IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Not Reportable
Case no: 1774/2012

In the matter between:

MOMENTUM GROUP LIMITED	Plaintiff
and	
MASWIL FINANSIELE ADVISEURS CC	First Defendant
JOSUA DANIEL VAN DEN HEEVER	Second Defendant
ALTUS JOHANNES VAN DEN HEEVER and **JACO DE WITT VAN DEN HEEVER** (in their capacity as joint executors of the estate late **BENJAMIN VAN DEN HEEVER)**	Third Defendant
ANDRIES JOHANNES LE GRANGE	Fourth Defendant
MARTHINUS JOHANNES SPANGENBERG	Fifth Defendant
MONICA JOHANNA LE GRANGE	Sixth Defendant
ANDRIES JOHANNES LE GRANGE	Seventh Defendant

Coram: MAMOSEBO J.

Heard: 22-26/04/2024, 03-14/03/2025 & 22/07/2025.

Delivered: 19 /12/2025.

Summary: Debt recovery – Contractual claim – Claims against first to third respondents withdrawn – Claims against fourth to seventh defendants based on suretyship agreements – Defendants received statements but raised no objection thereto thereby acquiescing and agreeing to be bound by such statements – Interpretation of the suretyship agreement – Plaintiff is entitled to prove the extent of the principal debtor's and surety's liability by means of a certificate of balance – Principle restated: Our law of suretyship does not recognize a so-called 'prejudice principle' – Prejudice caused to the surety can only release the surety (whether wholly or partially) if the prejudice is the result of a breach of some or other legal duty or obligation by the creditor.

ORDER

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1. The fourth, fifth, sixth and seventh respondents are jointly and severally liable to the plaintiff in the sum of R474 858.24 (with the seventh defendant's liability being limited to R94 584.00) together with interest at 14% per annum and costs on an attorney and client scale.

JUDGMENT

Mamosebo J

[1] The plaintiff, Momentum Group Limited (Momentum), instituted action against the first defendant, Maswil Finansiele Adviseurs CC (Maswil), for the recovery of an amount of R474 858.24, interest thereon at the rate

of 14% per annum calculated from 12 May 2012 to date of final payment, and costs of suit on the scale as between attorney and own client. The claim against the second to seventh defendants is based on separate but identical deeds of suretyship concluded in support of Maswil's obligations towards Momentum, as evidenced by commission statements dated May 2012.

[2] The first defendant, Maswil Finansiele Adviseurs CC, was previously a company duly incorporated in terms of the company laws of the Republic of South Africa ("Maswil Makelaars (Edms) Bpk"), before its subsequent conversion to a close corporation. As a Close Corporation, the first defendant underwent a name change from Maswil Makelaars CC to its present name in August 2010. The second defendant is Josua Daniël Van den Heever. The third defendant was Benjamin Van den Heever, who has since passed away, and the executors of his estate are accordingly cited in his stead. The fourth defendant is Andries Johannes Le Grange (Le Grange Snr or Rampie). The fifth defendant is Marthinus Johannes Spangenberg. The sixth defendant is Monica Johanna Le Grange. The seventh defendant is Andries Johannes Le Grange (Le Grange Jnr).

[3] Maswil was liquidated after Momentum had instituted these proceedings. Consequently, Momentum abandoned seeking any judgment against it. It follows that Maswil's counterclaim and plea did not proceed. However, it is within the purview of Maswil's indebtedness that the indebtedness of the remaining defendants should be established. The action proceeded against the second to the seventh defendants based on the deeds of suretyship.

[4] The second and third defendants, Messrs Josua Daniël Van den Heever and Benjamin Van den Heever were represented by Mr Van der Walt SC. They participated in these proceedings until cross-examination of the plaintiff's first witness, Ms Chantel Lee Fordham, when the proceedings were adjourned to enable parties to exchange further documents. Prior to the recommencement of the trial, and on 23 April 2024, Momentum withdrew its case against the second and third defendants, the latter having passed away. The parties agreed that each party will pay its own costs. The matter proceeded against the fourth to the seventh defendants, who will collectively be referred to as the defendants. Following several amendments to the pleadings, the defendants also abandoned their counterclaim.

[5] Momentum is a duly incorporated and registered credit provider. This is what it has pleaded in its particulars of claim. On or about 18 May 1998, Momentum Life Assurers Limited changed its name to First Rand Limited. The long-term insurance business of First Rand Limited was transferred to Momentum Group Limited around 30 June 2000. All rights and obligations, including all claims arising from the deeds of suretyship (annexures "B" and "C"), formed part of the long-term insurance business of First Rand Limited, and were transferred to Momentum Group Limited (plaintiff), the successor in title of Momentum Life Assurers Limited.

[6] It is trite that the plaintiff must prove its case on a balance of probabilities. The defendants raised special defences, consequently leading to what now stands for determination by this Court:

6.1. Whether Momentum breached the terms of the suretyships, resultantly causing the defendants prejudice; and

6.2. Whether by concluding "new" broking agreements, Momentum nullified the deeds of suretyship in respect of the fourth to sixth defendants whose deeds of suretyship were concluded in respect of the previous broking agreement.

<u>Evidence for the plaintiff</u>

[7] Ms Fordham, who has served as the plaintiff's litigation attorney for the past 11 years, gave evidence on behalf of the plaintiff in that capacity. In her role, she works with the plaintiff's debit management team, which is the collections department, enforcing the broker house commission debt. She has access to the head office filing systems and had access to the broker house agreements, the deeds of suretyship, loan agreements, internal and external communication between the broker house and Momentum, the commission accounts and the transfer agreement, Mr Le Grange Snr's IC code, commission and current account.

[8] On 25 May 2011, Maswil and Momentum concluded the latest and final version of the broking agreement which reflects the commencement date of 15 August 1996 and is marked exhibit "A". The broker house ("Maswil") was allocated a unique broker house code number 023865 when it was to perform broking services for Momentum. The agreement was signed by Messrs Le Grange Snr, the fourth defendant and Le Grange Jnr, the seventh defendant, in their capacities as principals of the broker house and directors (later members of the close corporation) of Maswil, clearly specifying that the agreement was concluded on behalf of the broker house. The broking agreement started when the first agreement was signed on 15 August 1996 and continued, despite the amendments, until the termination.

[9] Exhibit "A" was preceded by an initial agreement concluded between Maswil, represented by Josua Daniel Van Den Heever, and Momentum on 12 July 1996, marked exhibit "F". At the time of signature, the plaintiff was Momentum Lewens Versekeraars Beperk, now referred to as Momentum Group Limited. As explained earlier, the plaintiff has gone through several name changes registered through the Companies and Intellectual Property Commission but remains the same party. Momentum and Maswil, with the latter represented by Marthinus Johannes Spangenberg and Le Grange Snr, concluded an updated broking agreement which superseded the previous agreements in 2002, marked exhibit "G", with its commencement date also reflected as 15 August 1996. On 04 September 2003, Momentum and Maswil, with the latter represented by Le Grange Snr concluded an Addenda to Momentum Broking Agreement marked exhibit "H", and its commencement date remained 15 August 1996. On 15 June 2005, Momentum and Maswil, with the latter represented by Le Grange Snr and Mr Spangenberg, concluded another updated broking agreement, exhibit "I", which replaced the previous agreements. Throughout these agreements, the registration numbers of the companies and the unique code of the broking house were the same. The different agreements were concluded either because of the change in the industry practices, or in the plaintiff's or defendants' details, or the change to the broker house details as evidenced, for example, by exhibits "F" (Momentum Lewens Versekeraars Beperk and Maswil Makelaars (Edms) Bpk) and "G" (Maswil Makelaars (Edms) Bpk and Momentum Group Limited).

[10] On 20 May 2009, Momentum and Maswil, with the latter represented by Le Grange Snr and Jnr concluded a Debit Loan Agreement ("Exhibit K")

which is offered to broker houses that have fallen into debit balances to enable them to continue earning a commission while repaying the debt/ debit balance. An amount of R600 000.00 was advanced to Maswil, which cleared the debit balance. Accordingly, Maswil was to repay that amount in 15 equal monthly instalments, inclusive of interest. These instalments would be paid by debiting Maswil's commission account held with Momentum. Thus, there needed to be sufficient commission earned within the month to cover the instalment.

[11] Mr Le Grange Snr entered into a Financial Planner Agreement with Momentum, exhibit "R", issued on 25 June 2010 and commencing on 01 July 2010 under the code 066157, in terms of which he was appointed as an independent contractor to canvass and sell products and policies of Momentum and other associated companies. Momentum advanced commission and fees to him, which were repayable upon lapsing, termination or cancellation of the products or policies. Le Grange Snr, however, terminated the financial planner agreement on 28 February 2011, a mere seven months later. In terms of the termination clause of the Financial Planner Agreement, termination of the said agreement meant that it was closed for new business.

[12] In its particulars of claim at paragraph 19, Momentum averred that, with its consent, Le Grange Snr sold and/or transferred his existing book comprising the entire broker portfolio to Maswil on 16 March 2011. The transfer was effected on 12 April 2011. Momentum contended that there was compliance by itself, Maswil and Le Grange Snr with all the conditions precedent before effecting the transfer, alternatively, that it waived strict compliance with such conditions by consenting to the transfer or sale. Maswil, represented by Le Grange Snr, accepted all

rights and obligations arising from the financial planner agreement. An amount of R492 010.53, categorised as commission at risk and reflected on Le Grange Snr's existing book, which included his entire broker portfolio, was transferred from his financial planner broker code to Maswil's broker code as reflected in Maswil's commission account.

[13] According to Ms Fordham's testimony, who relied on exhibits "T1" and "T2" to address the book transfer issue, the clients were transferred from Le Grange Snr to Maswil. Exhibit "T1", signed by Le Grange Snr on 22 March 2011, and under the Maswil letterhead, is a FICA[1] declaration accepting the broker entity code 066157 which was allocated to Le Grange Snr as a financial planner. Exhibit "T2" under the heading "application for transfer of clients and business" shows that the transfer is from Le Grange Snr 039999/066157 to 023865/810329 Maswil Makelaars sole proprietor. It further records the products that were transferred. The type of transfer is shown as a book sell from MFP (Independent Financial Planner) to MDS (other role within the broker house, Maswil). The transfer was completed on 12 April 2011.

[14] According to the broking agreement, the broker house would canvass and obtain applications for insurance policies, maintain and service those policies, and Momentum would pay commission and fees on those policies to the broker house. Policies would be written under a specific product house that would in turn receive commission. Momentum pays the broker house commission under a specific code, and the broker house pays its own brokers. In certain instances, Momentum, exercising its discretion, would pay annualised advanced commission, and should the premiums on those policies not be paid, Momentum would recalculate

[1] Financial Intelligence Centre Act 38 of 2001.

what was paid in advance and claw back the portion of the advanced commission based on the regulations under the Long-Term Insurance Act.[2] Should a broker house have clawed back commission which creates a debit, Momentum would be entitled to set off any credits coming into that credit account against the debit balance. The certificate of balance, signed by the Momentum manager, need not be proven and would serve as *prima facie* proof of the debit owing by the broker house.

[15] Mr Pieter Jansen van Rensberg is currently at Momentum Holdings as business owner for Momentum commission system where there are seven or eight service providers. He provided the following evidence on behalf of Momentum. All commissions pass through the system and are netted off each other before commission is paid. A commission is generated by this system. The information on the commission system is the policy number, the details of the broker involved, the activity that was done, the commission amount payable to the broker and VAT. The system also has retention facility should there be risk on the side of the broker. The commission statement is similar to an invoice. Commission at risk entails certain products, for example; when Momentum myriad is sold to a client, the commission is regulated by the Long-Term Insurance Act and is paid upfront for a period of two years, split into two portions, being 66% up front and 33% to be paid 12 months later. The commission clawback would be over a period of 24 months. The risk amount would be calculated by the system, indicating the commission to be clawed back should the policy lapse. To ensure the integrity of the commission system, a monthly reconciliation is done and audited on a regular basis by both internal and external auditors.

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[2] 52 of 1998.

[16] Clause 14.1 of the broking agreement stipulates:

> 'Momentum will provide commission statements to the Broker House. The Broker House agrees that Momentum will make available the commission statements on its website (w[...]) or by email on request thereof. The Broker House must inform Momentum in writing within 21 days of the date of such statement if it disputes any entry on the commissioned statement, failing which, the contents of such statement will be deemed to be correct.'

[17] The commission statement reflects what the broker house has earned, whether there were any advance payments of commission made, whether there were any loan repayments or policy lapses, and any other deductions like VAT. The names of Messrs Le Grange Snr and Jnr appear in all the commission statements as principals of the broker house. No query was raised within 21 days after the commission statements in relation to Maswil were issued. Therefore, Momentum deemed the commission statements to be correct in terms of clause 14.1 above. The commission statements ran until November 2012. From May 2011, the broker house account fell into a debit amount of R205 820.18 resultantly causing Maswil to be indebted to Momentum as appearing in the commission statements in exhibit "B".

[18] Consequently, Momentum addressed a letter by registered mail to Maswil Makelaars CC under the heading 'Termination of broker contract Maswil Makelaar CC, Reg No 1904/175005/23023865', dated 14 July 2011 (exhibit "C1"). The letter terminated the broker house agreement as seen from the quoted relevant parts below:

> 'This letter serves to give you 14 days' notice that the above contract with Momentum Group Limited and its associated product houses will be terminated with effect from

28 July 2011. Please refer to clause 9 of your contract for the provisions governing the termination.

HANDED OVER FOR LEGAL COLLECTION

The consequences of the termination are as follows, as agreed in terms of Clause 9 of your contract:

1. We will credit the broker house retention account with all future commission due. The payment of such commission will be withheld for a period of 24 months from date of termination.
2. Upon expiry of the 24-month period, Momentum will pay to the broker house any credit balance that has vested. (Kindly note that the broker house carries the onus of notifying us on the expiry of the said period, and we will not effect such payment automatically). Thereafter Momentum will pay any further commission on an as-and-when basis.
3. No new business may be submitted in terms of this contract, nor may any alterations be effected to existing policies issued hereunder.
4. Please take note that this vested commission does not include F[...], Health and Short term.

Please note that should you have any other contracts with Momentum, the termination of this contract will not affect the existence of such contracts.

In order to continue assisting your clients, with the servicing and advice on any policy, you are requested to make a selection below and follow the instructions accordingly:

<u>Option 1</u>: Complete the attached application for transfer of clients to another active Momentum Broker House; this transfer will only take place at Momentum's discretion and will depend on current legislation & the licensing of the accepting broker;

<u>Option 2</u>: Instruct Momentum in writing to reintermediate your clients on your behalf through one of our reintermediation processes.

Should we not receive your feedback within 45 days from date of this letter, Momentum will automatically process option 2 and apply reintermediation.'

As at 28 May 2012, the debit balance was R486 813.03. This meant that the commission advanced was clawed back and Maswil was indebted to Momentum for the repayment of the amount.

[19] Clause 9.4 of the broking agreement stipulates thus: 'Either party may terminate this agreement by giving 14 days' written notice to the other, and such party will not have to furnish reasons for the termination in such notice.' Notwithstanding that the clause did not require any reasons to be given, Momentum gave Maswil reasons for the termination, being that the debt from the broker house was handed over for legal collection. Although the opening balance of the commission statement on 12 May 2012 was R473 932.88, the plaintiff is claiming an amount of R474 858.24 as appearing on the certificate of balance as at 11 May 2012, signed by Mr Carl Martin Webb Van Rooyen, Head of Legal Momentum Sales. The effect of the termination of the agreement was that, not only was Maswil closed for new business, but the said termination would not extinguish any of Momentum's rights under the agreement. In terms of the broking agreement, "new business", as referred to in clause 9.1, means any new application as well as any premium increases (excluding CPI increases), term extensions, and alterations to existing policies.

[20] With the exception of the seventh defendant, Le Grange Jnr, whose liability is limited to R94 584, the other defendants concluded various unlimited deeds of suretyship in which each of them bound him/herself to Momentum Group Limited and its successors in title, as surety and co-principal debtor *in solidum* with Maswil Makelaars (Edms) Bpk (the debtor), to and in favour of Momentum Group Limited and its successors in title (the creditor), for the due performance of all the obligations of the debtor to the creditor, more particularly any amount owing by the debtor

as a result of any debit balance reflected on the debtor's commission account with the creditor.

[21] The parties agreed that this Court can use the English version of the Deed of Suretyship marked exhibit "P" for all the defendants whose deeds are similar but in Afrikaans. The deeds of suretyship went on to provide, *inter alia,* as follows[3]:

'1. I hereby acknowledge to be fully acquainted with all the obligations of the debtor to the creditor.

. . .

7. Should the creditor institute any legal action arising out of this suretyship against me, I undertake to pay the costs of such action – including collection commission and tracing fees – on the scale as between attorney and own client.

8. The creditor shall be entitled to cede, assign, encumber, deal with or alienate his interest hereunder without my consent or notice to me. Any reference to the creditor herein includes the creditor's successors in title, or other legal holder thereof.

9. I hereby accept that the creditor may in his sole discretion without prejudice to his rights hereunder and without my consent or notice to me and without thereby in any way relieving me from liability towards the creditor, do any of the following: release or acquit securities, sureties and/or co-principal debtors partially or entirely in respect of the debtor's indebtedness; change or alter any conditions; advance or re-advance money and encumber any securities further; reach a settlement or make any other arrangement with the debtor; on the insolvency of the debtor prove a claim against the insolvent estate and accept any offer of compromise; compromise with the debtor or allow him an extension of time, relaxation, or indulgence in respect of his liabilities; institute legal proceedings against the debtor without prior notice to us of the debtor's default or its (the creditor's) intention to take proceedings.

. . .

13. Any admission, or acknowledgement of indebtedness by the debtor, will be binding on any surety. I hereby agree that a certificate purporting to be signed by a

[3] Clauses 1, 7, 8, 9, 13 and 18 of the deed of suretyship.

manager of the creditor (whose authority need not to be proved), showing the total debt owing by me at the date of that certificate, in terms hereof, shall be sufficient and satisfactory proof to enable the creditor to obtain provisional sentence or judgment against me in terms of this deed of suretyship for the amount mentioned in such certificate, and the onus shall rest upon me to prove that the amount thus mentioned is not due.

. . .

18. No termination or variation of this suretyship will be of any force and effect unless it is recorded in writing and signed by the creditor.'

[22] This is what the sureties committed to in their respective deed of suretyship:

'I, the undersigned _______________(name) do hereby bind myself as surety and co-principal debtor in *solidum* with Maswil Makelaars (Edms) Bpk (94/05883/07) (hereafter referred to as the debtor) to and in favour of Momentum Group Limited Reg. No. 1904/002186/06 and its successors in title (hereafter referred to as the creditor) for the due performance of all the obligations of the debtor to the creditor, more particularly any amount owing by the debtor as a result of any debit balance reflected on the debtor's commission account with the creditor.'

[23] The plaintiff closed its case, after which, the defendants elected not to testify and not to call any witnesses but to close the defence case as well. The following is the defendants' case from their papers and their counsel's oral argument.

Evidence for the defendants

[24] Firstly, Ms Fordham's evidence was attacked by the defence counsel purely on the basis that it was hearsay evidence as she has no personal

knowledge thereof because her appointment at Momentum occurred after the broking agreements and the deeds of suretyship were signed.[4]

[25] Secondly, the defendants challenged the validity of the transfer of Mr La Grange Snr's book as well as the proof of the resultant indebtedness of Maswil. They took issue with the fact that a certain Ms Alta Scheepers had demanded that all the affected parties must sign consent documents, including the consent to cession as well as the FICA declaration, to be returned to her. She also added the following:

> 'Please also take note of the current commission at risk amount of R 193 758.10. When a transfer is completed, all commission will flow to the new code as indicated below:
> FUTURE COMMISSION: - any future commission to be calculated and released by the Product House. For instance: new policy movements e.g. CPI's and upfront commission.
> UNRELEASED COMMISSION: - commission calculated but not yet received by the product house. Refer to upfront renewals.
> ALREADY RELEASED COMMISSION INCLUDING FUTURE CLAWBACKS: It overwrites the debit follow credit rule – which means the debit will go to the new planner code, irrespective of where the credit went.'

There was an email requesting that the transfer be put on hold as Mr Le Grange Snr, under code 066157, wanted to settle his debt before the transfer could be effected. However, following further considerations and enquiries regarding commission flows, an email from Mr Andre Olivier dated 18 April 2011 reads: 'commission flows for the current month should also be transferred please. No transfer must be made on the Health Book.'

[4] *S v Ramavhale* 1996 (1) SACR 639 (A) at 650B-D; see also *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA) para 40.

[26] It was further argued that, on a proper construction regarding sale/transfer as contemplated in clauses 9.6.1 or 9.6.2 of the Financial Planner Agreement, this Court should rather ask whether Momentum was justified in transferring the clients and liabilities to Maswil/Le Grange Jnr. Clause 9.6 of the Financial Planner Agreement stipulates:

‘9.6 In the event of termination of this Agreement as set out in Clause 9.4 and 9.5, the Financial Planner will be entitled to sell his existing book to another Momentum intermediary or apply for an independent broker agreement with Momentum, subject to the following:

9.6.1 Should the Financial Planner apply for a Momentum independent broker agreement:

9.6.1.1 Momentum must receive the completed application forms for a broker agreement within 30 (thirty) days from termination of the Agreement;

9.6.1.2 Momentum must consent to the application for a broker agreement;

9.6.1.3 Momentum must receive the Agreement of Sale concluded between the Financial Planner and new broker entity within 30 (thirty) days from the issue date of the new broker agreement;

9.6.1.4 The new broker entity accepts all rights and obligations from the Financial Planner Agreement including possible future lapses and current debit balances.

9.6.1.5 In the event that the independent broker agreement is granted, commission flows will continue to be credited to the commission account of the Financial Planner, and will be paid out (to the banking account of the broker house) after a portfolio transfer to the independent broker has been effected (in accordance with Momentum’s protocols for portfolio transfers at that time). Where such a portfolio transfer is duly effected, the parties agree that this will not amount to a contravention of Clause 3.1.1 above.

9.6.1.6 Any commission accrued and owing to the Financial Planner in respect of business submitted prior to the date of termination and as reflected in his commission account on Momentum’s systems at the time of termination, will be paid out to the Financial Planner, after it has vested, on an *ad hoc* basis upon the request of the Financial Planner, (subject to set off as against any amounts owing), or transferred to the independent broker code in accordance with the request for a portfolio transfer.

9.6.2 If the Financial Planner sells his existing book to another Momentum Broker or Financial Planner then the following conditions will apply:

9.6.2.1 Momentum must receive the Agreement of Sale concluded between the Financial Planner and the proposed buyer within 30 days from date of cancellation of the Agreement;

9.6.2.2 Momentum must give written consent to the sale or transfer of the existing book to the proposed Momentum intermediary. Momentum will not unreasonably withhold such consent;

9.6.2.3 The new broker or Financial Planner will accept all rights and obligations from the Financial Planner Agreement including possible future lapses and current debit balances. A portfolio transfer must be effected (in accordance with Momentum's protocols for portfolio transfers at that time). Where such a portfolio transfer is duly effected, the parties agree that this will not amount to a contravention of Clause 3.1.1 above.'

[27] The challenge by the defendants in respect of the transfer of Le Grange Snr's clients from his MFP code to Maswil's code boils down to whether there was procedural compliance either with clause 9.6.1 or 9.6.2 by Momentum. Sight must not be lost that Messrs Le Grange Snr and Jnr signed the broking agreement together, and they are both members of Maswil. So, when one considers whether there was a transfer/ sale of book by Le Grange Snr, this aspect remains in the background as a relevant consideration. Mr Le Grange, for the defendants, referred the Court to the replying affidavit of Mr Andrè Olivier, Regional Manager of the plaintiff, in an application for judgment in terms of Rule 31(1)(c) after the respondents had signed a confession to judgment in terms of Rule

31(1)(b) on 11 February 2019 under Case No 2/2012, brought by Momentum against Le Grange Snr and Ms Monica Le Grange, now the 6th respondent, in which the said Olivier had said:

> '18.1 When the defendant joined the plaintiff as a financial planner the defendant was obliged to resign as key individual and representative for Maswil Brokers….The defendant could not continue to conduct business as an intermediary through Maswil.'

[28] Mr Le Grange, for the defendants, contended that, without the written sale agreement as contemplated in clause 9.6.2, the plaintiff had failed to establish its case. He contended that the purpose of such a written agreement is to record Maswil's acceptance or consent to the liabilities, and that this acceptance or consent must be evidenced in writing. Accordingly, the agreement must reflect Maswil's acceptance not only of the clients but also of the liabilities; without this, the plaintiff has not made out a case. Further, the defendants seem to contend that Momentum, except for furnishing its own statement under Maswil, has not provided any evidence that when Le Grange Snr left Maswil to join Momentum MFP on 07 July 2010, the initial debt belonged to Maswil. In an internal Momentum email communication from Riaan Coetzee to Bertus Visser, the following was said: '[Snr] used to be the principal… and [Jnr] took over Maswil with [Snr's] debit approx. R200 000.'

The communication went on to state that Snr's debt was taken over by Jnr/Maswil. The defendants argued that there is lack of evidence showing that either Jnr/Maswil consented or accepted Snr's debt of about R200 000. The defendants claim that because Ms Alta Scheepers, a Momentum employee, had requested for a consent agreement, failing which Snr's debt would follow him to his new MFP code, the failure by

Momentum to furnish such consent overrides the "debit follow credit rule".

[29] In their amended plea, the defendants denied that the deed of suretyship is still valid, as it was "nullified" by the new broker agreements entered into. Mr Le Grange submitted that not only does Momentum expect the sureties to be held liable for the debt stemming from the time when the defendants concluded the suretyship agreements, but also for the debts that arose after the conclusion of the suretyships. Counsel argued that for Momentum to succeed in such a claim, it must prove, on a proper interpretation of the deed of suretyship, that it is a "continuing covering suretyship(s)". This is so because it would be covering a continuing future debt which must be clear from the wording of the deed, so the argument went.

<u>Analysis</u>

Suretyship

[30] In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*[5], the Supreme Court of Appeal (SCA) cautioned that 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).

[31] The rules of interpretation are trite, one needs to adopt a holistic approach. This approach to interpretation was enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6] as follows:

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[5] 2009 (4) SA 399 (SCA) para 39.
[6] 2012 (4) SA 593 (SCA) para 18.

> '. . . 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. 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.'

[32] Mr Le Grange, for the defendants, advanced a purely textual approach. According to counsel, the phrase *'owing by the debtor'* indicates a current obligation, something that needs to be settled. The term "account" in the phrase *'debtor's commission account'*, is not plural, further argued counsel. The word would therefore refer to a specific account where the commission owed to the debtor is recorded and does not refer to other, further or future accounts. Mr Le Grange further submitted that the phrase *'as a result of any debit balance'* is an indication of a current obligation.

[33] I disagree with counsel's interpretation. As long as there is (or will be) an outstanding debt flowing from the broking agreement, there is (or will be) a debt owing for purposes of the phrase *'owing by the debtor'*. In light of the context provided, the aforesaid phrase does not necessarily limit the debt to a current debt. The contention that the term "account" in the phrase *'debtor's commission account'* is not plural is also neither here nor there because the various debts in relation to a certain commission

account may be reflected in one document, as in this case, where it was recorded in the certificate of balance. It suffices that the said account is the debtor's commission account. The phrase *'as a result of any debit balance'* does not necessarily indicate a current debt either because any debit balance can comprise consolidated debts over a certain period and be summed up into a debit balance. Further, in all likelihood, a suretyship agreement meant to be in relation to a specific current debt would have stipulated the respective amount owed.

[34] Accordingly, from the language used in the deed of suretyship and in the light of ordinary rules of grammar, it is evident that the intention of the sureties was to bind themselves together with Maswil for the due performance of all the obligations of the debtor to the creditor, provided they appear on the debtor's commission statement. Even if it were to be accepted that the suretyship agreement is ambiguous for failure to define the nature and origin of the debt, Mr Le Grange's interpretation still falls short.

[35] In instances where a court must undertake an interpretative exercise wherein there is some ambiguity, Innes CJ in *Glenn Brothers v Commercial General Agency Co Ltd*[7] instructively said: 'in reading a document like this, we are justified in looking at the circumstances under which the guarantee was given, and the position of the various parties concerned.' Indeed, it is so that one is aligned with the trite rules of interpretation that endorse a holistic approach wherein one is to read the words used in the context of the document as a whole, and in the light of all relevant circumstances to establish the intention of the parties.

[7] 1905 TS 737 at 740; see also *Swart en 'n Ander c Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 200E-202C.

[36] It is trite that a suretyship is by nature an accessory to the underlying transaction which creates the obligations of the principal debtor.[8] Thus, a suretyship obligation arises only in respect of a principal obligation owed by another. In all three different occasions when the suretyship agreements were concluded, the underlying transaction was always the broking agreement. The broking agreement would therefore be one of the key factors to be considered when interpreting the suretyship agreement. The nature of the broking agreement and how it would operate was never in dispute or unknown by the sureties. By nature, the broking agreement, while deemed to have been in effect as of 15 August 1996, essentially conceives of continuous/future transactions between Maswil and Momentum. This is a strong indicator that it must have been the sureties' intention for the suretyship agreements to at least include future debts.

[37] Further, the law on suretyship agreements is clear, in the words of Corbett JA in *Trust Bank of Africa Ltd v Frysch*[9], 'it is not essential that the principal obligation exists at the time when the suretyship contract is entered into. A suretyship may be contracted with reference to a principal obligation which is to come into existence in the future'. If a suretyship agreement can be concluded even before the underlying transaction exists, surely a suretyship agreement can be in relation to a debt that has not yet been incurred. Mr Le Grange provided the terminology the suretyship agreement would have had for it to include future debts. However, counsel's interpretation makes a mockery of the suretyship agreement concluded on 28 January 2002 by the fourth and fifth defendants because there was no existing debt at the time, at least according to counsel. It would make no sense for the fourth and fifth

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[8] *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 473G-H; see also *Odendal and Another v Structured Mezzanine Investments (Pty) Ltd* (482/13) [2014] ZASCA 89 (30 May 2014) para 9.

[9] 1977 (3) SA 562 (A) at 584G-H; see also *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 474A.

defendants to conclude a suretyship agreement in relation only to an existing debt when there was in fact no existing debt as of 28 January 2002. This indicates that the reasonable interpretation is that the parties intended for the suretyship agreement to relate to future debts as well.

[38] In *Bock and Others v Duburoro Investments (Pty) Ltd*[10], the SCA elucidated:

> 'This Court, in *ABSA Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA); ([2002] 1 All SA 355 (SCA) at para [14], was confronted with the submission that:
>
> > "there is a general so-called "prejudice principle" in our law to the effect that, if a creditor should do anything in his dealings with principal debtor which has the effect of prejudicing the surety, the latter is fully released."
>
> It came, in the words of Olivier JA, without any mincing, to the conclusion that no such principle exists and held (at para [19]):
>
> > "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 the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances."

[39] From the language used in the deed of suretyship, in the light of ordinary rules of grammar, as well as the relevant context, it is evident that the defendants bound themselves individually as surety and co-principal debtor in *solidum* with Maswil in favour of Momentum Group Limited for the due performance of all its obligations. More particularly any amount owing by the debtor as a result of any debit balance reflected on the debtor's commission account with the creditor. Momentum has not released the defendants as sureties and co-principal debtors at any stage.

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[10] 2004 (2) SA 242 (SCA) para 20.

The Debit Loan Agreement, exhibit “K”, signed for by Messrs Le Grange Snr and Jnr, was for the benefit of Maswil. I can conceive of no reason why the defendants cannot be held liable in terms of the deeds of suretyship, unless the defendants demonstrate any breach of some legal duty or obligation by Momentum. I turn to this issue as it relates to the alleged unlawfulness of the book transfer.

Book transfer

[40] The defendants’ challenge on the transfer of Mr Le Grange Snr’s book cannot stand. From the two documents, exhibits “T1” and “T2”, as well as the internal exchange of emails between the plaintiff’s personnel[11], there seems to be merit in what is pleaded by the plaintiff in paragraph 19E of its amended particulars of claim which reads thus:

> ‘The plaintiff, first and fourth defendants [Messrs Le Grange Snr and Jnr] duly complied with all the conditions precedent referred to in paragraph 19A.12.1 – 4 alternatively, such conditions precedents were agreed upon for the sole benefit of the plaintiff who waived strict compliance therewith by expressly alternatively tacitly consenting to the sale and transfer and effecting such transfer to the first defendant’s [Maswil’s] commission account.’

[41] Further, Messrs Le Grange Snr and Jnr have participated in the process of the transfer and cannot approbate and reprobate by now demanding a written agreement in hindsight. Ms Fordham testified that Maswil obtained positive commission flows from the transferred clients, and this portion of her testimony was not challenged. This transfer of commission at risk had no actual impact on Maswil and only became relevant upon cancellation or termination of the policy which fell within the clawback period. Maswil’s commission was already in the negative even prior to

[11] Pages 813 and 814 of trial bundle volume 2.

the book transfer as evidenced by the reconciliation statement, raw data and commission statements. No evidence was tendered by the defendants to substantiate their contention that Maswil's indebtedness was predominantly as a result of the book transfer which prejudiced them as sureties.

[42] Accordingly, I conclude that the defendants have not shown any breach of a legal duty or obligation by Momentum. Therefore, they remain bound in terms of the suretyship agreement for any amount owing by Maswil as a result of any debit balance reflected on Maswil's commission account with Momentum.

Quantum

[43] Momentum needs only to furnish a certificate of balance that is in accordance with the broking agreement as well as the suretyship agreement, and such shall, without more, be *prima facie* evidence of the amount owing.

[44] The defendants challenged the certificate of balance as hearsay, accusing Momentum of being opportunistic in relying on such a certificate of balance having failed to prove its quantum. First, they challenged the fact that its author's position, Mr Carl Martin Webb Van Rooyen, is Head of Legal Momentum Sales which does not qualify him as a department head of Momentum. Clause 13.7 of the Broking Agreement stipulates:

> 'A certificate signed by a department head of Momentum, whose capacity need not be proven, will constitute *prima facie* proof of the total amount that the Broker House owes to Momentum. Such certificate may serve as a liquid document in any

competent court of law for the purposes of provisional sentence, default judgment or summary judgment or any other legal proceedings.'

[45] The second challenge was that the certificate of balance does not specify the limited liability of the seventh defendant, making it seem as if he is five times the limitation specified in the deed of suretyship that he signed. Thus, this omission constitutes a clear indication that the signatory failed to apply his mind to the documents at hand. As a result, the correctness and reliability of the certificate of balance are open to serious question. They further contended that the certificate was signed on 02 October 2012 when the amount specified in the summons was R474 858 advanced commission and or fees and or monies to Maswil, whereas two years later, on 21 August 2014, in Momentum's amended particulars of claim, a book sale/transfer of debt from Le Grange Snr to Maswil to the risk amount of R492 010.53 was included. Thus, the inclusion of the sale/transfer debt renders the said certificate outdated. It was further argued that the sureties did not agree to a certificate of balance issued by a department head, and that clauses 13.2 and 15.2 of the deed of suretyship refer to a certificate issued by a manager. Consequently, the certificate is without force and effect, the defendants concluded.

[46] To even challenge the position of Head of Legal: Momentum Sales or that the deed of suretyship requires the signatory to be a Head of Department lacks merit. As head of a legal department, Mr Carl Martin Webb Van Rooyen's position qualifies. The defendants are merely raising a technical argument that is unnecessary. To further claim that in the deeds of suretyship the position of the signatory is a manager and that Mr Van Rooyen is not a manager is fallacious. Manager is defined in the Concise Oxford English Dictionary as:

a) A person who manages an organization or group of staff.
b) A person who controls the professional activities of a performer, sports player, etc.
c) A person in charge of the activities, tactics, and training of a sports team.
d) Computing a program or system that controls or organizes a peripheral device or process.
e) A member of either House of Parliament appointed with others for some duty in which both Houses are concerned.

I am, therefore, unable to find any reason to disregard the certificate of balance *in casu* merely because it may be outdated or did not specify the seventh defendant's limited liability. The defendants' submissions in as far as the position Head of Legal or manager is concerned are technical and misplaced.

[47] The submission that the certificate constitutes inadmissible hearsay is not supported by the facts. The clauses provide that it will constitute *prima facie* proof of indebtedness, and the authority of its author need not be proved. As elucidated by the SCA in *Senekal v Trust Bank of Africa Ltd* ("*Senekal*")[12]:

> 'There might be several items to which such a certificate relates, some of which may appear to be unassailable while others may either be shown to be inaccurate or appear to be of dubious reliability, or might require some modification or adjustment. I can find no reason why in such circumstances the certificate is to be entirely disregarded merely because it is found or thought to be inaccurate or unreliable in certain respects. At the end of the case, when all the evidence (which includes the certificate) is in, the

[12] 1978 (3) SA 375 (A) at 382G-383A.

Court must decide whether the party upon whom the *onus* rests has discharged it on a proper balance of probabilities. As was pointed out by Stratford JA in *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478:

> "*Prima facie* evidence, in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence."

If the *prima facie* evidence or proof remains unrebutted at the close of the case, it becomes "sufficient proof" of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the *onus* of proof. (*Salmons v Jacoby* 1939 AD 588 at 593.)'

[48] The contention that the seventh defendant's (Le grange Jnr's) liability is limited to R94 584.00 is common cause, and I cannot fathom why this aspect alone can draw an adverse consequence. As pronounced in *Senekal*, there is no reason why the entire certificate should be disregarded when, with all the evidence presented, a modification would cure this inaccuracy. I therefore find that the certificate of balance was duly signed.

[49] It is established law that if there is a duly signed certificate of balance, as I have held in *casu*, the onus lies with the party challenging the correctness of the amount reflected therein to adduce evidence to the contrary.[13] Instead of adducing evidence in rebuttal, the defendants appear to have reversed the onus and left it to the plaintiff to prove the veracity of its computation systems. In the words of Van Zyl J; 'It would place an unbearable, if not an impossible, burden on the [plaintiff] if [it] were required to prove the accuracy of the system employed in generating the certificate. The parties expressly dispensed with this kind of evidentiary burden by providing that a duly signed certificate reflecting the amount outstanding would be sufficient proof thereof.'[14]

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[13] *Momentum Life Assurers Ltd v Thirion* [2001] JOL 9094 (C) para 46.
[14] *Ibid.*

[50] The plaintiff's witnesses provided direct evidence. Ms Scallan, for the plaintiff, submitted that since the sixth and seventh defendants were present in court throughout the proceedings but never testified, this Court should draw an adverse inference against the defendants. The trite principle was enunciated by the Appellate Division in *Elgin Fireclays Ltd v Webb*[15]*,* that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. But the inference is only a proper one if the evidence is available and if it will elucidate the facts.[16] There are four defendants in these proceedings, particularly on the issue of the suretyship and the new broker agreement. No explanation was proffered why they were not called to testify.

[51] Based on the evidence set out above, I am satisfied that the plaintiff has discharged its onus of proving its case on a balance of probabilities that the first defendant, Maswil Finansiele Adviseurs CC, is indebted to the plaintiff for commission advances in the sum of R474 858.24. I am further satisfied that the fourth to the seventh defendants have failed to prove their pleaded defences. It therefore follows that the plaintiff is entitled to its relief with the defendants being jointly and severally liable to the plaintiff in the sum of R474 858.24 with interest at 14% per annum. The seventh defendant's liability is limited to R94 584.00. There is no reason why costs should not follow the result.

[52] In the result, the following order is made:

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[15] 1947 (4) SA 744 (A); see also *Dlanjwa v The Minister of Safety and Security* (20217/2014) [2015] ZASCA 147 (1 October 2015) para 29.

[16] *Elgin Fireclays Ltd v Webb (Supra)* at 749-750.

1. The fourth, fifth, sixth and seventh respondents are jointly and severally liable to the plaintiff in the sum of R474 858.24 (with the seventh defendant's liability being limited to R94 584.00) together with interest at 14% per annum and costs on an attorney and client scale.

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MAMOSEBO J

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

Appearances

For the plaintiff:	Adv. J Scallan
Instructed by:	Gerings Attorneys
	c/o PGMO Attorneys
For the 2nd and 3rd defendants:	Adv. D van der Walt SC
Instructed by:	Wessels & Smith Inc.
	c/o Duncan & Rothman Inc.
For the 4th to 7th defendants:	Adv. A J Le Grange
Instructed by:	Oosthuizen Attorneys Inc.
	c/o Engelsman Magabane Inc.