

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 14287 / 2014
APPEAL CASE NO: A 45 / 2024**

In the matter between:

CHRISTA LEONIE VAN LOUW

First Appellant

NICOLAAS JACOBUS SMIT

Second Appellant

TREVOR JOHN ARTHUR VAN LOUW

Third Appellant

and

THE LAND BANK AND AGRICULTURAL DEVELOPMENT Respondent
BANK OF SOUTH AFRICA t/a LAND BANK

Coram: Le Grange, Wille *et* Sher, JJ

Heard: 22 January 2025

Delivered: 14 February 2025

(Delivered by email to the parties' legal representatives and by release to SAFLII.
The judgment shall be deemed handed down at 10h00 on 14 February 2025.)

JUDGMENT

WILLE, J: (unanimous)

INTRODUCTION

[1] This appeal is before us due to a successful application for leave to appeal granted by the Supreme Court of Appeal. The respondent advanced large sums of money to the principal debtor following several cascading agreements. During this time, the principal debtor was facing strained financial trading circumstances. The principal debtor was finally wound up because it breached the various written loan agreements and could not repay the funds it had received.¹

[2] This appeal concerns the liability of some of the sureties based on various specific suretyship agreements. The conclusion of the surety agreements and the terms thereof are not the subject of any dispute. Payment is in dispute.²

[3] This appeal involves a relatively narrow issue that concerns the release of the appellants' liability (as sureties) because of the alleged prejudicial conduct by the respondent's representative.³

[4] Initially, no less than seven defendants were cited as defendants in the trial action. However, the trial action proceeded in this matter only against the current appellants (cited as the fourth, fifth and seventh defendants in the trial action).⁴

[5] The initial controlling mind behind the principal debtor was cited as the first defendant in the action proceedings. He is now deceased. He was an unrehabilitated insolvent at the time of his death. His executor and the trustees were duly substituted as parties. They have withdrawn the first defendant's defences to the action. A judgment was granted against the first defendant following the withdrawal of the

¹ Intshona Milk Products (Pty) Ltd (registration number 205/010856/07), (the "principal debtor").

² The appellants (as sureties) contend for a 'release' from their surety obligations.

³ The appellants aver that the creditor acted in a manner prejudicial to their risk as sureties.

⁴ The first defendant (Mr Louw) passed away on 20 December 2020 (after he had testified).

defences to the action proceedings.⁵

[6] After the trial in the court (*a quo*), a judgment was granted against the appellants jointly and severally (the one paying the others to be absolved) in the sum of R142 319 311,58 with interest and costs.⁶

[7] The order, the subject of this appeal, was based on the appellants' liability regarding the deeds of suretyship concluded by the appellants as security for the indebtedness of the principal debtor to the respondent (the Land Bank).⁷

[8] As alluded to earlier, the terms of the various suretyship agreements were not disputed. A specific waiver contained in the various suretyship agreements was not engaged regarding the prejudice shield raised by the appellants. This issue will be dealt with briefly at the end of this judgment.⁸

[9] The appellant's primary focus in this appeal concerns a dispute about the trial court's factual findings in as much as these factual findings did not favour and support the defence raised by the appellants.⁹

OVERVIEW

[10] The appellants contend for their release from their surety obligations on the facts because of the principle relating to the release of a surety due to prejudice caused to the surety by the creditor's actions. This principle was eloquently formulated in *Davidson* as follows:

'...As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within

⁵ This judgment falls to rank as a joint and several judgment with any other judgment that may be obtained against the remaining sureties.

⁶ This included the costs of two counsel.

⁷ The trial court held the sureties liable and rejected their release as contended for.

⁸ It will be dealt with by way of an obiter dictum as this issue was not argued engaged by the parties.

⁹ The appellants submitted that the trial court made incorrect factual findings.

*the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer...*¹⁰

[11] The reach of this principle (as formulated in *Davidson*) was affirmed in *Bock* as it remains uncontroversial in that if the prejudicial conduct complained of is authorised by the principal obligation or the suretyship document itself, then the surety is not released.¹¹

THE PLEADINGS

THE RESPONDENT'S PARTICULARS OF CLAIM

[12] I do not consider it necessary to deal in any detail with the averments as set out in the respondent's particulars of claim. I say this because there are no controversial averments in the respondent's particulars of claim. The respondent's case against the appellants is based on and underpinned by the loan agreements and suretyship documents signed by the appellants.¹²

[13] I must highlight one aspect of the suretyship documentation that seemingly escaped the attention of both the appellants and the respondent. The suretyship document contains the following clause, which is highly relevant to the core shield raised by the appellants. As alluded to earlier, I will deal with this aspect at the end of my judgment. The suretyship documents contain the following provisions:

*'....The Sureties hereby irrevocably waive any right to rely on any defence based on waiver, estoppel or prejudice to them...'*¹³ (my underlining).

THE APPELLANT'S PLEA

[14] The appellants admit that a restructuring agreement was entered into between the principal debtor (validly represented) and the respondent. However, the appellants averred that they did not know the identity of the person or persons who

¹⁰ Absa Bank Ltd v Davidson 2000 (1) SA 1117 (SCA) ("*Davidson*") paragraph 19.

¹¹ Bock & Ors v Duburoro Investments (Pty) Ltd 2004 (2) SA 242 (SCA) ("*Bock*").

¹² The content of documentation signed by the appellants was not disputed.

¹³ Paragraph 5.6 of the suretyship document. .

represented the respondent when this restructuring agreement was concluded.¹⁴

[15] The main goal of the restructuring agreement was to consolidate the agreements (and the indebtedness) of the principal debtor so that a turn-around strategy for the principal debtor's business could be developed and implemented to attract an investor.¹⁵

[16] Further, a turnaround strategist would be appointed by the respondent to assist in managing the financial affairs of the principal debtor.¹⁶

[17] The appellants further pleaded that the turnaround strategist would be appointed as the principal debtor's managing director and take the position of the Chairman of the Board of Directors of the principal debtor.¹⁷

[18] In summary, the appellant's case (as initially pleaded) amounts to the following:

- (a) The respondent took *de facto* control of the principal debtor's business through the turn-around strategist.
- (b) The success (or otherwise) of the principal debtor's business depended entirely on the respondent's decision-making process to the exclusion of the remaining shareholders of the principal debtor.
- (c) The respondent owed the appellants a duty of care (I accept what is meant by this is instead a 'legal duty') employing the implementation of the tacit or implied terms of the re-structuring agreement to do all things and take all steps to ensure the proper management and financial success of the business of the principal debtor.¹⁸

[19] In addition, the appellants admitted the conclusion of the written agreements

¹⁴ This was challenging to understand because of the admission by the appellants.

¹⁵ This was not the subject of any dispute.

¹⁶ The appellants explicitly pleaded this. The turnaround strategist was Mr Botha.

¹⁷ This was disputed by the respondent because the agreement concluded in this connection only provided for Mr Botha to be appointed as a director of the principal debtor. Nothing more and nothing less.

¹⁸ This was in essence, the core shield raised for the release of the sureties from their obligations.

and the terms of these agreements, as alleged by the respondent. Further, it was acknowledged that the respondent made certain monetary advances to the principal debtor regarding these agreements.¹⁹

[20] Finally, it was further admitted that the respondents entered into the deeds of suretyship and that the suretyship agreements (and the terms thereof) were binding on them. This makes the shields raised by the appellants in the trial action even more challenging to understand, considering the waivers contained in the suretyship agreements, as alluded to earlier. I say this because the appellants expressly and irrevocably agreed not to raise the shield of 'prejudice' to them.²⁰

THE APPELLANTS' CASE

MR LOUW

[21] Mr Louw was initially a manager of the principal debtor and thereafter a consultant to the principal debtor. He was a shareholder and served as a director on the board. He later resigned.²¹

[22] He testified that at a board meeting of the principal debtor, the appointment of the respondent's turnaround specialist as a director was confirmed. Further, this specialist was also appointed as the managing director of the principal debtor.²²

[23] Mr Louw was a signatory to the restructuring agreement and acknowledged that it provided that:

*'...The Land Bank shall appoint a representative on to the borrower's board to monitor and control the implementation of the existing debt restructure contemplated therein...'*²³

[24] In addition, he was in wholesale agreement that the 'cheese factory' portion of

¹⁹ The amount due, owing and payable by the principal debtor was not disputed.

²⁰ The entire trial was about the alleged prejudice to the appellants.

²¹ He resigned as a director on 25 June 2012.

²² Mr Botha was also appointed as the Chairman of the Board.

²³ Following the terms of the restructuring agreement.

the principal debtor's business should be closed by the board. He agreed that the respondent's turnaround specialist was appointed with his blessing in an attempt to save the principal debtor's business. He also agreed that the selected turnaround specialist had the necessary expertise in the business of the dairy industry.²⁴

[25] He conceded that he was actively involved in the business's finances. No written communication showed that he opposed or disagreed with the overall turnaround strategy adopted by the turnaround specialist employed by the respondent.²⁵

[26] Much criticism was levelled about an alleged disagreement regarding the timing of the installation and commissioning of an additional line for producing long-life dairy products.²⁶

[27] One of the financial experts recommended that the respondent convey to the principal debtor that a consistent track record of selling a certain quantity of milk should be achieved before the installation of the second line was commissioned.²⁷

[28] The evidence demonstrated that after some time, this witness became less involved in the business and sought employment elsewhere. He eventually resigned. Before he resigned, the budgets for that specific financial year were tabled, thoroughly discussed, debated and approved at a board meeting.²⁸

[29] In summary, his evidence revealed that:

- (a) the respondent indeed introduced a third party to the table as a possible investor.
- (b) it did not mean that because the principal debtor applied for additional funding, the respondent was obliged to provide it.

²⁴ He initially believed that Mr Botha was not a dairy industry specialist.

²⁵ No board meeting minutes reflected that he disagreed with the way in which the business was run.

²⁶ The second UHT production line (the "second line").

²⁷ The principal debtor would have to be able to sell about 1.5 million litres of UHT per month.

²⁸ The budgets for 2013 were discussed and approved. He resigned with effect from June 2012.

- (c) much of his evidence amounted to conjecture and speculation, and some of his recollections carried little probative weight when evaluated in the context of expert evidence presented.²⁹

MS VAN LOUW

[30] She was the first appellant and a majority shareholder. She was a director of the principal debtor. Initially, she was the board's chairperson and, thereafter, the vice-chairperson.³⁰

[31] Her evidence of the precise role of the turnaround strategist is challenging to understand. I say this because the minutes of the board meeting on this issue demonstrated that all the board members agreed that the turnaround specialist employed by the respondent should be appointed as the chairman of the board of the principal debtor. Significantly, she conceded that the role of the turnaround specialist would be limited to facilitating the turnaround, monitoring, observation and reporting of the business of the principal debtor.³¹

[32] In summary, her evidence revealed that:

- (a) there was no correspondence from her indicating her dissent or complaining about how the principal debtor's business was conducted.
- (b) she had a fiduciary duty towards the principal debtor's business and thus had a duty to report any misconduct or mismanagement.
- (c) she agreed that the principal debtor had to meet specific threshold requirements before the respondent could advance any further money.
- (d) she admitted that the respondent was entitled to recover the money due to it and perfect its security.

²⁹ His evidence at times was contradicted and inconsistent with the documentary evidence presented.

³⁰ This was after Mr Botha became the Chairman of the Board.

³¹ She effectively conceded that Mr Botha was not in control.

- (e) furthermore, she conceded that the contractual obligation to source a suitable equity partner was an obligation imposed upon the principal debtor.³²

[33] The closure of the principal debtor's business and its ultimate winding-up were other issues that featured in her evidence and bear scrutiny. Some of the notable aspects of her testimony in this connection were the following:

- (a) the respondent was informed in writing by the principal debtor that it could not finance its losses.
- (b) the principal debtor informed the respondent in writing that it had no option but to freeze the business and commence closing-down procedures.
- (c) the respondent made it quite clear that those issues about the closure, when it was supposed to start and how it should be dealt with were to be decided by the board of the principal debtor.
- (d) an agreed closure plan was to be submitted to the respondent, and following this, at least two options were given to the principal debtor's shareholders prior to the closure of the principal debtor's business.
- (e) the appellants could relinquish their shares or submit a final settlement offer to the respondent.³³

[34] Thus, the evidence demonstrated that the principal debtor's board ultimately decided to continue with the mothballing process and the implementation of the closure plan of the principal debtor's business.³⁴

MR DE JAGER

[35] He is a chartered accountant. He was the principal debtor's auditor. The

³² It was not the obligation of the respondent to source a suitable investor.

³³ At this stage, Intshona owed the Land Bank an amount of R140 000 000,00.

³⁴ If the recommendations in the Deloitte report had been followed from inception.

appellants filed expert notices and summaries regarding his evidence. Initially, he confirmed that if specific professional recommendations had been implemented, the winding-up of the principal debtor's business may not have been necessary.³⁵

[36] As the trial progressed, he amended his evidence, among other things, to suggest that if the second production line had been commissioned and implemented, it would have produced a positive cash flow stream with the result that the business of the principal debtor would not have failed.³⁶

[37] The following features of his evidence, in my view, bear further scrutiny:

- (a) the general body of evidence suggested that the implementation of the second production line was to be delayed pending the commissioning of more rigorous financial forecasts.
- (b) the business of the principal debtor had historically operated below a break-even point and did not generate sufficient profit due to low turnover.
- (c) of crucial importance was that the principal debtor was selling milk for less than the cost of producing the milk.³⁷

THE RESPONDENT'S CASE

MR LONDT

[38] The respondent employed him as an agriculture and economic specialist in restructuring business entities. He testified about the appointment of the restructuring specialist by the respondent. He confirmed that this role was limited to facilitating the turnaround, monitoring, observation and reporting of the business of the principal debtor.³⁸

[39] Mr Botha was the respondent's representative on the board to assist the

³⁵ In my view this amounted to more of a special plea than independent expert evidence.

³⁶ It seemed to me that this evidence could be categorised as highly "speculative".

³⁷ This fell within the terms of the "Restructuring Agreement".

³⁸ This was following the suite of cascading agreements between the parties.

principal debtor with the business turnaround following the internal memorandum he prepared seeking approval for this appointment. He testified that the actual role that was to be played by the turnaround specialist was never in doubt nor the subject of any legitimate dispute. One of the terms of the revolving loan facility agreement concluded with the principal debtor contained a clause which confirmed the nature and the scope of the role to be played by the turnaround specialist. This role was never in doubt.³⁹

[40] Most importantly, the service contract for the employment of the turnaround specialist set out the nature of the services to be rendered as follows

‘...The services to be provided by the contractor shall be that of turning around the business of Intshona Milk Products (Pty) Limited (“the Company”) and shall include but not be limited to: managing the turnaround of the company, endeavour to manage the company so as to become a profitable business; advise the Land Bank on the sustained feasibility of the business; provide a monthly report to the Land Bank...’⁴⁰

[41] He confirmed that the principal debtor was under the control of their board and that its management was always subject to the decisions of that company's board.⁴¹

[42] According to him, the turnaround specialist was not the respondent's agent, as he was not appointed to benefit the respondent but to assist in the financial management and profitability of the principal debtor's business.⁴²

[43] He also confirmed what the respondent's attitude was regarding the approval for the additional finance for the second production line.⁴³

[44] He confirmed that the obligation to find a suitable investor rested with the principal debtor, and this obligation could not be placed at the door of the respondent. The respondent may have been granted permission to assist in the sourcing of a

³⁹ Only the interpretation of the meaning of this term was disputed and not the term itself.

⁴⁰ The wording of this term was not disputed.

⁴¹ Put another way, Mr Botha did not act on a frolic of his own.

⁴² The creditor employed Mr Botha but he was not the creditor's agent

⁴³ Considering the recommendations in the “Deloitte” report.

suitable investor, but the responsibility to do so remained with the principal debtor.⁴⁴

MR CAMPBELL

[45] He is a chartered accountant and is qualified as a certified fraud examiner. He specialises in forensic accounting work. He confirmed that it was too early to have commissioned the second production line, considering the material presented to him.⁴⁵

[46] He further confirmed that achieving the requisite 'economies of scale' and commissioning the second line were not necessarily inextricably linked. Put another way, one could determine whether there was an appropriate economy of scale on the first line and, after that, independently evaluate whether a second line was required.⁴⁶

CONSIDERATION

THE EXPERT EVIDENCE

[47] The evaluation of the expert evidence cannot be faulted. I say this because:

*'...[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert...'*⁴⁷

[48] The evidence by the appellant's expert cannot be appropriately classified as testimony by an independent expert. I say this because he was the principal debtor's auditor. Because of his involvement, the weight of his evidence may very well be

⁴⁴ This was not the subject of any meaningful challenge.

⁴⁵ With specific reference to the Deloitte report and the various expert summaries filed.

⁴⁶ He suggested a two-stage approach.

⁴⁷ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371 F-G.

diminished. Further, he amended his report using a supplementary report and ultimately relied on a document purportedly created by the respondent, which was never admitted into evidence. The expert's report should not have been amended as this ultimately was not to the benefit of the appellants.⁴⁸

THE RESTRUCTURING AGREEMENT

[49] The appellants advance that the trial court erred in its finding that the appellants failed to prove the terms of the agreements between the parties. I accept they mean a breach thereof by the respondent. A reading of the trial court's judgment reflects that all the material connected to the restructuring agreement was considered. Moreover, the evidence demonstrated, among other things, that the relationship between the oral agreements contended for and the written documentation was not adequately engaged with or explained. In any event, had the appellants established and demonstrated the binding terms of the agreements by adducing sufficient evidence, it may not have been to their advantage.⁴⁹

[50] If the appellants had agreed to the conduct that led to their prejudice, the 'prejudice-principle' defence would have failed as a matter of law.⁵⁰

THE ROLE OF THE TURNAROUND SPECIALIST

[51] Self-evidently, the evidence demonstrated that:

- (a) his role was limited to that of one of the principal actors in conducting the business of the principal debtor - nothing more and nothing less.
- (b) his role was not that of the respondent's agent.
- (c) the business actions and decisions he made were performed in pursuit of the best interests of the principal debtor's business activities.

⁴⁸ Kelly v London Transport Executive [1982] 2 All ER 842 (CA).

⁴⁹ It may have been demonstrated that the appellants agreed to the alleged "prejudicial" conduct.

⁵⁰ Absa Bank Ltd v Davidson 2000 (1) SA 1117 (SCA) at paragraph 19.

- (d) the principal debtor's board understood the restructuring agreement, and no evidence was presented indicating that they believed they were obliged to appoint the turnaround specialist as their executive chairperson.
- (e) the turnaround specialist was appointed by agreement by all the principal debtor's board members.
- (f) no case was made to exonerate any of the other directors in relation to the discharge of their fiduciary duties and their collective duty to ensure the management of the company was conducted in its best interests.
- (g) the appellants did not explain when the turnaround specialist's actions ceased to be those of the principal debtor being performed by its executive chairperson and managing director.⁵¹

[52] I say this primarily because whether a person has control of a juristic person remains a factual enquiry. In this case, the facts did not support and underpin the legal submissions and arguments presented by the appellants on this discrete issue.⁵²

THE CONTROL OF THE PRINCIPAL DEBTOR

[53] The control issue was examined with reference, among other things, to the minutes of the board meetings, being the official record of the principal debtor's business affairs. Undoubtedly, the appellants failed to demonstrate that the board lost control over the principal debtor's business at any stage.⁵³

[54] The primary argument advanced by the appellants regarding this issue was that the terms of the '*service agreement*' between the turnaround specialist and the respondent supported their contention that the respondent intended to control the principal debtor's business. This argument is challenging to follow. I say this because the principal debtor was not a party to the service agreement. Thus, the principal debtor was not bound (in the absence of the concurrence of the principal debtor's

⁵¹ This was never canvassed by way of *viva voce* evidence.

⁵² Insufficient facts were presented in this connection.

⁵³ This was certainly not reflected in any of the official minutes.

board) to the terms of this service agreement with the turnaround specialist.⁵⁴

THE CONDUCT OF THE TURNAROUND SPECIALIST

[55] The appellants make the allegations, among other things, that the turnaround specialist, the respondent's agent in the management and control of the principal debtor's business:

- (a) acted negligently.
- (b) alternatively, fraudulently delayed the planning and implementation of the necessary expansion in production.
- (c) caused the principal debtor not to obtain the funding required by it.
- (d) starved the business from needed cash flow for more than six months and effectively brought about the commercial insolvency of the principal debtor.
- (e) conducted the principal debtor's business recklessly.
- (f) radically departed from the normal business activities of the principal debtor.
- (g) unlawfully abandoned the business of the principal debtor.⁵⁵

[56] The objective evidence demonstrated that the appellants did not contest the expert's findings regarding a history of overestimation in relation to production. The same report indicated that it was premature to commission and implement the second production line.⁵⁶

[57] Thus, significant doubt exists that the demise and winding-up of the principal debtor's business directly resulted from the turnaround specialist's conduct, acting on a frolic of his own or as the respondent's agent.⁵⁷

⁵⁴ This is another reason why the turnaround specialist could not have been the respondent's agent.

⁵⁵ On 31 May 2013.

⁵⁶ The expert report by Deloitte's dealt with this overestimation aspect in terms.

⁵⁷ The demise was more likely as a result of a combination of a number of various factors.

[58] In summary, there can be very little debate that the respondent, as a prudent lender, had the sole discretion to base its lending decisions on reliable financial information and forecasts. The respondent had a legal entitlement to protect its interests by lending responsibly.⁵⁸

THE ONUS OF PROOF

[59] I am in wholesale agreement with the trial court's findings that the appellants failed to prove that the respondent controlled the principal debtor's business utilising the turnaround specialist's conduct. Thus, the respondent did not owe the principal debtor any legal duty. A breach of this legal duty (even if it existed) is essential for proving that the appellants suffered prejudice.⁵⁹

[60] At best, for the appellants, there were two mutually destructive versions concerning the existence (or not) of this legal duty. The court *a quo* applied the correct legal test when dealing with the probative weight of these two mutually destructive versions.⁶⁰

[61] The trial court's factual and 'credibility' findings are presumed to be correct unless they are shown to be wrong with reference to the record. Thus, an appeal court is limited in its ability to interfere with the trial court's findings and may not do so simply because it would have come to a different conclusion.⁶¹

[62] It is not procedurally permissible for this court to second-guess the trial court's well-reasoned factual findings. The appellants failed to demonstrate any conclusions drawn that were manifestly wrong. What is clear from the evidence in the record is that the appellants failed to show that the respondent breached any legal duty or obligation under the loan agreements, thereby causing prejudice to the appellants as sureties.⁶²

⁵⁸ No case was made for exonerating the remaining directors for releasing them from their collective and individual responsibilities.

⁵⁹ This was set out in terms in *Davidson*.

⁶⁰ *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at 14I-15E.

⁶¹ *City of Cape Town v Mtyido* (1272/2022) [2023] ZASCA 163 (1 December 2023) at paragraph 23.

⁶² In my view (as alluded to later), this amounts to alleging and proving either a breach of contract or a breach of a legal duty.

[63] Significantly, on the pleadings, the appellants admitted that certain monies were loaned to the principal debtor following a suite of agreements and that they concluded the deeds of suretyship as security for these loans. The appellants admitted that the terms and conditions in the surety deeds were binding on them.⁶³

[64] The admitted terms and conditions of the suretyship agreements bear further scrutiny. A particular admitted term was never raised by the appellants or the respondents in their pleadings or through oral arguments. I raised this for the first time during the appeal hearing and engaged briefly with counsel about this specific waiver. I will, therefore, deal with it through an *obiter dictum*.⁶⁴

OBITER

[65] The suretyship documents contain the following term:

*‘....The Sureties hereby irrevocably waive any right to rely on any defence based on waiver, estoppel or prejudice to them...’*⁶⁵

[66] It may have been argued that the meaning to be attributed to this surety term is unambiguous as it entails an agreement by the appellants not to raise the defence of prejudice, which they have done. This is what the entire case was about.⁶⁶

[67] The correct context bears reference and scrutiny. The purpose of the subject term appears in the text. It is to prevent the appellants from raising the defence of prejudice. The waiver applies to any legal proceedings regarding a proper reading of the text.⁶⁷

[68] It may be that the respondent only consented to loan and advance monies to the principal debtor because it did not want to risk being sued for its involvement in the entire transaction by way of prejudice. I do not know this, as this issue was never raised or argued by any of the parties. Further, this subject term in the surety

⁶³ The quantum of the respondent’s monetary claim was not placed in dispute.

⁶⁴ The surety document stipulated that “prejudice” could not be raised as a defence.

⁶⁵ Paragraph 5.6 of the Suretyship document. (my underlining).

⁶⁶ Despite this, this issue was never engaged with by the parties.

⁶⁷ The text does not seem to be ambiguous at all.

document may be unenforceable and contrary to public policy, alternatively inconsistent with section 34 of the Constitution of the Republic of South Africa, 1996.⁶⁸

[69] The public policy argument could have been based on the premise that the appellants would not have constitutionally waived their rights regarding the defence of prejudice and that public policy factors weigh against enforcing the subject term in the suretyship agreements in these circumstances.⁶⁹

[70] Had this been raised, I would not have persuaded that the waiver was irrelevant and that the subject term is inconsistent with public policy.⁷⁰

[71] I say this because a waiver of rights in this connection formed the subject of scrutiny in *Lufuno*.⁷¹ Admittedly, this was in the context of arbitration agreements. There was a judicial assumption that such rights could be waived. The court remarked that where parties agree to arbitrate, they arguably do not so much waive their rights but simply agree not to exercise them.⁷²

[72] Another aspect to consider is that it seems common cause on the facts that the appellants chose voluntarily to consent to the terms of the suretyship documents. This brings me to the '*pacta sunt servanda*' principle. It seems to me that this is a case where the appellants agreed and accepted expressly that they understood what they agreed to in the suretyship documents. I say this because this was admitted in the pleadings presented in the trial court.⁷³

[73] The correct position in our law on this score has been recently clearly re-stated in *Beadica*.⁷⁴

[74] In summary, establishing whether a clause should be enforced includes

⁶⁸ The Constitution of the Republic of South Africa, 1996.

⁶⁹ This was never raised or engaged with by the parties.

⁷⁰ I say this because the subject term must have been included for a reason.

⁷¹ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) paragraphs 199 to 218.

⁷² *Lufuno* at paragraph 216.

⁷³ The appellants did not deny any of the terms of the suretyship obligations.

⁷⁴ *Beadica* 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 (5) SA 247 (CC)

considering whether the parties negotiated with equal bargaining power and understood what they were agreeing to. In this matter, it is clear that the parties possessed equal bargaining power, and they must have understood what they agreed to.⁷⁵

[75] It is clear from the facts that the appellants chose voluntarily to consent to the terms of the subject clause. This brings me to the public policy arguments and debate. Public policy, in this context, falls to be constitutionally infused. This means that a court may refuse to enforce specific contractual terms of an agreement where that term itself, alternatively, the enforcement thereof, would be contrary to public policy. This is achieved by way of a measured balancing exercise.⁷⁶

[76] For obvious reasons, this refusal by a court must be used sparingly. Public policy generally dictates that parties should be bound by their contractual obligations embodied in a contract. In this case, I do not know the circumstances under which the suretyship documents were concluded. That said, the appellants attracted the onus of exhibiting that the subject prejudice term was against public policy.⁷⁷

[77] Besides, the subject term does not prohibit the appellants from raising legitimate shields. The limitation is specific. The subject term prevents the appellants from raising the defence of prejudice in litigation with the respondent. The appellants voluntarily relinquished their rights, which were limited in scope.⁷⁸

[78] The appellants freely surrendered certain limited rights in return for money to be loaned and advanced. Contractual interpretation is an objective process of attributing meaning to the words used in a document read in the context of the document as a whole and having regard to the apparent purpose of those words.⁷⁹

COSTS

[79] Given this matter's relative complexity and importance, the respondent submits

⁷⁵ No evidence to the contrary was adduced.

⁷⁶ *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5.

⁷⁷ *Barkhuizen* at paragraph 58.

⁷⁸ The limitation was ringfenced and specific.

⁷⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paragraph 18.

that the engagement of two counsel was warranted. The respondent contends for costs in the following terms:

- (a) Senior Counsel on scale C.
- (b) Junior Counsel on Scale B.
- (c) The attorney of record on Scale B.

[80] I agree with these submissions concerning costs.⁸⁰

CONCLUSION

[81] The appellants failed to establish the legal duty as contended for by them. If such a duty was demonstrated (I say it was not), then I hold the view that it was not established that the respondent breached it by acting in a manner towards the principal debtor that prejudiced the appellants such that the '*reach of this prejudice*' had the effect of releasing them from their obligations in terms of their suretyships in favour of the respondent. It is so that prejudice may release a surety from their obligations to the creditor if that prejudice results from a breach by the creditor of some or other legal duty to the surety, typically in the form of a breach of the contract between the parties.⁸¹

[82] I say this also because the court in *Davidson* ultimately decided the matter based merely on an interpretation of the contract, giving rise to the principal obligation and the suretyship agreement. The same applies in this case. The surety would not be released if either of the agreements permitted the creditor's conduct.⁸²

[83] Further, the decision in *Bock* may have been influenced by the decision made in *Brisley*. In the latter case, the court held that as far as good faith justified using the *boni mores* of the community to determine the enforceability of a contractual term, that test

⁸⁰ Senior and junior counsel represented the appellants, and the respondent's attorney is a senior practitioner.

⁸¹ *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) at paragraphs [20] to [21], citing with approval the matter of *ABSA Bank Limited v Davidson* 2000 (1) SA 117 (SCA) at paragraph [19].

⁸² Forsyth and Pretorius, *Caney's - "The Law of Suretyship"* - Sixth Edition at page 206.

or threshold is not part of our law of contract. This does not assist the appellants.⁸³

[84] The structure of a surety obligation bears some scrutiny. It consists (in my view) of two discrete contractual arrangements. Firstly, in the form of a principal agreement between the principal debtor and the creditor. Secondly, in the form of a suretyship agreement between the creditor and the surety. Thus, the prejudice principle, in essence, pertains primarily to a breach of contract in the sense of ordinary contract law.⁸⁴

[85] Where the creditor deviates from the principal agreement it may be open to the surety to argue that a specified term of the principal agreement would have been upheld and that this formed part of a tacit term of the suretyship agreement. A breach of such a term (or a tacit term) may amount to a breach of the suretyship agreement, and the reach of this breach may result in the release of the suretyship obligation.⁸⁵

[86] A surety (as in this case) is a volunteer, as opposed to the position of the principal debtor who receives the funds from the creditor. Thus, a variation in the surety's risk at the instance of the creditor concerning the principal debtor may very well be a contractual basis for releasing a surety.⁸⁶

ORDER

[87] Thus, I propose that the appeal should fail. However, the order granted by the trial court should be amended and substituted. I say this because only three of the sureties were before us on appeal. The record reflects that judgments have been obtained against some of the remaining sureties and others.

[88] The order that I propose is the following:

1. The appeal is dismissed.
2. The appellants shall be liable for the respondent's costs on the scale

⁸³ Brisley v Drotsky 2002 (4) SA 1 SCA at paragraphs 11 to 24.

⁸⁴ Where the creditor acts to the prejudice of the surety, this may amount to a breach of contract.

⁸⁵ Standard Bank of South Africa Ltd v Cohen 1993 (3) SA 854 (SE).

⁸⁶ Michigan Law Review, Raymond H. Rapaport, Volume 40, Issue 2.

as between party and party as taxed or agreed.

3. The costs of the respondent's Senior Counsel shall be on Scale C, Junior Counsel on Scale B and the respondent's attorney of record on Scale B.
4. The introductory portion of the order granted by the trial court is amended and substituted with the following introductory wording:

"...Judgment is granted against the first defendant, the fourth defendant, the fifth defendant and the seventh defendant, jointly and severally, the one paying the other to be absolved, to rank as joint and several judgments with any other judgments obtained or to be obtained against the remaining defendants..."

WILLE, J

I agree, and it is so ordered:

LE GRANGE, J

I agree.

SHER, J

APPEARANCES:

<u>For the Appellants:</u>	Z F JOUBERT SC J D DE VRIES
Instructed by:	B D P ATTORNEYS

For the Respondent:

D J JACOBS SC

T SARKAS

Instructed by:

ADRIAANS ATTORNEYS