

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023/109082

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>25/2/2025</u> DATE	 SIGNATURE

In the matter between:

BIDVEST BANK LTD

Applicant

And

WELLSTED: GRAEME-JON

Respondent

Neutral Citation:

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J

Introduction

- [1] This litigation concerns an application for money judgment which is underpinned by the guarantees provided by Mr. Wellsted, the respondent in this application. Bidvest Bank, the applicant, is claiming R11 million. The respondent consents to a judgment being entered against him for R7 million but disputes that he is liable to pay the balance of R4 million.

Background

- [2] The cause of action relates to two guarantees executed by the respondent in favour of the plaintiff for R4 million and R7 million for the indebtedness of ZAR X Pty Ltd (“the principal debtor”) under a business account facility and overdraft agreement concluded between the plaintiff and the principal debtor.
- [3] There is no controversy about when the facility and overdraft agreement was concluded. There is also no controversy that the principal debtor has defaulted to service the overdraft facility. There is also no controversy that during August 2022, the plaintiff obtained a money judgment for R27 million against the principal debtor. The total recoveries from the principal debtor amounted to R13 million and as at 1 October 2023 the amount of R 21.4 million remains outstanding which the respondent disputes. It is, furthermore, common course that the principal debtor is in business rescue as of February 2023. It is not in dispute that the principal debtor has not satisfied the payment in full of the amount in terms of the judgment. The applicant received information during February 2023 that the principal debtor had gone into business rescue. Consequently, both guarantees were called up in terms of the proceedings before this Court. The two guarantees

executed in favour of the applicant and their terms as well as the signature thereof by the respondent are not in dispute.

Contentions by the respondent

- [4] The respondent, in his defence relating to the guarantee of R4 million contends that action was instituted against him under case number 2021/51095 and was withdrawn without tendering costs and that he was not sued on the second guarantee of R7 million. He contends furthermore that he tendered other securities ceded to the applicant and that the tender was rejected by the applicant. He furthermore contends that when the overdraft facility was increased from R17 million to R24 million, he was required to sign the R7 million guarantee and an amendment was sent to him as per an amendment letter "FA 7" annexed to the founding affidavit of the applicant.
- [5] The second guarantee of R7million was concluded on 27 October 2020. He furthermore, by implication states that the second guarantee replaced the first guarantee of R4 million which was concluded during July 2018. The respondent alleges that Mr. Protheroe, an official of the bank represented to him that the second guarantee would replace the first guaranteed. He argues that the letter of amendment of October 2020 served as a notice to release him from the obligations of the R4 million guarantee. Consequently, so argues the respondent, there is clearly disputes of facts which entitles his contention about the first guarantee to be acceptable and that the application for money judgment in relation to the first guarantee should be dismissed with costs.

Issue for determination

- [6] The issue for determining is whether the respondent is liable for R4 million based on the first guarantee.

Material terms of the agreement

- [7] In order to resolve the dispute between the parties regarding the disputed first guarantee of R4 million, is important to consider the material terms relating to variation of the guarantee agreement. Firstly, the first guarantee referred to in the founding affidavit as “FA 3”, at clause 7 regarding the guarantee provides as follows:

“7 ADDITIONAL SECURITY

This Agreement shall be in addition to and not in substitution for any other undertakings, guarantees, suretyships, or other security held in, hereafter to be held by the Creditor from the Guarantor or any third party in connection with the Secured Obligations or otherwise and the rights of the Creditor under this Agreement will not be affected or diminished thereby. The Creditor shall, without prejudice to its rights hereunder, be entitled to release any such additional security held by it.”

This clause is also applicable to the second guarantee of R7 million which was concluded during October 2020 and annexed to the founding affidavit of the applicant referred to as “FA8”.

- [8] Clause 18.2 of the first and the second guarantee provides as follows:

“No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or affect unless in writing and signed by the Parties.”

- [9] The amendment letter relied on by the respondent and dated 13 October 2020 and addressed to the directors of the principal debtor states, inter alia, at paragraph one that the Facility amount has been temporarily increased from R17 825 000 to R24 850 000 for a period of 2 months. Paragraph two of the letter records that a guarantee by Graeme -Jon Wellsted with his identity number therein stated in favour of the Bank limited to R7 000 000 plus interest and costs that may arise due to the indebtedness of the Customer to the Bank is required. More importantly, the last paragraph of the letter of amendment states that the terms and conditions in the Facility letter dated 17 July 2018, including any amendments thereto remain valid and binding in so far as they are not contradictory to the amended terms stated herein.

Legal principles and reasons

- [10] Mr Pye SC contended on behalf of the respondent that in interpretation of contracts, context is everything. He argued that the purpose of the amendment letter of the 27 October 2020 was to replace the R4 million guarantee with the R7 million guarantee and that extrinsic evidence should be adduced to determine the context of the amendment letter. This issue has been dealt with numerous times by our courts.
- [11] In the seminal case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹, the SCA said the following on the principles relating to the interpretation of the contracts, legislation and documents:

¹ [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

“Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.² It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*.³ The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.⁴ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The

² Spigelman CJ describes this as a shift from text to context. See ‘From Text to Context: Contemporary Contractual Interpretation’, an address to the Risky Business Conference in Sydney, 21 March 2007 published in J J Spigelman *Speeches of a Chief Justice 1998 – 2008* 239 at 240. The shift is apparent from a comparison between the first edition of Lewison *The Interpretation of Contracts* and the current fifth edition. So much has changed that the author, now a judge in the Court of Appeal in England, has introduced a new opening chapter summarising the background to and a summary of the modern approach to interpretation that has to a great extent been driven by Lord Hoffmann.

³ *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16 - 19. That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

⁴ Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an iterative process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp (in administrative receivership) Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2012] Lloyd's Rep 34 (SC) para 28. See the article by Lord Grabiner QC ‘The Iterative Process of Contractual Interpretation’ (2012) 128 *LQR* 41.

‘inevitable point of departure is the language of the provision itself,⁵ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[12] The case of *KPMG Chartered Accountants (SA) v Securefin Limited and Another*⁶ is instructive on the question whether witnesses need to be called to give extrinsic evidence on the context and purpose of the agreement. The SCA KPMG said:

“First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corp* [1985] ZASCA 132 (at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’ (*Delmas Milling Co Ltd v du Plessis* **1955 (3) SA 447** (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms

⁵ Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25 to 30.

⁶ (644/07) [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 39

‘context’ or ‘factual matrix’ ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* [2008] ZASCA 94; 2008 (6) SA 654 (SCA) para 7.)”

[13] In *Capitec Bank Ltd and Another v Coral Lagoon Investments 194 (Pty) and Others*⁷ the Supreme Court of Appeal said the following about the interpretation of contract:

“[38] ...Under the expansive approach to interpretation laid down in *Endumeni*, extrinsic evidence is admissible to understand the meaning of the words used in a written contract. Such evidence may be relevant to the context within which the contract was concluded and its purpose, and this is so whether or not the text of the contract is ambiguous, either patently or latently. On the other hand, the parol evidence rule is an important principle that remains part of our law. Affirmed by this Court in *KPMG Chartered Accountants (SA) v Securefin Limited and Another (KPMG)* and *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association (Blair Atholl)*⁸, the parol evidence or integration rule requires that, save in exceptional circumstances such as fraud or duress, where the parties to a contract have reduced their agreement to writing and assented to that writing as a complete and accurate integration of the contract, extrinsic evidence is inadmissible to contradict, add to or modify the contract.”

[14] Although in contract interpretation context is everything, it should always be remembered that it is the function of the court seized with the

⁷ ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 38.

⁸ [2009] ZASCA 7; [2009] 2 All SA 523 (SCA); 2009 (4) SA 399 (SCA) para 39; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) paras 64-77.

interpretation of the contract to consider whether calling witnesses would be necessary to give context to the agreement.

[15] Mr. Pye SC, submitted on behalf of the respondent that the 27 October 2020 document provided that the respondent was required to provide a guarantee for R7 million plus interest and costs that may arise due to the indebtedness of ZAR X to the applicant.¹³ This is clearly contradictory to the original facility letter of 17 July 2018 which required the respondent to provide a guarantee for R4 million. He contended furthermore that self-evidently the R7 million guarantee would replace the R4 million guarantee provided pursuant to the first facility letter. This submission loses sight of the fact that on the fact of either the amendment letter or the guarantee itself, there is no mention of the R7 million guarantee being a replacement of the R4 million. The opposite is true as the guarantee specifically states that it is no a replacement of any existing security.

[16] The respondent contended that when he signed the R 7 million guarantee, he did not intend to bind himself to the R4 million previously signed as he took it that the R4 million guarantee was no longer enforceable. It is hard to understand when the memorial of the parties' agreement is crafted in such clarity that there cannot be any doubt on what the parties agreed. It should be remembered that it is never a function of the court to draft agreements for the parties. The court simply considers the contract it is before it and interprets its terms and conditions.

[17] In the instant case, both guarantees have clause 7 which provides that each guarantee is not a replacement of any existing security. Mr Pye SC

contended that I should consider it appropriate to call a witness to contradict clause 18.2 of each guarantee on non-variation where it is provided that only terms which have been reduced to writing and signed by both parties would be valid and enforceable. In my view, the contention by Mr. Wellsted that his discussion with Mr. Potheroe that the second guarantee of R7 million was a replacement of the R4 million guarantee executed during July 2018 is self-serving. I say so because it is not business like for a lender with the exposure increased from R17 million to R24 million to decrease the value of the guarantee. It would have made logical sense if the original overdraft of R17 million was reduced, say by R4 million and that there was confirmation in writing as agreed by the parties that the R7 million was a substitution of the R4 million guarantee. Consequently, the contention by the respondent that he understood the R7 million guarantee to be a substitution of the R4 million is illogical and has no factual basis. The alleged dispute of fact is therefore without merit and the matter is capable of determination on papers.

- [18] My interpretation, which is based on the terms that have not been disputed in both guarantees is that each guarantee was a stand-alone and could be called up independently or jointly. My view is fortified by the amendment letter dated the 27 October 2020 which makes no mention of the fact that the R 4 million guarantee has been replaced by R7 million guarantee. The attempt to lead evidence under the circumstances would be contrary to the express terms of both guarantees in so far as the variation of the agreements are concerned. The contention by the respondent that the reference to clause 7 of the R7 million guarantee that the guarantee is not a substitution of any existing security should be regarded as *pro-non scripto* is without merit and must fail.

Order

[19] Having heard counsel for the parties judgment is granted against the respondent in favour of the applicant for:

19.1. Payment of the sum of R4 million.

19.2. Interest on the aforesaid amount at the rate of prime plus 5% per annum calculated from date of judgment to date of final payment.

19.3. That the applicant to be directed to pay the respondent's costs of opposition to the application.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 3 September 2024

DATE JUDGMENT HANDED DOWN: 25 February 2025

APPEARANCES

Counsel for the Applicant: Adv A.A.R. Marques
Instructed by: Du Toit, Sanchez, Moodley Inc

Counsel for the Respondent: Adv WB Pye SC
Instructed by: Tracey Lomax Attorneys