of *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others*², where the import of this legal principle was summarised by the Court. In that case,

² *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (CPD)

the Court emphasised that affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based³.

[39.] It is important to mention that the Appeal Court, in the fairly recent case of *Skog NO Others v Agullus & Others*⁴ held that:

*"It is trite that in motion proceedings, the affidavits filed in the application, constitute evidence. In such proceedings, the norm is that affidavits are limited to three sets. For this reason, utmost care must be taken to fully set out the case of a party on whose behalf an affidavit is filed"*⁵.

[40.] I am satisfied that the Applicant's Founding affidavit fully set out the facts on which it relies for the relief it is seeking, as the averments made therein are fully corroborated by the contents of the Loan Agreement, the Guarantee Agreement, and the Deed of Suretyship signed by the Fifth Respondent. In addition, thereto, the Applicant's affidavit detail steps embarked upon by the parties, at the instance of its attorneys to resolve the dispute, by holding settlement negotiations.

[41.] Regarding the Fifth Respondent's contention that the letter of 26 March 2021 that he sent to the Applicant on behalf of Blue Cloud, constitutes a privileged settlement negotiation, which was aimed at resolving the dispute, I find that:

³ See also: *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96, at para 13

⁴ *Skog N.O & Others v Agullus & Others* 2024 (1) SA 72 (SCA)

⁵ At paragraphs 18 of the judgment

41.1. it is clearly evident that as at 26 March 2021, no dispute had been declared by the Applicant, nor was any Letter of demand sent to the Applicant's attorney, regarding the default by Blue Cloud in honouring the terms of the Loan Agreement;

41.2. the Fifth Respondent, in his capacity as the director of the First to Fourth Respondents, wrote the said letter in acknowledgement of the indebtedness of Blue Cloud to Trencon, highlighting the payments of interest already made in terms of the Loan Agreement, and proposing new payment plans, due to what the letter refers to as "*the depressed demand for office space occasioned by the COVID 19 Pandemic*", and that "*The Pandemic had forced tenants to request reduced rentals and rent holidays, putting further pressure on Blue Cloud's cashflow*"; and

41.3. the parties commenced their "*without prejudice*" negotiations only on 14 March 2022, nearly one year later, pursuant to the Letter of demand sent by Trencon's attorneys to Blue Cloud's attorneys.

[42.] In this regard, the principle upheld in the case of *ABSA Bank Ltd v Hammerle Group*⁶ is applicable. In that case, it was held that:

"... As a general rule, negotiations between parties which are undertaken with a view to settlement of their disputes are privileged from disclosure. This is regardless of the fact whether or not the negotiations have been stipulated to be on a "without prejudice" basis. However, there are

⁶ *ABSA Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA); See also: *Lynee and Main Incorporated v Naidoo*, 2005 JDR 0972 N

exceptions to this rule. One of these is that an offer made, even on a without prejudice basis, is admissible in evidence as an act of insolvency".

[43.] In the circumstances, I find that the letter of 26 March 2021, written by the Fifth Respondent on behalf of Blue Cloud, does not constitute privileged settlement negotiations. It is evident from the contents thereof, that this was not a settlement negotiation, but a proposal for a new payment plan, which was initiated by Blue Cloud, through the Fifth Respondent.

[44.] I cannot be oblivious to the fact that, these being motion proceedings, this Court is bound by the legal principle laid down in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁷. In terms of that principle, the Appellate Division held that: "... where in proceedings on notice of motion, disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order... In certain instances, the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real genuine or bona fide dispute of fact"⁸.

Certificates of balance

[45.] Regarding the Certificates of balance issued in accordance with Clause 7.7 of the Loan Agreement, it is averred in the Answering affidavit that "*Given the*

⁷ *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

⁸ At 634 E-635C; See also *Wightman t/a JW Construction v Headfour and Others* 2008 (3) SA 371 (SCA), at para 12

failure to prove any indebtedness as aforesaid, the Certificates of indebtedness have no evidential value". I find this averment to be replete and lacking any factual basis in that the validity of the Loan Agreement, which is co-signed by the Fifth Respondent, and three witnesses, and which stipulates the requirement for the Certificate of balance to be furnished by a director of the Applicant, has never been disputed. In fact, it is not disputed that Blue Cloud made payments to defray the debt, as averred in the Founding affidavit and in the Fifth Respondent's letter of 21 March 2021 that proposed a new payment plan.

- [46.] It is an established legal principle that facts in the Applicant's affidavit which are not formally admitted in the Answering affidavit, cannot be denied but must be regarded as admitted. The case of *Senekal v Trust Bank of Africa Ltd*⁹ to which I was referred by the Applicant's Counsel, is more relevant herein. In that case, the Appellate Division held as follows in that regard:

*"The inquiry, then, in the light of what I have just said, is whether at the end of the case, the prima facie evidence afforded by the Certificate had been so disturbed as to prevent its becoming sufficient proof"*¹⁰.

- [47.] The law regarding Certificates of indebtedness has been settled, and remains as summarised by the Appellate Division in the case of *Bank of Lisbon International Ltd v Venter en 'n Ander*¹¹ as follows:

⁹ *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) p382 H-383C

¹⁰ At p383 B

¹¹ *Bank of Lisbon International Ltd v Venter en 'n Ander* 1990 (4) SA 463 (A) at p481F-H – 483B

47.1. Certificates of indebtedness constitute *prima facie* proof of the amount owing by the debtor;

47.2. A creditor who relies upon a Certificate of indebtedness is not required to present evidence in support of the Certificate; and

47.3. The debtor is thus required to put up evidence in order to rebut the *prima facie* probative value of the Certificate. If he does not, the Certificate alone is sufficient proof of the creditor.

[48.] In this case, no evidence was pleaded in the Answering affidavit, rebutting the *prima facie* probative value of the Certificate of balance relied on by the Applicant, as quantified. I therefore cannot find any rationale for deviating from the foregoing *Bank of Lisbon* principle, and the terms of the Loan Agreement as stipulated, in Clause 7.7, read with Clause 7.8, and Clauses 1.1.3.3, 1.1.3.5 and 1.1.3.17 thereof.

[49.] In my view therefore, the Respondents' contention challenging the admissibility of the Certificates of balance relied on by the Applicant, ought to be dismissed. The probative value of the said Certificates appears in Clause 7.7 of the Loan Agreement, the validity of which remains unscathed.

[50.] In the circumstances, this Court is therefore left with no option but to invoke the *Plascon-Evans* rule, by accepting the version of the Applicant as pleaded in the Founding affidavit, and which is not expressly denied in the Answering affidavit.

[51.] I am satisfied that the First to Fifth Respondents have failed to aver facts in rebuttal of the Applicant's claim. The Applicant has therefore succeeded in establishing the indebtedness of the First to Fifth Respondents in the amount of R 22 112 236.70c.

[52.] I am of the view that the applicable rate of interest payable in respect of the debt should be as stipulated and agreed to in Clauses 6.1.2, 7.8, 1.1.3.3 and 1.1.3.5 of the Loan Agreement.

Costs

[53.] The Applicant seeks an order for costs on the scale as between attorney and own client.

[54.] The Constitutional Court, in the case of *Baloyi v Public Protector and Others*¹² held that:

"It is trite law that costs are awarded to the successful party, subject to certain limited exceptions. The purpose underlying this principle is to indemnify the successful litigant against the expenditure incurred as a result of having been unjustly compelled to either initiate or to defend litigation as the case may be".

[55.] In this case, Clause 18 of the Loan Agreement concluded by the Applicant, represented by its director, and the First to Fourth Respondents represented by the Fifth Respondent who also signed the Suretyship in his personal capacity, provides for Blue Cloud to reimburse Trencon on demand, for the

¹² *Baloyi v Public Protector and Others* 2022 (3) SA 321 (CC) at para 51

charges and expenses, including value-added-tax and the fees and expenses on the scale as between attorney and its own client, incurred by Trencor in connection with the successful enforcement of its rights.

[56.] In lieu of the fact that the scale prayed for by the Applicant accords with the parties' Loan Agreement, there is no legal basis for this Court to deviate therefrom.

ORDER

[57.] In the result, I make the following order:

57.1. The First to Fifth Respondents are jointly and severally liable for:

57.1.1. Payment of an amount of R 22 112 236.70c;

57.1.2. Interest on the aforesaid amount, calculated daily and compounded monthly in arrears, at the rate of prime plus 6% per annum *a tempore morae* from 01 May 2024 to the date of final payment;

57.1.3. Costs of suit, including the costs for employment of two counsel, on the scale as between attorney and own client.



L.M. MONTSHO-MOLOISANE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Date heard : 13 February 2025

Judgment delivered : 14 April 2025

By electronic circulation to all parties

Appearances

Counsel for the Applicant : A Bester SC

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