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

JUDGMENT

Case no: 2025-084166

In the matter between:

ANDREA GAFFE	**First Applicant**
MARTINA ZANINELLI	**Second Applicant**

and

KRISTIAN KRISTENSEN FORMENTI	**First Respondent**
WILLIE JAKOBUS VAN RENSBURG	**Second Respondent**

Neutral citation: Andrea Gaffe & Another (Case no 2025-084166) [2026] ZAWCHC (4 August 2026)

Coram: JUSTICE N MAYOSI

Heard: 3 August 2026

Delivered electronically: 4 August 2026

ORDER

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1. The second respondent is ordered to pay the applicants the amount of R17 600 000.00 together with interest thereon from date of judgment, calculated at 2.5% per month until date of final payment.

2. The second respondent is ordered to pay the costs of this application on the attorney and client scale, including the costs of two counsel where so employed.

JUDGMENT

Mayosi J:

Introduction

[1] On or about 17 June 2023, the applicants, both acting personally, and Culture Cares (Pty) Ltd (**Culture Cars**), duly represented by the first respondent, concluded a written acknowledgement of debt in terms of which Culture Cars acknowledged that it was indebted to the applicants in the total amount of R12 million (**the AOD**).

[2] The further material terms of the AOD included the following:

[a] Culture Cars would repay the capital sum of R12 000 000.00 on 1 July 2024, in full and final settlement.

[b] Culture Cars would pay each of the applicants the sum of R600 000.00 as interest every four months - on 1 November 2023, 1 March 2024 and 1 July 2024.

[c] Should Culture Cars fail to perform any of its obligations and/or commit an act or ground of insolvency, then the full outstanding balance of the debt together with costs became immediately due and payable.

[d] Interest was defined as meaning the rate of 2.5% per month, in the event of default and/or breach under the AOD.

[e] Costs were defined as all and any costs, collection commission, including costs on the attorney and client scale, payable as a result of a party breaching any term of the AOD.

[f] The AOD constituted the entire agreement between the parties regarding the matters contained therein and no party was bound by any undertakings, representations, warranties, promises or the like not recorded therein.

[3] It was an express term of the AOD that the respondents both bound themselves as surety and co-principal debtor in *solidum* for the obligations to the applicants for the capital amount of R12 million as well as the interest payable. It is not disputed that the respondents appended their signatures to the agreement and agreed to the terms of the written suretyship contained therein.

[4] Culture Cars failed to make any payments under the agreement. It was finally liquidated on or about 23 January 2025.

[5] On or about 1 November 2023, the first applicant received a payment in the amount of R1 million, which the first respondent indicated must be apportioned to the outstanding amount.

[6] In about June 2025 the applicants launched this application seeking as against the respondents, jointly and severally the one paying the other to be absolved, an order for payment of the amount of R17 6000 000.00 together with interest calculated at 2.5% per month a *tempore morae* until the date of final payment.

[7] The amount of R17 600 000.00 claimed consisted of the capital and interest that remained due and payable to the applicants.

[8] The first respondent did not oppose the application and judgement was granted against him on 4 August 2025.

[9] This hearing concerns only the claim against the second respondent.

[10] The execution of the AOD is not disputed by the second respondent. In particular, the second respondent does not dispute his signature of the AOD or his initials on each page thereof, nor does he dispute that the document that he signed contained the suretyship clause relied upon by the applicants. He also does not dispute the liability of Culture Cars (as principal debtor) under the AOD.

[11] In his answering affidavit the second respondent raised what he termed as preliminary defences in advancing his opposition to the claim:

[a] First, he contended that the agreement is void under the National Credit Act 34 of 2005 (the NCA).

[b] Second, he contended that he should be released from his suretyship on the basis that the principal debtor's obligations were materially varied to his prejudice. This objection arose from another

agreement that was subsequently concluded between the first applicant and the first respondent, which was unrelated to the second respondent.

[c] Third, he contended that the suretyship does not comply with the formalities prescribed by section 6 of the General Law Amendment Act 50 of 1956 (the GLAA).

[12] The first and second preliminary defences were abandoned at the hearing. The GLAA defence was persisted with. Furthermore, the heads of argument raised two points in *limine* as well as two new defences that were not previously foregrounded in the second respondent's answering affidavit, which I shall address in the course of this judgment.

[13] I deal first with the points in *limine*.

The points in *limine*

[14] The applicants are Italian nationals. It appears from the features of the founding affidavit that I describe hereunder that when the founding affidavit was deposed to by the first applicant, he was in Italy.

[15] The affidavit is signed by the first applicant, and the signature of the notary before whom the first applicant signed the affidavit appears under the attestation and space designated for the commissioner of oaths' signature. There is no signature on this space. What also appears under the attestation clause is a notarial certificate of authentication executed in Verona by notary Gabriele Noto; and the apostille that appears at the end of the founding papers authenticates the notary.

[16] The second respondent contends that the document said be a founding affidavit is not an affidavit, with the result that there is no evidence in

support of the notice of motion, and the application is not properly before the court.

[17] The second respondent's main complaints about the founding affidavit are that:

[a] The attestation clause is blank. It reads: *"which was signed and sworn to before me at_____on this the___day of May 2025…"* No place is inserted; and no date is inserted.

[b] No commissioner of oaths has signed in the space designated therefor.

[18] Section 8(1) of the Justices of the Peace and Commissioner of Oaths Act 16 of 1963 (**the Act**) empowers the Minister to declare the holder of any office in any country outside the Republic to have the power to administer an oath.

[19] Section 8(2) of the Act directs that such person shall *"authenticate the affidavit or declaration in question by affixing thereto the seal or impressing thereon the stamp used by him in connection with his office or, if he possesses no such seal or stamp, certifying thereon under his signature to that effect."*

[20] The regulations promulgated pursuant to section 8(1) are contained under GN R1872 of 1980 (the Regulations). They expressly provide that *"any person who exercises in a state to which independence has been granted by law a legal profession equivalent to that of an attorney, notary or conveyancer in the Republic"* is accorded the powers conferred upon a commissioner of oaths by section 7 of the Act.

[21] In **Africa's Best Foods (Pty) Ltd v ED Foods SRL**[1] the Full Court recently commented as follows in respect of these provisions:

> "[21] Section 8(1)(a) of the Act empowers the Minister to declare by notice in the Government Gazette that *'the holder of any office in any country outside the republic shall in the country in which or at the place at which he holds such office, have the powers conferred by section seven upon a commissioner of oaths…'* The Minister designated, *inter alia*, the following persons with the powers conferred by s 7 upon a commissioner of oaths: *'Any person who exercises in a state to which independence has been granted by law a legal profession equivalent to that of an attorney, notary or conveyancer in the Republic.'* Thus, for example, a qualified notary or attorney in Italy has the powers of a commissioner of oaths for South Africa in that country. Once such legal professional in the foreign country administers the oath in such country, i.e., outside of SA, he is required in terms of s 8(2) to '*authenticate the affidavit or declaration in question by affixing thereto the seal or impressing thereon the stamp used by him in connection with his office or, if he possesses no such seal or stamp, certifying thereon under his signature to that effect*.' Any affidavit made before such professional in the foreign country and authenticated in accordance with the provisions of s 8(2) is admissible as evidence in SA on its mere production in terms of s 8(3) and '*shall be as effectual as if made in the Republic before a commissioner of oaths.*'

[22] It is accepted by the second respondent, correctly so, that in circumstances such as the present where an affidavit is, on the face of it, non-compliant in one or other respect with the Act and Regulations, this Court retains a discretion to condone that non-compliance where the interests of justice so require and where no prejudice results. This accords with what the Full Court stated in **Africa's Best Foods**:[2]

> '[35] Courts have consistently recognised that judges regularly exercise a discretion to condone non-compliance if there is substantial compliance with the regulations. The discretion is not unfettered, but must be exercised

[1] 2026 (3) SA 151 (GJ)
[2] *Supra*

> judicially upon a consideration of the facts of each case. As Goosen J put it in *Briedenhann*, in para 56, '*the discretion with which I am vested must be exercised judicially, upon consideration of all the relevant facts and in the interests of justice*.' It is for the court, after considering the totality of the evidence, to determine whether, as a fact, substantial compliance with the regulations is proved.

[23] I am satisfied that in this case, the founding affidavit is substantially compliant with the Act and the regulations, and accordingly that this is a proper case for the condonation of the non-compliances that are relied upon by the second respondent. As appears from the founding affidavit, a qualified notary in Verona, Italy, who has the powers of a commissioner of oaths in terms of section 8(2) of the Act read with the Regulations, has administered the oath and authenticated the affidavit by affixing thereto their seal, or impressing thereon the stamp used by them in connection with their office. In attesting the signature, the notary confirms the name of the first applicant; that the latter appeared before them and affixed the signature in their presence. The notary then signed the affidavit below the attestation clause, clearly indicating that the oath was administered, and the affidavit was properly authenticated as required.

[24] Furthermore, there is no prejudice to the second respondent resulting from the condonation of the non-compliances in the founding affidavit. None is alleged by the second respondent. The interests of justice support the condonation of the non-compliances in the founding affidavit.

[25] The second point in *limine* raised is that there is no confirmatory or other affidavit from the second applicant. It is said therefore that the second applicant has adduced no evidence; the claims advanced by the applicants are several and the second applicant's claim therefore is not properly before the Court.

[26] There is no merit to this point.

[27] The first applicant deposed to the founding affidavit and gave evidence on behalf of the applicants in support of their claim. His authority to do so has never been challenged, nor has his statement that the facts contained in his affidavit are within his own knowledge and belief.

[28] The applicants are life partners. There is no basis for suggesting that the first applicant does not know the material facts – which are essentially the execution of the AOD (which is admitted) and the second respondent's failure to pay in relation to which the second respondent has advanced no allegations to discharge the onus that rests on him to establish payment. Consequently, the absence of a confirmatory affidavit by the second applicant is of no moment. The material facts are essentially admitted by the second respondent.

The suretyship does not comply with the GLAA

[29] Section 6 of the GLAA requires that the terms of a contract of suretyship be embodied in a written document signed by or on behalf of the surety.

[30] This requires, as held in **Sapirstein and Others v Anglo African Shipping Co (SA) Ltd**,[3] by Trengove AJA, that:

> "…the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification other than evidence by the parties (namely the creditor and the surety) as to their negotiations and consensus."

[3] 1978 (4) SA 1 (A)

[31] The second respondent contends that there is no valid suretyship binding on him because the AOD does not comply with section 6 of the GLAA in the following respects:

[a] The capacity in which he is alleged to have signed it is ambiguous;

[b] The AOD does not clearly or with certainty record the essential terms of the suretyship; and

[c] The document is further tainted by defects of form and substance.

[32] An examination of the AOD itself reveals that there is no foundation for the contentions.

[33] The suretyship is contained in a specific clause in the AOD, which reads as follows:

> "**SURETYSHIP/SPECIAL CONDITION**
>
> Kristian Formenti, Willie Van Rensburg and Mark Smith binds themselves as surety and as principle debtor in solidium for the obligation to the Creditor for the capital amount of R12 000 000.00 (Twleve million rand) and well as the Interest payable."

[34] The identity of the surety, the nature and the amount of the principal debt are plainly express terms, capable of ascertainment. So too is the principal debt, the interest rate, the principal debtor and the creditor, all of which were expressly defined in the AOD.

[35] The second respondent is expressly mentioned by name as a surety, and his identity number is included in the signature page. He is clearly identified as the surety. He then signed the document. He does not

dispute that he appended his signature to the AOD. In doing so, he plainly and voluntarily accepted those terms and he places no evidence before this Court to the contrary.

[36] Pertinently, the second respondent does not allege: (1) that he did not sign the document in his capacity as surety; or (2) that the AOD does not in its explicit terms contain a suretyship by him; or (3) that he was under any misapprehension as to the existence of the suretyship clause or its terms at the time he signed and initialled the document; or (4) that there was any *iustus* error on his part in signing the document.

[37] There is no ambiguity in the capacity in which the second respondent signed the AOD, for all of the above reasons and also because the principal debtor was represented by the first respondent in the agreement, and not by him. In all of these circumstances the suretyship is clearly valid and complies with the GLAA.

The quantum is not ascertainable on the papers

[38] In the answering affidavit the second respondent contends that the amount claimed is inflated and fails to credit payments made; and that the interest charged is usurious, contrary to public policy and contrary to the in *duplum* rule. The second respondent merely advances these allegations as conclusions, without any facts to support them.

[39] The interest has not exceeded the capital and accordingly does not infringe the in *duplum* rule.

[40] As to the amount claimed, it is not in dispute that R12 000 000.00 was advanced to Culture Cars and that only R1 000 000.00 was repaid. In the

founding affidavit the first applicant explains that the amount of R17 600 000.00 claimed is made up as follows: R12 000 000.00 (capital) plus R3 600 000.00 (interest) plus R3 000 000.00 (monthly interest of R300 000.00, being 2.5% of R12 000 000.00, for the 10-month period of 1 July 2024 to 1 May 2025) less the R1 000 000.00 received on or about 1 November 2023.

[41] It is also not in dispute that the interest rate was agreed at 2.5% per month. The second respondent simply makes the conclusion that the amount is inflated without setting out the reasons why that is so.

[42] To put the issue of the quantum claimed beyond doubt, a professional accountant Mr Albertus Geldenhys filed an affidavit confirming that the method of calculation set out in the founding affidavit was correct. He stated that when he applied the same method of calculation, he came to a higher figure, i.e., R18 250 000.00, attributable to the capitalisation of interest accrued during the term of the loan at the expiry of its term, before the commencement of the running of the additional interest upon breach of the AOD. This accounted for the R650 000.00 difference between the two amounts. However, the applicants waived this portion of interest and in light of that, he confirmed that the amount claimed by the applicants was correct.

[43] The second respondent advances no evidence as to the basis for arguing that the interest is unconscionable, usurious or contrary to public policy. The interest rate in this matter was agreed to be in the amount of 2.5% per month. It is a commercially sound practice to charge interest in circumstances where large sums have been advanced and no repayments have been made, as is the case under the AOD.

[44] The second respondent furthermore contends that as the AOD does not provide for a certificate of indebtedness, the applicants must prove his indebtedness to them by admissible evidence. But this goes against the principle in **Chemfos**[4] that an acknowledgement of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor. The AOD is such an acknowledgement of debt. It is sufficient proof the second respondent's indebtedness.

Conclusion

[45] None of the defences raised by the second respondent on the merits are sustainable.

[46] In the circumstances, I make the following order:

[a] The second respondent is ordered to pay the applicants the amount of R17 600 000.00 together with interest thereon from date of judgment, calculated at 2.5% per month until date of final payment.

[b] The second respondent is ordered to pay the costs of this application on the attorney and client scale, including the costs of two counsel where so employed.

N T MAYOSI

JUDGE OF THE HIGH COURT

[4] Chemfos Ltd v Plaasfosfaat (Pty) Ltd 1985 (3) 106 (AD), at 102C- D

Appearances

For applicant:	Adv JG Dickerson SC
	Adv D Robertson
Instructed by:	Werksmans
For respondent:	Adv Paul Tredoux
Instructed by:	JMB Gillian Attorneys