

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D3133/2025**

In the matter between:

CAPITEC BANK LIMITED

APPLICANT

and

MOUNTAIN MEADOW INVESTMENTS (PTY) LIMITED

FIRST RESPONDENT

(Registration Number: 2015/451359/07)

JIVESH RAJENDRAN PATHER

SECOND RESPONDENT

Identity Number: 9[...]

Coram: MOSSOP J

Heard: 21 January 2026

Delivered: 21 January 2026

ORDER

The following order is granted:

1. Judgment is entered against the first and second respondents, jointly and severally, the one paying the other to be absolved for:

(a) Payment of the sum of R2 098 877,35;

(b) Interest thereon at 12.50 percent calculated daily and compounded monthly in arrears from 1 February 2025 to date of final payment, both days inclusive;

2. Judgment is entered against the first and second respondents, jointly and severally, the one paying the other to be absolved for:

(a) Payment of the sum of R4 543,47;

(b) Interest thereon at 22.10 percent calculated daily and compounded monthly in arrears from 1 February 2025 to date of final payment, both days inclusive;

3. The liability of the second respondent in respect of the amounts mentioned in paragraphs 1(a) and 2(a) is to be limited to the amount of R1 950 000.

4. The respondents shall pay the applicant's costs jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

JUDGMENT

MOSSOP J:

Introduction

[1] The applicant seeks two money judgments against the respondents, jointly and severally. The amounts claimed are R2 098 877,35 and R4 543,47 respectively. The first respondent is the principal debtor in each instance, and the second respondent is joined in the matter as a consequence of a deed of suretyship (the deed of suretyship) concluded by him for the obligations of the first respondent due to the applicant. In terms of the deed of suretyship, the second respondent's liability is restricted to the amount of R1 950 000.

[2] Whilst both respondents had previously been legally represented, no legal representative was present this morning when the matter was called as the legal representatives had previously withdrawn from acting at the end of November 2025. However, a Mr Ravesh Pillay appeared in the place and stead of the second respondent. He is apparently a cousin of the second respondent, and he advised me that he had been involved in the business affairs of the first respondent. He explained that the second respondent is presently in Johannesburg and could not attend court this morning because of financial constraints.

The applicant and Mercantile Bank Limited

[3] The applicant is a commercial bank operating throughout South Africa and in 2020 it acquired Mercantile Bank (Mercantile) and thereby acquired all its assets and liabilities. As a consequence of this acquisition, the banking licence of Mercantile was cancelled, its business was subsumed into the business of the applicant, and it became an operating division of the applicant. Ultimately, Mercantile was deregistered as a juristic entity and ceased to exist.

[4] It is settled law that a division of an incorporated company does not itself have independent legal personality.¹ If a business is described as being a division of an incorporated company, as in this instance, then the inescapable inference is that the incorporated company trades, inter alia, as the division.² There may, conceivably, be more than one division through which the incorporated company trades, each with its own trading name. The consequence of this is that the applicant has correctly been cited as the applicant in this application.

The applicant's version

[5] During August 2022, Mercantile, now a division of the applicant, and the first respondent concluded a written agreement in terms of which it advanced to the first respondent a loan facility in the amount of R1,8 million (the loan agreement). The loan agreement recorded that the transaction was between the first respondent and: 'Mercantile Bank A Division of Capitec Bank Limited'.

[6] The loan was to be repaid by the first respondent to the applicant in 62 monthly instalments each of R37 288,02, the first instalment payment to be made on the date of the first draw down made by the first respondent against the loan facility.

¹ *Two Sixty Four Investments (Pty) Ltd v Trust Bank* 1993 (3) SA 384 (W); *Mega Flex ('n Divisie van Sentrachem Bpk) v White River Motor Trading (Edms) Bpk* 1996 (1) SA 616 (T).

² *Two Sixty Four Investments (Pty) Ltd v Trust Bank*, supra, 385F-386F.

[7] As security for this facility, the second respondent signed the previously mentioned deed of suretyship in favour of the applicant, limited to the amount of R1 950 000.

[8] The loan facility was duly made available to the first respondent, who drew down against it and was thereby required to commence repaying the applicant. The first respondent, however, did not pay all its instalments to the applicant and fell into arrears with its obligations, which eventually reached the amount of R783 338,23. The simple mathematical exercise of dividing the arrear amount by the amount of each instalment demonstrates that the arrear amount equates to approximately 21 unpaid monthly instalments. No payments whatsoever have been made by the first respondent to the applicant since 1 October 2023, a period in excess of two years.

[9] As of 20 February 2025, the first respondent owed the applicant the amount of R2 098 877.35. Consequently, on 27 February 2025, the first respondent was placed in mora by the applicant's attorneys and demand was made of it for the repayment of the balance then owing. When it was not forthcoming this application was launched.

[10] During the same period as the loan facility was negotiated and concluded, so, too, was an overdraft agreement negotiated and concluded (the overdraft agreement). The overdraft agreement, again concluded by 'Mercantile Bank A Division of Capitec Bank Limited', was in the amount of R150 000. It, as with the loan agreement, was secured by the deed of suretyship put up by the second respondent, limited to the amount of R1 950 000 and was repayable on demand.

[11] The overdraft facility was accepted by the first respondent and was utilised by it. The first respondent then stopped servicing it and last made a payment in February 2024. The balance presently outstanding, however, is the comparatively small amount of R4 543,47.

[12] The applicant perceived there to be a deterioration in the financial health of the first respondent arising out of its various defaults and accordingly cancelled both the loan agreement and the overdraft agreement.

The respondents' version

[13] The version of both respondents is contained in an answering affidavit that can, at best, be described as being parsimoniously worded. Responses to paragraphs in the founding affidavit which are populated with substantial detail are met with one sentence answers, either admitting, noting, or denying the paragraph being dealt with. There are 38 paragraphs in the answering affidavit, of which 30 comprise of no more than one sentence that does not exceed more than two lines of words. The approach adopted by the respondents is more suited to the presentation of a plea and not the formulation of an answering affidavit.

[14] Several points were raised by the respondents in the answering affidavit, and I now consider them seriatim.

The first point

[15] The respondents seek to challenge the personal knowledge of the deponent to the founding affidavit to depose to the facts contained within it. This is not an unusual challenge, and such challenges are often embarked upon in matters involving large financial institutions. The challenge usually has its basis in the fact that the deponent to the founding affidavit did not personally deal with the principal debtor and therefore, so the argument goes, cannot possibly possess any personal knowledge of the matter. Wallis J in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & another*³ observed that:

'[F]irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and that where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts.'

These words were spoken in an application for summary judgment but are equally applicable to this application. The point consequently has no merit.

The second point

[16] The respondents have denied that the deponent to the applicant's founding affidavit was authorised to bring the application on the applicant's behalf. This, again,

³ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & another* 2010 (5) SA 112 (KZP) para 13

is a point that is usually raised in conjunction with the first point taken by the respondents. But in bringing such a challenge, the respondents did not invoke the provisions of Uniform Rule 7(1).

[17] On a purely factual basis, the deponent to the founding affidavit did not bring the application but was, in truth, simply the witness who explained what the applicant's case was. The application was actually brought by the applicant's attorneys who prepared the application papers in the name of the applicant, or caused them to be thus prepared, and who signed the notice of motion. In my view, that conduct by the attorneys on its own is sufficient to establish authority to act in the absence of any formal challenge in terms of Uniform Rule 7(1).⁴

The third point

[18] The respondents deny the existence of the loan agreement and the deed of suretyship.⁵ This appears from their response to paragraphs 15 and 16 of the founding affidavit, in which the loan agreement is referenced, and to paragraph 40 of the same affidavit, where the deed of suretyship is dealt with.

[19] In their answer to the allegations in paragraphs 15 and 16, the respondents state:

'Save to state that the Facility Letter and the Loan Agreement are annexed marked "FA5", the remaining allegations as contained herein are denied.'

In the first sentence of their answer to paragraph 40, the respondents simply state that the allegations in that paragraph are denied.

[20] It appears to me that this is simply a stratagem employed by the respondents in order to attempt to generate a dispute of fact. I come to this conclusion after considering the second and further sentences of the same paragraph from which the first sentence narrated above comes, and which reads:

'Mercantile Bank prior to concluding the credit agreement was obliged to take reasonable steps to assess my understanding of the risks and costs of the proposed credit and my rights and obligations under the suretyship which it failed to do. My debt repayment history and

⁴ *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Beperk* 1957 (2) SA 347 (C) at 351G-352B; *ANC Umvoti Council Caucus and Others v Umvoti Municipality* [2009] ZAKZPHC 47; 2010 (3) SA 31 (KZP) paras 27 and 28.

⁵ The respondents do not deny the conclusion of the overdraft agreement.

existing financial means, prospects and obligations were not considered. I verily believe that the agreement must be deemed to be reckless in terms of the National Credit Act as Mercantile Bank failed to conduct the above assessment. I am over-indebted by entering into the credit agreement.'

[21] I confess that I have some difficulty in fully comprehending what has been stated in that extract, for the language used is imprecise and unclear. When referring to the 'the credit agreement', it is not clear which document the second respondent was referring to: the loan agreement or the overdraft agreement or the deed of suretyship.

[22] Whatever the true intent of the second respondent was in expressing himself as he did, the extract quoted above does contain a specific acknowledgment of the existence of the deed of suretyship, notwithstanding that the existence of that very document was denied in the first sentence of that paragraph. The existence of the deed of suretyship is, after all, the very basis upon which the second respondent contends that he is over indebted. He could not be over indebted if there was no deed of suretyship.

[23] Any doubt that may exist regarding whether the respondents' denial of the existence of the loan agreement and the deed of suretyship is bona fide is, however, put to bed by the realisation that the respondents admit in the answering affidavit that a copy of the loan agreement is attached to the founding affidavit and that the applicant dutifully complied with its contractual obligations in terms of both the loan agreement and the overdraft agreement. The loan agreement is in the name of the first respondent and has been digitally signed by the second respondent.

[24] The denial of the physical existence of these agreements is accordingly not bona fide and may accordingly be safely rejected.

The fourth point

[25] The respondents allege that the applicant is not entitled to rely on the certificate of balance that it has put up to establish the quantum of the respondents debt to it. The objection is based upon the submission that the person who signed

the certificate is not a manager of the applicant, a requirement imposed by the loan agreement.

[26] The contrived nature of the points taken by the respondents becomes vividly obvious in this instance. The respondents are correct in asserting that, inter alia, a manager in the employ of the applicant was required to sign such a document.⁶ At the commencement of the founding affidavit, the deponent, Mr Luqmaan Alli (Mr Alli), describes himself thus:

‘I am an adult male employed by the Applicant as a litigation manager.’

The respondents’ answer to that allegation was to note the contents of the paragraph. There was, accordingly, no denial of the truth of its contents.

[27] The certificate of balance in question demonstrates that it was also signed by Mr Alli. As his position as a manager had not been disputed, the certificate of balance complies with the requirements of the loan agreement.

[28] The point must therefore fail.

The fifth point

[29] The final point raised by the respondents is that the applicant is guilty of advancing reckless credit. The allegation in this regard is contained within the extract of the answering affidavit mentioned when considering the third point raised by the respondents.

[30] An important consideration behind the promulgation of the National Credit Act 34 of 2005 (the Act) was to avoid consumers being burdened with reckless credit.⁷ The second respondent claims that he, and not the first respondent, has been personally burdened with reckless credit through the deed of suretyship (ignoring for a moment his contradictory assertion that the deed of suretyship does not exist).

⁶ Clause 16 of the loan agreement.

⁷ *Desert Star Trading v No 11 Flamboyant Edleen* [2010] ZASCA 148 para 14.

[31] It is settled law that a deed of suretyship stands apart from, and is accessory to, the contract between the principal debtor and its creditor.⁸ In *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd*,⁹ the court held that the Act only applied to a credit guarantee in the form of a deed of suretyship to the extent that the Act applied to the principal debt. This arises out of the wording of s 8(5) of the Act, which states:

‘An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.’ [Underlining added]

[32] It follows, therefore, that where the principal debt is not a credit agreement as contemplated by the Act, the provisions of the Act will not apply to it. Where that is the case, because of the accessory nature of the deed of suretyship, the Act also does not apply to the deed of suretyship, and the surety may consequently not assert reliance on any of the defences permitted in terms of the Act. That therefore leaves but a single question to be answered: did the Act apply to the loan and overdraft agreements?

[33] The applicant states that the Act did not apply, whereas the respondents take the contrary position, but provide no reasoning that explains their position. The reasoning behind the applicant’s assertion that the Act does not apply is twofold: in terms of s 4(1)(a) of the Act, the first respondent, a juristic entity, had an asset value or annual turnover that exceeded the threshold value determined by the Minister in the Cabinet responsible for consumer credit matters (the Minister) from time to time in terms of s 7(1) of the Act; alternatively, the loan agreement was a large agreement as contemplated by s 9(4) of the Act. Either way, so the applicant contends, the Act does not apply.

[34] As regards the first ground relied upon by the applicant, it is beyond dispute that the first respondent is a juristic entity. Section 4(1)(a) of the Act provides as follows:

⁸ *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) 609 (A) at 622I.

⁹ *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T); See also *Nedbank Ltd v Wizard Holdings* 2010 (5) SA 523 (GSJ) paras 4, 9 and 10.

'Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except -

- (a) a credit agreement in terms of which the consumer is -
 - (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);'

[35] In a financial statement attached to the replying affidavit, it is recorded that the first respondent has total assets in excess of R3 million. The threshold value determined by the Minister is R1 million.¹⁰ The loan agreement accordingly does not fall under the Act. That must mean that the deed of suretyship does not either and the first respondent cannot rely upon the statutory concept of the granting of reckless credit.

[36] There is therefore no need to consider the issue of whether this is a large transaction as conceived of by the Act.

Analysis

[37] There can be no doubt that all the documents relied upon by the applicant were properly concluded and that, as a matter of fact, they physically exist. That places the respondents in a difficult position, for those documents define their liability to the applicant. The only way out for them is to raise a technical defence. This the respondents have done but none of the technical defences raised, however, have any merit and none have withstood the slightest scrutiny. In short, no viable defences have been disclosed by the respondents, and the applicant is therefore entitled to the order that it seeks.

Costs

[38] The loan agreement, the overdraft agreement and the deed of suretyship provide for costs to be awarded on the scale as between attorney and client.¹¹ There

¹⁰ Government Notice 513 in Government Gazette 39981 dated 11 May 2016.

¹¹ Clause 15 of both the loan agreement and the overdraft agreement actually makes provision for the payment of costs on the attorney and own client scale, but judgment has not been sought on this

is no reason such order should not be made considering the order that I am about to make.

Order

[39] I accordingly grant the following order:

1. Judgment is entered against the first and second respondents, jointly and severally, the one paying the other to be absolved for:
 - (a) Payment of the sum of R2 098 877,35;
 - (b) Interest thereon at 12.50 percent calculated daily and compounded monthly in arrears from 1 February 2025 to date of final payment, both days inclusive;
2. Judgment is entered against the first and second respondents, jointly and severally, the one paying the other to be absolved for:
 - (a) Payment of the sum of R4 543,47;
 - (b) Interest thereon at 22.10 percent calculated daily and compounded monthly in arrears from 1 February 2025 to date of final payment, both days inclusive;
3. The liability of the second respondent in respect of the amounts mentioned in paragraphs 1(a) and 2(a) is to be limited to the amount of R1 950 000.
4. The respondents shall pay the applicant's costs, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

MOSSOP J

scale for some or other reason. Clause 3 of the deed of suretyship provides for costs to be paid on the scale as between attorney and client.

APPEARANCES

Counsel for the applicants:

Ms N Y Cele

Instructed by:

KWA Attorneys
24A Grant Avenue
Victoria
Johannesburg

Locally represented by:

Martin Law Incorporated
41 Westville Road
Westville

Counsel for the respondents:

No appearance