



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

CASE NO: D1613/2025

In the matter between:

ENGEN PETROLEUM (PTY) LTD
(Registration Number: 1989/003754/07)

APPLICANT

and

HITECH CHEMICALS (PTY) LTD
(Registration Number: 2003/022685/07)

FIRST RESPONDENT

NAIDOO, GOPAUL
(IDENTITY NUMBER: 5[...])

SECOND RESPONDENT

ORDER

In the result, I make the following order:

1. The application is granted.

2. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay to the applicant in the sum of R6 133 869.63.
3. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay interest on the amount in paragraph 1 above at the prime rate of interest plus 4% per annum, calculated from 14 November 2024 to the date of final payment.
4. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application on the attorney and client scale.

JUDGMENT

Nicholson AJ

[1] Engen Petroleum (Pty) Ltd (Engen), the applicant, initiated legal proceedings against the first respondent, Hitech Chemicals (Pty) Ltd (Hitech), relying on an acknowledgment of debt (AOD) executed on 12 and 15 August 2024. The AOD recorded that, as at 15 August 2024, the first respondent was indebted to Engen in the sum of R9 099 877.35. In accordance with the AOD, the parties agreed to a payment plan consisting of six equal instalments. The content of the AOD is undisputed; therefore, reiterating its details here is unnecessary.

[2] In fulfilment of this agreement, Hitech made two instalment payments, each in the amount of R1 516 646.21, on 31 August 2024 and 30 September 2024, respectively. However, following these payments, the first respondent failed to make any further payments in terms of the AOD. As a result, the current sum claimed by Engen in the proceedings is R6 133 869.63.

[3] The preamble to the settlement agreement records that Engen supplied the first respondent with petroleum products during the period from March to May 2024. As of 30 June 2024, the first respondent's indebtedness to Engen amounted to R9

099 877.35, which sum included interest calculated at the prime rate. The AOD formalised the arrangement to settle this amount in six equal instalments of R1 516 646.21, payable on the last day of each month, commencing on 31 August 2024.

[4] The AOD contains an acceleration clause specifying that the full outstanding balance of the indebtedness will become immediately due and payable in the event of any material breach. Additionally, the AOD includes a non-variation clause, and at clause 7.7 expressly provides that the signatories warrant they are duly authorised to execute the agreement on behalf of Hitech. It is apposite to note that the AOD indicates Gopaul Naidoo ('Mr Naidoo'), the second respondent executed the document with the statement:

'For and on behalf of Hitech Chemicals (Pty) Ltd who duly warrants that he is so authorised.'

[5] Mr Naidoo is being sued in his capacity as surety to the first respondent, Hitech. The surety agreement was executed on 5 February 2004. According to the deed of suretyship, the second respondent has bound himself as both surety and co-principal debtor alongside the first respondent.

[6] Under the terms of the agreement, Mr Naidoo is obligated to ensure the due and punctual payment to Engen of all monies presently owed, or that may be owed in the future, by the principal debtor to the creditor, regardless of the cause from which such indebtedness may arise.

[7] The deed further stipulates that the suretyship is to be continuing and standing, meaning it cannot be terminated, even with respect to obligations of the principal debtor that may not have arisen at the time Mr Naidoo seeks termination, unless Engen provides prior written consent. This suretyship is additional to, and does not prejudice, any other securities presently held or that may be acquired in the future by Engen from or on behalf of Hitech

[8] The deed of suretyship also contains an undertaking by Mr Naidoo to indemnify and hold harmless the first respondent against any loss sustained because of any past, present, or future dealings or transactions with Engen. This

indemnity applies regardless of whether such loss or damage can be recovered under the terms of the suretyship.

[9] In casu, Engen seeks a monetary judgment against Engen as stipulated in the AOD, and further seeks to hold Mr Naidoo jointly and severally liable for the judgment pursuant to the provisions of the Deed of Surety.

[10] The first and second respondents oppose the application for various reasons. The respondents argue that Hitech is managed by two directors. They contend that the AOD in question was signed by only one director instead of both, which, in their view, renders the AOD invalid.

[11] This position is grounded in the company's memorandum of association and articles of association ('MOA'). These documents prescribe the procedures for authorising company decisions and require that actions such as the execution of an AOD must be approved and signed by both directors.

[12] Furthermore, it is emphasised that the MOA were duly registered with the Registrar of companies and close corporations on 11 September 2003. As a result, any departure from these established requirements, such as signing an AOD with only one director's signature, is considered non-compliant and invalid according to the respondents.

[13] The respondents refer to specific clauses in the company's memorandum and articles of association, which state:

'75. The quorum necessary for the transaction of the business of the directors, unless there is only one director, may be fixed by the directors, and unless so fixed shall, where the number of directors exceeds 3, and where the number of directors does not exceed 3, shall be 2.

76. Subject to the provisions of the act, a resolution in writing, signed by the directors shall be valid and effectual as if it had been passed at a meeting of directors duly convened and held.'

[14] Mr Naidoo, the second respondent states that he signed the AOD while under significant pressure. This pressure, according to the second respondent, arose due to explicit threats made by Engen, which indicated that the supply of petroleum products to Hitech would be discontinued if he did not agree to sign the document. Given the urgency of the situation, where customers were already waiting for deliveries, the second respondent felt compelled to proceed with signing.

[15] Mr Naidoo further explains that his agreement to sign the AOD was conditional. He maintains that he only signed the document on the understanding that Engen would conduct a proper reconciliation of Hitech's account and thereafter rectify the AOD. This reconciliation, as he describes, would involve a thorough analysis of vouchers and other supporting documentation to verify the account status.

[16] Mr Naidoo further asserts that, at the time of signing the AOD, he did so without obtaining the necessary approval required by the company's MOA. He emphasises that he did not possess the authority to enter into a binding agreement on behalf of the first respondent. Moreover, he contends that Engen and its representatives were fully aware that the AOD was signed hastily and without any formal resolution from the first respondent.

[17] Regarding the deed of surety, Mr Naidoo admits to signing the deed on 5 February 2004. However, he clarifies that by doing so, he did not bind the first respondent, Hitech. Instead, he only bound himself as surety and co-principal debtor together with Hitech Chemicals CC (registration number 1989/021874/23), a separate entity. He further points out that Hitech was registered and lodged with the Registrar of companies and close corporations on 11 September 2003.

[18] The second respondent adds that the deed of surety was prepared by Engen on or about 5 February 2004, at which point Hitech Chemicals CC had already ceased trading for more than twenty years prior to the signing of the purported AOD.

[19] The second respondent explicitly denies that any conversion took place and challenges the applicant to provide proof of such conversion. Moreover, he asserts

that even if such a conversion were proven, Hitech Chemicals CC no longer existed at the time the deed of surety was executed.

[20] Mr Naidoo submits that the deed of surety cannot bind him to the debt referenced in the AOD, because the AOD itself is invalid. Mr Naidoo also asserts that the AOD was prepared by Engen using its own figures, without disclosing to either respondent how those figures were determined. He is uncertain about the rate of interest used and whether the account was properly reconciled to include only receipts and deliveries, and to account for creditors and returns.

[21] The respondents argue that Engen has not established a case and point out that it is trite law that a case cannot be made out in a replying affidavit. They emphasise that Engen's representatives were, or ought to have been, aware of the requirement that any resolution binding the first respondent to the AOD must be signed by both directors.

[22] In reply, with regard to the issue of the second respondent's authority to sign the AOD, Engen relies on s 20(7) and (8) of the Companies Act 71 of 2008 (the Companies Act) which reads as follows:

'(7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirements.

(8) Subsection (7) must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers.'

[23] Engen relies on s 20(8) of the Companies Act, which entrenches the common law principles of ostensible authority and estoppel. These principles now serve to supplement the statutory presumption provided for in the Act. In accordance with s 20(7) of the Companies Act, Engen maintains that it was entitled to presume

that the second respondent had complied with all obligations and procedures as required by the company's founding documents.

[24] Engen further contends that there is no evidence to suggest that it knew or reasonably ought to have known, that article 75 had not been complied with. Additionally, there is no evidence indicating that Engen failed to act in good faith when it entered into the AOD with the first respondent. Furthermore, Engen asserts that Hitech partially fulfilled its obligations under the AOD by making two instalment payments, which is a tacit ratification of the agreement.

[25] With respect to the validity of the deed of surety, Engen relies on s 2(2) of the Close Corporations Act 69 of 1984 (the Close Corporations Act). This section provides that:

'(2) A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes in its membership, or its conversion to a company in terms of Schedule 2 of the Companies Act, until it is deregistered or dissolved-

- (a) in terms of this Act; or
- (b) in terms of the Companies Act, in the case of a juristic person that has been converted to a company.'

[26] Engen further relies on s 29D(1) of the Companies Act 61 of 1973 (the old Companies Act), which provides that:

- '(1) (a) On the registration of a company converted from a close corporation, all the assets, liabilities, rights and obligations of the corporation shall vest in the company.
- (b) Any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in respect of the corporation, shall be deemed to have been done by or in respect of the company.
- (c) The juristic person which existed as a close corporation before the conversion shall notwithstanding the conversion continue to exist as a juristic person, but in the form of a company.'

[27] Additionally, Engen refers to item 2(2) of Schedule 2 of the Companies Act, which stipulates that:

‘(2) On the registration of a company converted from a close corporation-

(a) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company.’

[28] Based on the aforementioned provisions of the old Companies Act, the Companies Act, and the Close Corporations Act, Engen argues that the underlying juristic person remains uninterrupted despite the conversion from a close corporation to a company. Consequently, it is immaterial whether the deed of surety refers to a close corporation or to a company, as the continuity of the juristic person is preserved throughout the conversion process.

Common cause facts

[29] The following issues are common cause:

- (a) Mr Naidoo signed the AOD on 15 August 2024;
- (b) Hitech made payment to Engen after the signing of the AOD;
- (c) Hitech delivered an email to Engen informing Engen of the delay in payment and requesting to make payment on a later date; and
- (d) Mr Naidoo signed the deed of surety on 5 February 2004 to bind himself as surety and co-principal debtor with Hitech Chemicals CC.

AOD - quantum

[30] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,¹ the Supreme Court of Appeal (SCA) held:

‘[13] *A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.* There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. *But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have*

¹ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA).

difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.’ (Own emphasis.)

[31] In *Hart v Pinetown Drive-In Cinema (Pty) Ltd*,² regarding affidavits and pleadings, the court held:

‘... [I]t must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. *The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound ...*’ (Own emphasis.)

[32] The quantum of the claim, insofar as it pertains to the AOD, is not contested. The objection regarding the quantum appears to stem from discussions that occurred prior to the execution of the AOD, however, in my assessment, this issue has not been adequately pleaded, nor is there sufficient supporting evidence, particularly given that the affidavits function as both pleadings and evidentiary material.

[33] The respondents do not contest that their account with Engen was in arrears. Instead, they assert that a ‘proper reconciliation’ was to be conducted, which never occurred. The reasons for requiring such a reconciliation remain unclear. Ordinarily, one would expect the respondents to set out a comprehensive plea

² *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-D.

addressing this matter. This would typically include referencing a contractual provision, explaining the reasons for disputing the arrears, indicating when and why the dispute was first raised, and, given the nature of these proceedings being motion proceedings, supporting these allegations with evidence.

[34] In this case, the issue of reconciliation was neither adequately pleaded nor substantiated with evidence showing that a reconciliation would have taken place or that the amount claimed is incorrect.

[35] Furthermore, the probabilities do not favour the respondents' assertion, for several reasons:

- (a) There is no mention of a reconciliation in the AOD.
- (b) Hitech made two payments matching the instalments specified in the AOD.
- (c) Hitech subsequently fell behind with payments.
- (d) Hitech contacted Engen via email requesting a grace period, only referencing the AOD in response to Engen.

Validity of the AOD

[36] The validity of the AOD is contested on two grounds: first, Mr Naidoo maintains that he signed the AOD under duress; and second, he lacked the necessary authority from his co-director at the time of signing.

[37] Mr Naidoo states that Engen informed him that fuel supply to Hitech would be discontinued unless Hitech executed the AOD prepared by Engen. Given the urgent circumstances, as a customer was awaiting fuel delivery, he signed the AOD without first obtaining the necessary approval from the co-director, fully aware that such authorisation was required. He contends that, under these circumstances, he acted under duress.

[38] In *Hohne v Super Stone Mining (Pty) Ltd*,³ the SCA held:

[31] *Arend v Astra Furnishers* dealt with a contractual claim. Having come to the conclusion that "generally speaking a contract induced by the threat of criminal prosecution is unenforceable on the ground of duress", Corbett J went on to say, in that case:

³ *Hohne v Super Stone Mining (Pty) Ltd* [2016] ZASCA 186; 2017 (3) SA 45 (SCA) (*Hohne*).

“It is not necessary to express a positive view on whether this rule obtains where the party threatened in fact owes a liquidated amount to the party making the threat and the agreement involves merely the payment of this amount.”

It is fundamentally important to bear in mind that in *Arend v Astra Furnishers* what the court was dealing with and set its face against was extortion or what is commonly known as “blackmail”. One cannot threaten to lay a criminal charge against someone for an act irrelevant to that for which payment has been attempted to be secured. The same applies in respect of embarrassing but not criminal acts that have no bearing on the claim in question. As Corbett J noted, without actually using the colloquialism, under the influence of English law, “blackmail” has long been recognised as a crime in our law and, accordingly, it has correspondingly been our law since the nineteenth century that an agreement concluded as a result of such blackmail is void for its illegality. In deciding matters of the kind in question it seems that, ultimately, it is policy considerations that are determinative. A consideration of whether or not a threat was *contra bonos mores* is precisely one of policy.

[32] Here, we are dealing with a delict. In *Machanick Steel* the underlying causa for the acknowledgment was a misappropriation of money — in other words, what was also a delict. The facts and the issues in this case are so similar to those that were relevant in *Machanick Steel* that I conclude that the experience of the appellant and, more particularly, what was said to him immediately before he began to confess to his theft, was not *contra bonos mores*. Furthermore, it did not result in Super Stone exacting or extorting something to which it was not otherwise entitled. The contrary is true. Moreover, the conduct of Super Stone was not otherwise unlawful, never mind illegal.

[33] The appellant has also sought to rely on the following passage from *Ilanga Wholesalers v Ebrahim and Others*, in which Milne J said as follows:

“Where, however, the creditor does not know and probably cannot establish (and a *fortiori* where he knows he cannot establish), the amount of the debtor's indebtedness it seems to me an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due. No doubt even where the plaintiff does not know the exact amount stolen he is fully within his legal rights in threatening to prosecute the debtor but to use the threat of such proceedings to extort an undertaking to pay an amount which he knows he cannot prove to be due in a Court of law constitutes, in my view, an abuse of his legal rights.”

Ilanga Wholesalers seems to operate against the appellant, rather than in his favour. Super Stone did not use any threats in order to extort an undertaking to pay an amount which it knew it could not prove. Even in our law of criminal procedure an exhortation to tell the truth will not exclude a confession. Not even a threat of the probability of arrest constitutes undue

influence. After all, the test is whether there is “any fair risk of a false confession”. (Footnotes omitted.)

[39] In their heads of argument, the respondents contend that Mr Naidoo’s experience of duress aligns with the standard articulated in *Patel v Grobbelaar*.⁴ The test for setting aside a contract on the basis of undue influence is outlined as follows:⁵

- (a) That the other party exercised influence over him;
- (b) That this influence weakened his powers of resistance and his will pliable;
- (c) That the other party exercised this influence in an unscrupulous manner in order to induce him to consent to a transaction;
 - (aa) Which is to his detriment; and
 - (bb) Which he, with the normal free will, would not have concluded.

[40] In *Patel*, the respondent, Grobbelaar, described as simple and naive, was persuaded by the appellant, Patel to sign a document acknowledging a fictitious R40 000 debt. A mortgage was subsequently registered over Grobbelaar’s farm to secure a non-existent obligation.

[41] Furthermore, in *Patel*, in the absence of evidence to the contrary, the court was entitled to infer that undue influence had been exercised, that the registration of the mortgage bond resulted from such influence, and that in the circumstances the bond was ordered to be cancelled.

[42] The present matter is clearly distinguishable on several grounds. Firstly, neither the pleaded facts nor the evidence in this case support the test established in *Patel*. Secondly, according to the respondents’ own account, the agreement in question was beneficial, enabling them to obtain fuel on credit despite arrears with Engen, and thus cannot be said to have prejudiced them. Thirdly, there is no allegation that Mr Naidoo signed the AOD in the absence of an underlying cause of action. Lastly, a threat to withdraw credit, where Hitech is arguably in breach of

⁴ *Patel v Grobbelaar* 1974 (1) SA 532 (A) (*Patel*).

⁵ *Ibid* at 533H-534A.

contractual obligations, does not, in my view, contravene public policy (*contra bonos mores*).

[43] In any event, the applicant's case aligns with the test established in *Hohne*, as there appears to have been a longstanding relationship between Engen and Hitech that deteriorated when Hitech fell into arrears. Consequently, the AOD was executed to allow Hitech to continue receiving services from Engen.

[44] As stated, Mr Naidoo asserts that he did not have the authority to bind Hitech, and therefore, the AOD is invalid. In support of the allegation, the respondents assert paragraphs 75 and 76 of Hitech's MOA, which clearly states that a resolution signed by both directors is needed to bind Hitech. It is not in dispute that the AOD was signed without the requisite resolution.

[45] In support of this assertion the respondents referred me to *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others*,⁶ where it was apparently said that a company can only be bound by the apparent authority of its representative where the company itself created the appearance of such authority and where the other contracting party reasonably relied upon it.

[46] I respectfully disagree that this statement accurately reflects the position in the present matter. While it is trite that a company acts through its directors, there is no dispute that Mr Naidoo signed the AOD, and he is a director of Hitech. Therefore, the representation was made by the company itself.

[47] However, in *NBS*, the court found:

'[26] What Cape Produce therefore has to prove in order to establish Assante's ostensible authority is:

1. A representation by words or conduct.
2. Made by the NBS and not merely by Assante, that he had the authority to act as he did.
3. A representation in a form such that the NBS should reasonably have expected that outsiders would act on the strength of it.

⁶ *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) (*NBS*) paras 24-25.

4. Reliance by Cape Produce on the representation.
5. The reasonableness of such reliance.
6. Consequent prejudice to Cape Produce ...

[27] It is necessary to state that two defences that have been unsuccessfully advanced in the past cannot avail the NBS. They are, first, that Assante was acting in his own interests and in fraud not only of Cape Produce but also of his employer, the NBS: *Chappell v Gohl* 1928 CPD 47, *Bowstead and Reynolds on Agency* 16th ed art 766 at 402. The second is that there existed internal restrictions on the actual authority of Assante even though they were not known to Cape Produce: *Bowstead* para 8-045 at 391 - 3, *Broderick Motors Distributors (Pty) Ltd v Beyers* 1968 (2) SA 1 (O) at 3E - F, De Villiers and Macintosh *The Law of Agency in SA* 3rd ed at 150. Neither of these contentions was squarely raised, but there were rumblings of them in the argument.'

[48] The position in *NBS* appears to be consistent with ss 20(7) and 20(8) of the Companies Act. Section 20 of the Companies Act was clarified in *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another*,⁷ where the court held that a significant development following the abolition of the doctrine of constructive notice is that a company may now be bound by ostensible authority, even where its Memorandum of Incorporation (MOI) expressly places the relevant authority outside the permissible scope of a representative. This results from the fact that, except in the case of a Ring Fenced ('RF') company, third parties are no longer deemed to have constructive notice of such restrictions. Consequently, if a company presents or holds out a representative as having the requisite authority, it may be held liable to third parties acting in good faith.

[49] In *One Stop Financial Services*, the court further articulated that the term 'formal and procedural requirements' in s 20(7) must be interpreted in accordance with the established scope of the *Turquand* rule. Rogers J added that when an individual is, or is represented to be, the company's managing director, any specific terms or limitations on their delegated authority may be viewed as matters of form or procedure. However, the court clarified that, regarding an ordinary director, granting authority to bind the company is not merely a formal or procedural matter.⁸

⁷*One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC) (*One Stop Financial Services*) paras 49-51.

⁸ *Ibid* paras 53-55.

[50] Additionally, in *One Stop Financial Services*, the court emphasized that proper consideration must be given to the requirement in s 20(7) that the third party must be engaging with the 'company.' Thus, for s 20(7) to be invoked, the third party must demonstrate that they were dealing with someone who possessed ostensible authority to bind the company. Only under such circumstances can it be said that the third party was dealing with the 'company,' allowing application of the *Turquand* rule.⁹

[51] In this matter, Mr. Naidoo serves as a director of Hitech and, based on the Answering Affidavit, appears to hold the position of managing director. Hitech obtained benefits under the AOD and made payments in accordance with its provisions. Clause 7.7 of the AOD expressly states that the signatories warrant their proper authorisation to execute the agreement on behalf of Hitech. Additionally, Mr. Naidoo signed the document with the following declaration:

'For and on behalf of Hitech Chemicals (Pty) Ltd who duly warrants that he is so authorised.' Under these circumstances, it was reasonable for Engen to rely on Mr. Naidoo's authority to sign the AOD, particularly as Hitech derived benefit from the agreement.

Surety

[52] Regarding the deed of surety, Mr Naidoo confirms signing the deed of surety on 5 February 2004, but states that he bound only himself and Hitech Chemicals CC (registration number 1989/021874/23), and not Hitech. He notes that Hitech was registered on 11 September 2003.

[53] The replying affidavit includes a Lexis WinDeed report, which confirms that it was compiled solely from the latest data provided directly to WinDeed by the Companies and Intellectual Property Commission (CIPC). According to the report, Hitech is registered as company number 2003/022685/07, with two directors: Kareshnee Gangiah and Gopaul Naidoo (the second respondent in these proceedings). Hitech Chemicals CC is registered under number 1989/021874/23. The tax reference number for both Hitech and Hitech Chemicals CC is 9126174201.

⁹ *Ibid* para 56.

Gopaul Naidoo has been a member of Hitech Chemicals CC since 20 February 1998. Engen contends that Hitech and Hitech Chemicals CC are, in effect, the same juristic entity. In opposition to the denial by the second respondent, it is asserted that the close corporation has been converted into a company.

[54] It is apparent that Hitech was converted from a CC to a company and therefore is the same juristic entity. It is also apparent from the various legislation cited by Engen, that the surety continues to bind Mr Naidoo to the debts of Hitech.¹⁰

[55] It is instructive that, although Hitech raised the issue of no limitation of an amount in the surety being pleaded in their answering affidavit, their heads of argument instead contend that, the deed of surety fails to comply with s 6 of the General Law Amendment Act 50 of 1956 (GLAA) due to the absence of a specified amount in the surety.

[56] Section 6 of the GLAA reads:

‘Formalities in respect of contracts of suretyship

No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.’

[57] The GLAA does not stipulate that the surety must be for a fixed amount. Furthermore, the cases cited by the respondents in its heads of argument¹¹ asserts that only the principal debt needs to be for a defined sum. Accordingly, the surety arrangement complies with the requirements of the Act.

[58] On the basis of these findings, it is clear that Hitech CC and Hitech constitute a single juristic entity, rendering the surety valid. Therefore, the deed of surety is enforced against Mr Naidoo for Hitech's obligations to Engen.

¹⁰ *Masibuyisane Services (Pty) Ltd v Eqstra Corporation (Pty) Ltd* [2020] ZASCA 159 paras 14, 38-40.

¹¹ *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 345A-D; *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 12A-D; *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) paras 16-17.

[59] During the proceedings, Mr. Mathopo, counsel representing Engen, submitted a draft order addressing the matters of costs, the amounts requested, and the relevant interest rate as stipulated in the AOD. As this draft order was consistent with the pleadings, the AOD, and my determinations, its provisions have been incorporated into the order detailed below.

Order

[60] In the result, I make the following order:

1. The application is granted.
2. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay to the applicant in the sum of R6 133 869.63;
3. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay interest on the amount in paragraph 1 above at the prime rate of interest plus 4% per annum, calculated from 14 November 2024 to the date of final payment; and
4. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application on the attorney and client scale.

NICHOLSON AJ

Case information

Date of hearing: 30 October 2025

Handed down: 3 February 2026

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