



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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 09/02/2023

A Maier-Frawley
A Maier-Frawley

CASE NO: 2021/34634

In the matter between:

VBS MUTUAL BANK (IN LIQUIDATION)

Applicant

and

**ITUMELENG MAFOKO
MABUYI ROWENA MEMELA**

First Respondent
Second Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. In this application, the applicant, VBS Mutual Bank (in liquidation), ('VBS') seeks to enforce its rights in terms of written suretyship agreements respectively concluded by the respondents, as sureties, in respect of the indebtedness incurred by the principal debtor, Leratadima Marketing

Solutions (Pty) Ltd ('Leratadima') to VBS, to the extent provided for in the respective suretyships.

2. The first and second respondents, who are married to one another, were the two shareholders and directors of Leratadima prior to its liquidation in December 2018. They each stood surety for any existing or future indebtedness that was or would be owed by the principal debtor to VBS arising from whatsoever cause, limited to an amount of R100 million, excluding interest.
3. Consequent upon VBS advancing loan funding in terms of a revolving credit facility extended to Leratadima during the period January 2016 to March 2018, which funds Leratadima (represented by the respondents) received and utilised, but failed, despite demand, to repay in full, the applicant instituted motion proceedings against the sureties in which it claimed:
 - 3.1. As against the first respondent, payment of the sum of R100 million, together with interest thereon at 9% per annum calculated from date of demand to date of final payment;
 - 3.2. As against the second respondent, payment of the sum of R100 million, together with interest thereon at 9% per annum calculated from date of demand to date of final payment;
 - 3.3. As against the respondents, joint and several payment of the costs of the application on the scale as between attorney and client.
4. Counsel acting for VBS informed the court at the hearing of the matter that VBS was abandoning its claim for payment (in aggregate total) of R200 million, seeking only judgment in the sum of R100 million as against the respondents for joint and several payment of the said sum, together with

mora interest and costs. To this end, a revised draft order was uploaded to the electronic file to cater for reduced relief. I deal with this further below.

5. The first respondent deposed to the answering affidavit on his own behalf and on behalf of the second respondent, who confirmed the allegations in the answering affidavit in a confirmatory affidavit attached thereto.
6. The respondents raised certain technical procedural points and legal objections in their heads of argument, essentially premised on the notion that the applicant failed to make out a case for the relief sought in its founding affidavit (including that it had impermissibly sought to supplement its case in its replying affidavit) and that the replying affidavit in any event fell to be ignored by the court on the basis that the applicant had failed to make out a case for condonation for the late filing of the replying affidavit. It is convenient to deal with the condonation point before dealing with the merits of the application and all other defences raised by the respondent.

Preliminary objection re condonation for late filing of replying affidavit

7. It is common cause that the applicant filed its replying affidavit 5 months late. In paragraph 48 of the replying affidavit, the applicant sought condonation for the late filing thereof, submitting that 'no prejudice will have been caused thereby'.
8. The respondent complains that the applicant tendered no explanation for the delay and submits that 'the absence of prejudice to the respondents does not even arise if no good cause is shown'. The respondent submits that the replying affidavit should therefore be disregarded by the court as *pro non scripto*.
9. As fate would have it, the respondents appear not to have filed their answering affidavit on time, which led to the matter initially being enrolled

on the unopposed motion court roll. Eventually the matter was removed from that roll with the court ordering the respondents to file their answering affidavit by a certain date.

10. A court has a discretion to consider all circumstances of the case. The overriding factor is the interests of justice.¹

11. As pointed out by Wepener J in *Pangbourne*:²

“ [16] There are a large number of matters that come before us in this Division in which parties, for a variety of reasons, agree to file affidavits at times suitable to them. Each case must be decided on its own facts and it cannot be said that when affidavits are filed out of time that is it not, without more, before the court... Affidavits can validly be before the court pursuant to an agreement between the parties – see Rule 27(1) which provides for such an agreement. It can also be validly before the court if the interests of justice require it.” (emphasis added)

12. The learned Judge referred to various authorities in support of the trite principle that the rules of court exist for the court, not the court for the rules.³ In addition, several authorities were quoted in *Pangbourne* in support of the approach often endorsed by our courts, which is not to encourage formalism in the application of the rules, as the rules are not an end in themselves to be observed for their own sake. They are, after all, provided to secure the inexpensive and expeditious completion of litigation before the Courts.⁴ Thus, for example, in *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 at 278F-G Schreiner JA remarked that ‘technical objections to less

¹ See *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477 A-B.; *Minister of Transport v Road Accident Fund and Others* (1082/2020) [2022] ZASCA 169 (1 December 2022) at par 34.

² *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) at par 16.

³ See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783. The principle was applied in several cases that followed. See the authorities cited in paras 16 and 17 of *Pangbourne* supra.

⁴ See *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C-F.

than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. ' In *Brenner's Service Station and Garage (Pty) Ltd v Milne and Another* 1983 (4) SA 233 (W) at 237E-F, Leveson AJ (as he then was) remarked that 'I think it emerges from the passages quoted that, in appropriate cases, the Court is entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party.'

13. In the present matter, the respondents had the replying affidavit in their possession for five months, and, as was the case in *Pangbourne*, they made no attempt to object to the late filing thereof until the objection was made in argument before me. The respondents did not invoke the remedy provided in Rule 30 of the Uniform Rules of Court to object to the late filing of the replying affidavit. Moreover, the respondents have failed to indicate what prejudice, if any, they suffered as a result of the late filing of the replying affidavit. Nor have the respondents made out a case for the striking out of the replying affidavit.
14. In so far as the respondents insinuate in their heads of argument that they would suffer prejudice if the replying affidavit were to be considered (and not struck out) because the replying affidavit contains new matter⁵ which they were not afforded an opportunity to respond to as the applicant had refused to agree to their proposal that the new allegations be addressed by them in a supplementary affidavit, such perceived prejudice remains unexplained, is unspecified and is in any event not related to the late filing of

⁵ The 'new matter' involved allegations concerning the respondents (acting on behalf of Leratadima) diverting payments which the principal debtor (as creditor) received from USAASA (as debtor) from being deposited into Leratadima's bank account held at VBS - in reduction of its indebtedness to VBS - and causing same to be deposited into Leratadima's bank account held at ABSA bank, in breach of Leratadima's payment obligations to VBS in terms of a written revolving credit facility agreement concluded between Leratadima and VBS; and further allegations that there was an erosion of VBS's security by the principal debtor and its directors.

the replying affidavit. The respondents were, after all, not hamstrung by the applicant's alleged refusal. They could have availed themselves of the right to file a further affidavit, with leave of court, a procedure which could have cured their technical objections but which they failed to pursue. In this regard, I can do no better than what Wepener J did in par 18 of the *Pangbourne* judgment than to quote the apposite remarks of Brand JA in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at para [32]:

"I am not entirely sure what is meant by the description of the application as 'totally irregular'. If it is intended to convey that the application amounted to a deviation from the Uniform Rules of Court, the answer is, in my view, that, as is often been said, the Rules are there for the Court, and not the Court for the Rules. The court a quo obviously had a discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained. Apart from being deprived of the opportunity to raise technical objections, I can see no prejudice that the respondent would have suffered at all. At the time of the substantive application the respondent had already responded – in its rejoining affidavit – to the matter sought to be included in the founding affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained. The respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis for its complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would merely result in a pointless waste of time and costs." (emphasis added)

15. In the absence of any demonstrable prejudice to the respondents in the event the application is to be dealt with and disposed of on its merits despite the late filing of the replying affidavit and given that the replying affidavit sets out relevant facts in order to refute salient aspects of the allegations made in the answering affidavit, it is my view that it is in the interests of justice that the replying affidavit be taken into account. I am thus inclined to exercise my discretion in condoning the late filing of the replying affidavit so

that the matter can be dealt with on its merits, 'unfettered by technicalities'.⁶

Background matrix

16. The relevant background facts, which are either common cause, undisputed or unrefuted on the papers, are the following.
17. In terms of a Supply and Delivery agreement (the 'supply contract') concluded between the Universal Service and Access Agency ('USAASA') and Leratadima on 7 November 2015, Leratadima (represented by the first respondent) agreed to manufacture, supply and deliver 500 000 digital terrestrial television set-top boxes ('STB's') and related equipment to USAASA for a total consideration of R344 630 000. 00
18. Pursuant to the conclusion of the supply contract, Leratadima approached VBS to procure loan funding to enable it to fulfil its obligations under the

⁶ (Borrowing from the words of Wepener J in *Pangbourne*.) An approach that eschews formalism where the interests of justice so dictate has been endorsed by the Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) at par 39, where the following was said:

"Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of courts are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures. Recently in *PFE International and Others v Industrial Department Corporation of South Africa Ltd*, this Court reaffirmed the principle that rules of procedure must be applied flexibly. There this Court said:

'Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.'"

See too: *Eke v Parsons* 2016 (3) SA 37 (CC) at par 39, where the following was said:

"...Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said "[i]t is trite that the rules exist for the courts, and not the courts for the rules". (footnotes omitted)

supply contract. In essence, Leratadima needed finance to fund the manufacture of the STB's by its suppliers.

19. On 15 January 2016, VBS and Leratadima entered into a written Revolving Credit Financing Facility Agreement (the 'facility agreement') in terms whereof VBS agreed to loan the capital amount of R100 million⁷ to Leratadima in the form of a revolving credit facility, subject to the terms and conditions contained in the facility agreement. The Revolving Credit Financing Facility account was defined in clause 1.2.9 as the account held by Leratadima at VBS under account number 10009820001 (the 'VBS Account'). In terms of a first written addendum concluded between VBS and Leratadima on 5 April 2016, the facility amount was later increased by an additional R150 million to the amount of R250 million.
20. The facility agreement was to endure for a period of one year, commencing on 15 January 2016 and terminating on 14 January 2017. In terms of a second written addendum concluded between VBS and Leratadima on 26 January 2017, the duration of the agreement was extended for a further period of 3 months, thus terminating by effluxion of time on 25 April 2017. In terms of the first and second addendums, *inter alia*, all forms of security provided in terms of the facility agreement, including suretyships executed by the respondents would remain in force until Leratadima discharged its indebtedness to VBS in full. The first respondent was a signatory to the facility agreement and its addenda and both the first and second addenda were incorporated as part of the facility agreement.
21. Relevant terms of the facility agreement included that VBS was entitled to charge an initiation fee of 7% of the facility amount (clause 3.2) and to charge interest at a rate of Prime plus 4% on the facility amount (clause 3.4);

⁷ Defined in clause 1.2.5, as the 'facility amount'.

All charges accruing in respect of the facility account as a result of the facility agreement were for Leratadima's account (clause 3.5); Leratadima agreed to cause all funds payable to it by USAASA under the supply contract to be paid into the VBS account and Leratadima was not entitled, without the written consent of VBS, to change the VBS account details for as long as any monies remained outstanding by Leratadima to VBS under the facility (clauses 5.6 read with 1.2.9); In terms of clause 6.1, 'all payments of proceeds by USAASA will be made by electronic transfer to the Revolving Credit Financing Facility', i.e., into the VBS account. In terms of clause 3.3, all payments to be made by VBS in respect of the facility agreement 'shall be made as per the purchase order received directly from the supplier/s of Leratadima to the supplier/s bank account as set out in the purchase order; Clause 10 contained a certificate clause in terms of which a certificate of indebtedness signed by an authorised employee of VBS would serve as sufficient proof the amount outstanding; The respondents respectively would stand surety in their personal capacities as sureties and co-principal debtors with Leratadima in respect of Leratadima's obligations under the facility agreement and any losses suffered by VBS (clauses 4.1.6; 5.7; & 11); The suretyships of the respondents would remain in force for as long as Leratadima was indebted to VBS and the sureties were not entitled to cancel or withdraw the suretyships until Leratadima's indebtedness was fully discharged (clause 11 & 11.2); the facility agreement would terminate by effluxion of time on the termination date (clause 9.1).

22. In terms of clause 14 of the facility agreement:

"14.1 This Agreement constitutes the **whole agreement** between the Parties, relating to the subject matter hereof **and no Party shall be bound by any term not recorded herein.**

...no extension of time, waiver or relaxation or suspension of any of the provisions or terms of this Agreement ... shall be binding unless recorded in a written document signed by the Parties....

14.3. No extension of time or waiver or relaxation of any of the provisions or terms of this Agreement or any agreement or other document issued or executed pursuant to or in terms of this Agreement shall operate as an estoppel against any Party in respect of its rights under this Agreement, nor shall it operate so as to preclude such party thereafter from exercising its rights strictly in accordance with this Agreement.

14.4 No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.” (emphasis added)

23. On 15 January 2016 the respondents each executed a written suretyship in favour of VBS bank. The respective suretyships contain identical terms. Relevant terms included the following:

23.1. The respondents respectively individually bound themselves as sureties and co-principal debtors *in solidum* with Leratadima for payment of the amount of R100 million, excluding interest, in respect of any debt which Leratadima owed, owes or may in future owe to VBS from monies lent and advanced (clause 3);

23.2. No variation of the terms of the suretyship would be of any force and effect unless reduced to writing and signed by the surety and confirmed by VBS in writing (clause 4);

23.3. The suretyship was to remain in force and effect for so long as Leratadima was indebted to VBS and the surety was not entitled to withdraw from or cancel the suretyship unless or until all Leratadima's indebtedness, commitments and obligations to VBS had been fully discharged (clause 6);

23.4. A certificate of indebtedness signed by any one of VBS's managers would constitute sufficient proof of the amount of the surety's

indebtedness under the suretyship and shall be a valid liquid document and 'shall be deemed to contain sufficient particulars, *inter alia*, for purposes of pleading, summary judgment or action instituted by VBS against the sureties' (clause 7);

- 23.5. In terms of clause 11, the surety renounced every benefit to which he or she was entitled to in law, including the benefits of excussion, division, cession of actions, revisions of accounts, no value received, the force and effect of which the surety acknowledged he/she was acquainted with;
 - 23.6. In terms of clause 17, in respect of any legal proceedings for the recovery of the amount due to VBS by the principal debtor, the surety undertook liability to pay the creditor's legal costs on the scale as between attorney and client.
24. VBS granted Leratadima access to the initial facility (R100 million) and later the extended facility (additional R150 million) and Leratadima accessed the facility funds during the period 26 January 2016 until at least November 2017. The statement of account pertaining to Leratadima's credit facility and attached to the founding affidavit as 'FA9' reflects the draw- downs made on the VBS account through payment of Leratadima's suppliers during the said period, as well as the payments made by USAASA into the VBS account from time to time in respect of goods supplied and delivered under the supply contract. However, at a point in time, Leratadima caused USAASA to make payments under the supply contract into Leratadima's Absa bank account (in aggregate total, the sum of R102 546 219.74) as opposed to making such payments into Leratadima's VBS bank account, as was incumbent upon it to do under the facility agreement.
 25. VBS fell victim to the perpetration of a massive fraud during 2017, as was widely publicized in the public domain.

26. This led to VBS being placed under curatorship by the Minister of Finance in March 2018. On 10 March 2018, a firm of auditors known as SNG, represented by Mr A. Rooplal (Mr Rooplal), the deponent to the applicant's affidavits, was appointed as curator.⁸ According to Mr Rooplal, all credit accounts (including Leratadima's facility) at VBS were suspended. At that stage, Leratadima was still contractually bound to deliver an outstanding amount of STB's to USAASA in terms of the supply contract and needed additional funds (to the funds hitherto utilised by it) from VBS with which to do so.
27. In June 2018, and whilst VBS was under curatorship, Leratadima (represented by the first respondent) approached the curator to advance the amount of R25 million to Leratadima, which request was declined on the basis that the credit facility had by then expired and in any event because the bank did not have the available funds to advance.
28. On 23 July 2018, the curator caused VBS's attorneys (Werksmans) to despatch a statutory demand to Leratadima in terms of s 345 of the Companies Act, 1973, in which payment of the sum of R152 071 422.68 was claimed, together with interest thereon as from 24 July 2018, in respect of

⁸ In terms of paragraph 4 of the appointment letter, annexure 'FA3' to the founding affidavit, Mr Rooplal was afforded the powers that arise from section 69(3)(c) of the Banks Act, 94 of 1990, which, in relevant part, reads as follows:

"(3) The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator -

(c) to cancel any agreement between the institution concerned and any other party to advance moneys due after the date of his appointment as curator, or to cancel any agreement to extend any existing facility, if, in the opinion of the curator, such advance or any loan under such facility would not be adequately secured or would not be repayable on terms satisfactory to the curator or if the institution lacks the necessary funds to meet its obligations under any such agreement or if it would not otherwise be in the interests of the institution."

Leratadima's then outstanding indebtedness to VBS in terms of the facility agreement and extended facility.

29. Leratadima's erstwhile attorneys (Allen & Associates) responded to the statutory demand in a letter dated 23 July 2018, in which they unequivocally conveyed that '*our client [Leratadima] does not dispute its liability to VBS...as discussed and calculated at the meeting but requests the final financing to comply with all its obligations, including payment of your debt⁹*' The said attorneys *inter alia* asserted that in terms of the facility agreement, VBS was obliged to make funding available to Leratadima for completion of the full contract with USAASA and not only a portion thereof. It was alleged that in failing to make further funding available to Leratadima to manufacture the outstanding SDT's, VBS was deliberately preventing Leratadima from performing its obligations to USAASA in breach of its (VBS's) obligations under the facility agreement.

30. Werksmans, responded to the aforementioned letter on 2 August 2018, stating, amongst others, that

"3. As at 23 July 2018, an amount of R152,071,422.68 remained owing by your client under the Revolving Credit Financing Facility. Despite clear provisions in the Revolving Credit Financing Facility Agreement ("the Facility Agreement") requiring that all proceeds of the USAASA contract are to be paid into a specified bank account held by your client at VBS Mutual Bank ("the Designated Account"), we understand that your client has caused USAASA to make payments into another account held by your client at another bank. That is a clear and material breach of both the terms and spirit of the Facility Agreement.

5 ... the Facility Agreement was granted for an initial period 12 (twelve) months and extended in January 2017 for a further period of 3 (three) months. That extended period

⁹ In the letter, reference was also made to Leratadima being in breach of its obligations to USAASA under the supply contract for failing to timeously deliver a number of outstanding STD's to USAASA and that Leratadima required VBS to make further funding of R25 million under the credit facility available to Leratadima to enable it to fund the performance of its remaining obligations to USAASA.

has expired, As such, no further amount may be drawn by your client under the Revolving Credit Financing Facility and the full amount owing by your client is due and payable.

6. As your client has made no attempt to settle the outstanding balance of the Facility, we sent them a letter of demand in terms of section 345 of the Companies Act, 1973 on 24 July 2018. That letter of demand was sent to the Sheriff for service on your client at its registered address prior to our client receiving your letters. A copy is attached for your attention.

8. We are pleased to note that your client does not dispute its liability towards VBS Mutual Bank but our client requires that such liability is now settled as a matter of priority."

31. As a result of Leratadima's failure to pay the amount demanded, in October 2018, VBS (in curatorship) launched an application for Leratadima to be finally wound-up.
32. On 6 December 2018, Allen & associates, acting on the instructions of Leratadima, addressed a letter to Werksmans informing VBS that *'Leratadima does not foresee any reasonable possibility to settle the debt under the revolving credit facility. Our instructions are therefore not to oppose the liquidation any further.'*
33. In the meantime, on 13 November, VBS was placed under final winding-up by order of court at the behest of a creditor, 'The Prudential Authority'. Mr Rooplal was appointed as the liquidator of VBS by the Master of the High Court.
34. On 11 December 2018, Leratadima was placed under final winding-up at the behest of VBS by order of court. VBS subsequently proved a claim in the sum of R156 183 602.22 with interest in the insolvent estate of Leratadima. Mr Richard Pollack was appointed as one of Leratadima's joint liquidators.

35. The liquidators of Leratadima elected to continue with the supply contract and procured the manufacture and delivery of all outstanding STD's to USAASA under the supply contract, and, notwithstanding the execution, implementation and finalisation of that agreement, Leratadima remained hopelessly insolvent and indebted to VBS.¹⁰
36. In his capacity as liquidator, Mr Rooplal was tasked with the recovery of debts owed to VBS for the benefit of its creditors. To this end, he launched the present application against the respondents on behalf of VBS (in liquidation).

Grounds of opposition

37. The respondents aver that they should be released from liability under their surety agreements on account of VBS's conduct in 'unlawfully and unilaterally' suspending (and ultimately terminating) the revolving credit facility, which action on the part of VBS unlawfully prejudiced the sureties, warranting their release from the suretyships.
38. As earlier indicated, certain procedural and legal objections and additional defences were raised for the first time in the respondents' heads of argument. Before dealing therewith, it is apposite to consider the respondents' version in the answering affidavit juxtaposed against the defences proffered in the heads of argument.

Respondents' version in the answering affidavit

Tacit extension of facility agreement during June/July 2016

¹⁰ This was confirmed by Mr Richard Pollack in a confirmatory affidavit. In his affidavit, Mr Pollack also confirmed having advised Mr Rooplal that during an enquiry into the trade affairs of Leratadima, the respondents conceded that they had traded recklessly, having used the assets and income of Leratadima to unlawfully enrich themselves and further, that they agreed to pay back the proceeds appropriated by them but which they have to date failed to do.

39. The respondents aver that as at March 2018 (being the time when all credit facility accounts at VBS were suspended pursuant to its placement under curatorship) the revolving credit facility had not expired, nor was Leratadima in breach of its obligations under the facility agreement. This is because 'the revolving credit facilities and the facility agreement was extended' by agreement between the parties. Although the respondents failed to plead whether such agreement was written or oral, who represented the parties in its conclusion, where and when precisely it was concluded, it was averred later in the answering affidavit that *'factually, as at March 2018, there existed (at least) a tacit extension of the credit facility on the same terms and conditions as originally entered into, closely tied to the ultimate successful execution and finalisation of the USAASA agreement'*. The respondents state that the tacit extension occurred in the following circumstances: pursuant to an arbitration award being granted in June 2017,¹¹ Leratadima and VBS 'agreed that the revolving credit facilities of R250 000 000.00... would remain intact' to enable Leratadima to supply and deliver a remainder of 324 000 STD's to USAASA. After June/July 2017, VBS continued to make the revolving credit facilities available to Leratadima and funds from USAASA in respect of proceeds generated from the supply contract continued to be paid into the VBS account.
40. It is noteworthy that this version presupposes an extant facility agreement, the duration of which had been tacitly extended by the parties after its termination date, which, as per the second addendum thereto, was on 25 April 2017.

¹¹ The award arises from arbitration proceedings involving Leratadima and USAASA (with the Minister of Communications also being joined as a party), which partially became settled in terms of a settlement agreement concluded between the parties and which was made an arbitration award. USAASA had suspended the supply contract in June 2016 before the supply of 500 000 STB's was completed, with the supply and delivery of 324 000 STD's still remaining outstanding under the supply contract. Pursuant to the award, during June/July 2017, Leratadima continued with the supply and delivery of the remaining STB's under the supply contract, which it says it did until March 2018 when the credit facility was suspended by the curator of VBS.

Provision of credit facilities under the facility agreement were linked to the successful execution and finalisation of the supply contract.

41. The respondents aver that the revolving credit facility would not have existed had it not been for the supply contract. The supply contract and its successful execution or completion was, to the knowledge of VBS, 'closely tied' to the credit facility, which facility was necessary to enable Leratadima to carry out its obligations 'in order to ultimately benefit' from the supply contract. Expressed differently, the contention is that the availability of funds in the revolving credit facility was necessary to enable Leratadima to fulfil its contractual obligations to USAASA and to secure the balance of payments owing to it by USAASA, which proceeds would be utilised for purposes of servicing the facility agreement (i.e., to enable Leratadima to discharge its repayment obligations to VBS under the facility agreement). In their heads, the respondents emphasise that the express wording of the facility agreement 'make it clear that the proceeds of the supply contract would be utilised for purposes of servicing the facility agreement.'¹²
42. The respondents further aver that the period during which credit facilities would be made available to Leratadima under the facility agreement was therefore linked to the period of manufacturing under the supply contract and its successful ultimate completion.

Release from suretyships on account of VBS's alleged unlawful suspension/repudiation of the facility agreement¹³

¹² "The facility agreement records the following:

2.1 The Borrower has entered into a contract with USAASA for the supply and delivery of Digital Terrestrial Television Set Boxes and related accessories under bid number USAASA/DTT/09/2014-15.

2.2 The Borrower has approached VBS and requested VBS to provide it with the required loan funding to fulfil the terms of the contract."

¹³ Paras 45- 50 of the answering affidavit.

43. The respondents aver that they should be released from their indebtedness arising from their suretyships on account of VBS's alleged repudiation of the terms of an extant facility agreement (the duration of which was tacitly extended) the allegation being that the decision by the curator to suspend the revolving credit facility, which was an arms-length transaction between VBS and Leratadima 'without proper reason and a rational decision' - in circumstances where Leratadima was not in breach of its obligations under the facility agreement and which, by March 2018, had not expired - amounted to a repudiation by VBS of its obligation in terms of the facility agreement to make the revolving credit facilities available to Leratadima until such time as the entire USAASA contract was completed. As a result of VBS's repudiation of the facility agreement by virtue of its unreasonable and irrational decision to suspend the credit facility in March 2018 and its concomitant refusal to make further funding available to Leratadima, the latter was unable to complete the USAASA contract and secure the balance of payments owing to it by USAASA. The suspension (and ultimate termination) of the credit facility was to the detriment and prejudice of the sureties, as, so it was averred, the obligations of the sureties would never have arisen had the supply contract with USAASA been completed with the available revolving credit facility, which was intact until such time as 'all facilities were simply suspended resulting from fraud not germane to the principal debtor Leratadima, or the sureties.' In those circumstances the sureties contend that it would be against public policy and *contra bonos mores* to seek judgment against the sureties and they are accordingly entitled to be released from their obligations under the suretyships. I deal with this defence below.

Defences raised in the respondents' heads of argument

Law points

Sureties are liable only in respect of the capital amount advanced to Leratadima (and not interest thereon) in terms of suretyships and the amount of the sureties' indebtedness is not determinable from the founding affidavit

44. The respondents contend that in terms of the suretyships, the sureties are liable for monies lent and advanced to the principal debtor *excluding* interest. Even if the suretyships are capable of more than one meaning, the suretyships ought to be interpreted *contra proferens*, i.e., against the author thereof, being the bank/applicant. If so interpreted, the respondents could only be liable in respect of the actual capital lent and advanced by the applicant to the principal debtor.
45. The respondents' further contend that the applicant has failed to establish the amount of the capital advanced by VBS to the principal debtor in its founding affidavit and the court cannot grant judgment for an undetermined amount of money. The certificate of indebtedness of the principal debtor relied upon in the founding affidavit includes interest that has accrued and has been capitalised, which the sureties are not liable for. This, so say the respondents, is similarly evident from the bank statement annexed to the founding papers as annexure 'FA9'.
46. The respondents argue that the facility agreement was concluded on 15 January 2016 in terms of which VBS agreed to lend and advance a capital amount of R100 million to the principal debtor. On the same day, the respondents signed written suretyships in terms whereof they acknowledged their liability to the applicant pertaining to the capital lent and advanced to the principal debtor i.e., the loan amount of R100 million, excluding any interest.
47. The respondents further argue that on a proper interpretation of the suretyships, each surety could only be liable to the applicant for an amount of R100 million jointly and severally with the principal debtor and the other

surety. The collective maximum liability of the sureties would accordingly not exceed R100 million.

48. The respondents contend that on the case as formulated in the founding affidavit, VBS has failed to set out facts in support of the capital amount advanced and therefore the quantum of the sureties' indebtedness cannot be determined on the papers and the application falls to be dismissed on this ground alone.

Failure to demonstrate that the suspensive conditions in the facility agreement were complied with.

49. The respondents take the point that the applicant failed to allege or prove in its papers that the conditions precedent in the facility agreement were complied with or that they were waived by the applicant on or before the signature date of the facility agreement.
50. The respondents further contend that absent proof of a valid written credit agreement, there is 'simply no underlying *causa*. Absent a *causa*, the applicant cannot hold the principal debtor liable nor the... sureties'. In so far as the applicant could hold the principal debtor liable in terms of a possible enrichment claim for 'certain capital amounts advanced', it was contended that this has nothing to do with the sureties and is in any event not the case advanced by the applicant in the application.

New defence on merits

Conclusion of a 'new independent credit agreement' between VBS and Leratadima

51. The respondents contend that clauses 2.1 and 2.2 of the facility agreement make it clear that the proceeds of the supply contract would be utilised for purposes of servicing the facility agreement. The ability on the part of the principal debtor to service its obligations in terms of the USAASA contract is

accordingly related to and dependent on the continued existence of the facility agreement. As the anticipated duration of the supply contract changed (by virtue of USAASA's unilateral suspension of the supply contract in 2016), which culminated in arbitration proceedings between USAASA and Leratadima and which in turn caused a significant delay in the finalisation of the supply contract), so too did the duration of the facility agreement change.

52. The disputes between Leratadima and USAASA were partially settled in June 2017. A settlement agreement concluded pursuant thereto was made an arbitration award. It terms of the award, Leratadima resumed the supply of the remaining 324 000 STB's due to USAASA under the supply contract.
53. Absent a waiver/*pactum de non petendo*, as at June 2017, the facility agreement (read with the second written addendum thereto), terminated as a result of the effluxion of time on 25 April 2017. The respondents contend that as a result of the termination of the facility agreement, a new and independent credit agreement was concluded between VBS and Leratadima in terms of which the credit facility of R250 million would remain intact and credit would be extended to Leratadima to enable the latter to service the supply contract until the finalisation thereof. The respondents argue that the new credit agreement has independent contractual force and does not purport to amend or vary the facility agreement that 'lapsed several months' earlier. The respondents further contend that this is what the parties always envisaged and is the only interpretation that makes commercial sense. They submit that the granting of further credit to Leratadima for 'another year' after the facility agreement had lapsed cannot be interpreted to be an indulgence on any interpretation of the facts.

Discussion

54. On the affidavits filed, there is no controversy about the fact that VBS loaned and advanced monies on credit to the principal debtor, who utilised same to fund the manufacture of STB's in order to supply and deliver same to USAASA under the supply contract. USAASA in turn paid for STD's supplied and delivered by way of electronic transfer of monies into the VBS account, at least until such time as Leratadima (represented by the respondents) caused USAASA to make payments into Leratadima's Absa bank account. Put differently, it is not in dispute on the papers that the facility agreement was considered by both applicant and respondents (including the principal debtor whom the respondents represented) to be valid, binding and enforceable and that it was implemented, in that funds were advanced to Leratadima, which Leratadima utilised to fulfil its obligations to USAASA under the supply contract. Payments by USAASA were made into the VBS account, at least until such time as USAASA's payments were diverted by Leratadima's representative/s to Leratadima's Absa account.
55. The respondents acknowledge that monies loaned and advanced by VBS were required by Leratadima to enable the latter to fulfil its obligations under the supply contract with USAASA. The supply contract was worth approximately R344 million. By the time the credit facility was suspended, Leratadima had supplied and delivered a large quantity of STD's to USAASA for which it had been paid. There is no suggestion by the respondents in their answering affidavit that Leratadima was not obliged to repay the monies advanced to it by VBS, nor is there any dispute that Leratadima incurred liability for the payment of interest, fees and charges as provided in the facility agreement. It is common cause that the design of the facility agreement was such that Leratadima would utilise the payments made by USAASA into the VBS account to repay the debt arising from the extension of credit by VBS to Leratadima. That is why Leratadima agreed, in terms of the

facility agreement, that *all* proceeds from the supply contract were to be deposited into the VBS account and that Leratadima was not entitled, without the written consent of VBS, to change the VBS account details for as long as any monies remained outstanding by Leratadima to VBS. Despite receiving and utilising funds that were loaned and advanced by VBS, Leratadima failed to repay the balance of its outstanding indebtedness to VBS in full.

56. VBS was entitled to *prima facie* prove the extent of the principal debtor's liability by means of a certificate, which it has done. The certificate is in any event supported by the bank statement, annexure 'FA 9' to the founding affidavit, which reflects the quantum of the principal debt, as at 1 May 2021, in the amount of R224 165 264.43. This amount included accrued interest, as capitalized, and bank fees and charges debited against the account. The amount reflected in 'FA9' (the facility account bank statement) is the self-same amount that was certified by a manager of VBS as the balance owing by the principal debtor to VBS. The certificate of balance is attached as annexure 'FA14' to the founding affidavit. Par 2 of the certificate reads as follows:

" 2. In my capacity as the Collections Manager of VBS, I do hereby certify that VBS (sic) and (sic) Leratadima Marketing Solutions (Pty) Ltd is indebted to VBS in the amount of R224 165 264.43 (Two hundred and twenty four million, one hundred and sixty five thousand, two hundred and sixty four rand and forty three cents) as at 1st May 2021 in respect of monies loaned and advanced by VBS to and (sic) Leratadima Marketing Solutions (Pty) Ltd for the contract Finance Account."

57. Criticisms were levelled by the respondents' counsel at the obvious typographical errors appearing in the above quoted extract of the certificate, which are identifiable by reference to the highlighted portions in order to contend that no reliance can be placed on the certificate. The certificate was provided by the applicant to establish the amount of the principal debtor's

indebtedness, as supported by the contents of the facility account in 'FA9'. There has never been a contention that VBS is indebted to itself and it is common cause that monies were loaned and advanced to Leratadima by VBS. The obvious typographical errors appearing in the certificate do not render it unreliable. Nor does the reference therein to a 'contract finance account' detract therefrom. The addendum (annexure 'FA8' to the founding affidavit) specifically refers to a 'contract financing facility' and such addendum was incorporated by its express terms into the facility agreement (the contract), whilst 'FA 9' is indisputably the finance account pertaining thereto. Save for submitting that the certificate cannot be relied on to establish the sureties' indebtedness as it contains accrued interest for which the sureties are not liable, the respondents did not challenge the correctness of the calculations appearing in the certificate in the answering affidavit. Nor did they put up evidence to refute the allegation in the answering affidavit that the amount claimed to be owing by the principal debtor was due and payable.

58. At the time that VBS claimed repayment of the debt in terms of its statutory demand, as at 23 July 2018, the principal debtor's indebtedness amounted to R152 071 422,68, as evidenced by the bank statement, annexure 'FA9'. Liability to repay such indebtedness was acknowledged by Leratadima in the letter of 23 July 2018 addressed by its erstwhile attorneys to VBS's attorneys. Leratadima admitted its inability to repay its undisputed indebtedness to VBS in its erstwhile attorney's letter of 23 July 2018, which inability to pay the undisputed amount claimed to be due, owing and payable ultimately culminated in its final liquidation. On the unrefuted version of the applicant, the respondents were the persons who represented Leratadima in all its dealings with VBS. As such, they would have had first-hand knowledge of the incurrence and extent of the indebtedness from time to time. There is

nothing in the papers to suggest that the respondents, representing Leratadima, ever queried or disputed the contents of the facility account statement, annexure 'FA9' to the founding affidavit (or any other bank statement pertaining to the credit facility) prior to the institution of these proceedings. In the answering affidavit, the respondents baldly denied the allegations in par 43 of the founding affidavit¹⁴ without putting up any evidence to dispute the accuracy of the contents of 'FA9' and without seriously and unambiguously addressing the allegations made in the founding affidavit.¹⁵ In their heads, the respondents took the point that the sureties are not liable for interest accrued on the principal debt, pointing out that 'FA9' contains accrued interest for which the sureties are not liable.

59. At the hearing of the matter, the applicant abandoned any claim against the respondents in respect of accrued interest on the outstanding amount owed by the principal debtor. It thus became unnecessary to determine the respondents' defence pertaining to the respondents' status as capital sureties or to interpret clause 3 of the suretyships in terms of which interest was excluded. In doing so, the applicant significantly decreased its claim against the sureties from a total combined claim of R200 million to a claim of R100 million, payable by the respondents on a joint and several basis.
60. The respondents took the point in their heads that the capital amount for which the sureties undertook liability is not determinable as no factual evidence of the capital amounts advanced to the principal debtor were alleged in the founding affidavit. This point is in my view contrived. The capital amount advanced in terms of the facility agreement to Leratadima is

¹⁴ There it was averred that the 'statement of account ('FA9') shows that Leratadima accessed the facility funds from 25 January 2016 until 8 March 2018. The statement of account in addition records the running of interest which continued to accrue on the outstanding amount owed by Leratadima in terms of the facility.'

¹⁵ See in this regard, *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paras 12- 13.

easily determinable and calculable from the contents of annexure 'FA9' to the founding affidavit. It requires no more than the adding up of the amounts of the capital debits (VBS's advances in respect of payment of Leratadima's suppliers together with costs and charges payable under the facility agreement) and capital credits (USAASA's payments) appearing on 'FA9' and subtracting the total amount of credits from the total amount of the debits. The applicant performed such exercise (i.e., the adding up of amounts excluding interest pertaining to the principal debtor's indebtedness) for purposes of oral argument tendered at the hearing of the matter,¹⁶ which revealed a capital indebtedness sans interest in the amount of R104 331 386.13. The respondents did not consider it necessary to perform such exercise, their counsel merely advocating during presentation of oral argument that the spreadsheet provided by the applicant's counsel during oral argument would not be considered and is in any event 'denied'.

61. In the answering affidavit the respondents rely on an extant facility agreement, which was alleged to have been tacitly extended on the same terms and conditions as contained in the original written agreement and which was in force and implemented until March 2018 when the facility agreement was unilaterally suspended by VBS whilst under curatorship. Significantly, the respondents did not plead that the agreement, as tacitly extended, either excluded the conditions precedent in clause 5 of the original written memorial or that such conditions were unfulfilled. In contradistinction to the pleaded defence, in their heads, the respondents contend for the 'lapse' by effluxion of time of a binding facility agreement

¹⁶ The extrapolation of the capital amounts (less interest) reflected in annexure 'FA9' to the founding affidavit - for which the respondents assumed liability under the deeds of suretyship - is contained in a spreadsheet prepared by the applicant's counsel and uploaded at 017-10 to 017-11 of Caselines. The spreadsheet reflects the capital amounts advanced by the bank to the principal debtor, together with costs and charges for which the principal debtor was liable (and in respect of which the sureties undertook liability), less payments received by USAASA in reduction of the principal debtor's indebtedness, which amounts to the sum of **R104 331 386.13**.

that was extant until its termination by effluxion of time in April 2016, followed by the conclusion thereafter of a new and independent credit agreement between VBS and Leratadima. Juxtaposed against or incompatible with this version, the respondents raise a legal point in their heads, namely, that the applicant failed to make out a cause of action in the founding affidavit in that it failed to allege and prove the conclusion of a valid and enforceable revolving credit facility agreement for want of pleading and providing factual evidence that the suspensive conditions contained in clause 5 of the facility agreement were either fulfilled or timeously waived.¹⁷

62. It bears mention that none of the defences, which are mutually destructive, were pleaded or raised by the respondents in the alternative.

¹⁷ In *Desert Star Trading v No 11 Flamboyant Edleen* (98/10) [2010] ZASCA 148 (29 November 2010) at par 11, the Supreme Court of Appeal held that:

“...It is so that a contract of suretyship is a separate contract from that of the principal debtor and his or her creditor. It is however accessory to that main contract. Thus for there to be a valid suretyship there has to be a valid principal obligation. Put differently, every suretyship is conditional upon the existence of a principal obligation. For, as Nienaber JA put it ‘[g]uaranteeing a non-existent debt is as pointless as multiplying by nought’. It follows that a surety is not liable to a person to whom the principal debtor is not liable. It is well settled that the general rule is that a surety may avail himself or herself of any defences that the principal debtor has save for those defences that are purely personal to the principal debtor.” (footnotes excluded)

The accessory nature of the contract of suretyship was emphasised by the Constitutional Court in *Shabangu v Land and Agricultural Development Bank of South Africa and Others* 2020 (1) SA 305 (CC), which held that a suretyship cannot survive where the underlying obligation is invalid. In that case there was no dispute that the principal loan agreement in terms of which the bank loaned and advanced monies to the principal debtor was invalid as it involved the Land Bank exceeding its statutory powers. The principal debtor entered into an acknowledgement of debt (‘AOD’) to repay a reduced amount to that which was owing to Land Bank under the invalid loan agreement. Various parties had stood surety for the loans advanced by the bank to the principal debtor. The matter turned on whether the taint of invalidity of the loan agreement also stretched to taint the AOD and the liability of the sureties in respect of the AOD.

The Constitutional Court however pointed out in par 33 of the judgment that ‘*What this judgment does not deal with are compromises by organs of state where the validity of the agreement remains disputed.*’

63. Whilst it is open to a party to raise a legal point *in limine* that the founding affidavit does not make out a case for the relief claimed,¹⁸ the manner or circumstances in which it may do so are not unrestricted. As pointed out by the Supreme Court of Appeal in *Southern Litigation*¹⁹

“...It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.²⁰ But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.²¹”
(emphasis added) (footnotes included)

64. In the present case, no facts relevant to the legal point were canvassed at all in the papers, let alone *fully* canvassed in the papers. The prejudice to the applicant is self-evident. Had the relevant facts germane to the point been canvassed in the papers, the applicant would have had the opportunity to dispute same and/or to deal therewith by means of putting up evidence in rebuttal.

65. That the facility agreement was binding on both parties and enforceable, was not challenged in the answering affidavit. In terms of the second addendum:

“2.4 The Customer [Leratadima] acknowledges the repayment arrangement as set out in the Main Agreement shall continue to be binding on the customer;

¹⁸ See, for example, *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Company* 1963 (1) SA 632; *Marais v Standard Credit Corporation Ltd* 2002 (4) SA (A) 892 (W) at 897 A-B.

¹⁹ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) at par 24 (‘Southern Litigation’).

²⁰ *Van Rensburg v Van Rensburg & andere* 1963 (1) SA 505 (A) at 510 A-C. The approach has been endorsed by the Constitutional Court: *CUSA v Tao Ying Metal Industries & others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.

²¹ *Fischer & another v Ramahlele & others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.

2.5 All other terms of the Main Agreement shall remain binding and enforceable on both parties.

This Addendum is attached to and made part of the Main Agreement signed by and between the Customer and the Bank."

66. Moreover, as earlier mentioned, the respondents relied on an extant facility agreement in the answering affidavit, with the revolving credit facility not having expired as at March 2018 by virtue of an alleged tacit extension thereof, coupled with VBS's breach of the terms thereof, entitling the sureties to the release from their obligations under the suretyships.²² The respondents' version that the facility agreement was tacitly extended is premised on the fact that a binding and enforceable agreement was in place, in other words, that the main agreement had not come to an end, whether because the suspensive conditions were not fulfilled or because of its extension. Significantly, in the answering affidavit the respondents did not allege that the suspensive conditions in the tacitly extended facility agreement on which they relied, were not fulfilled. As pointed out in *Bosch*:²³
- "... the effect of non-fulfilment of a suspensive condition is that the contract comes to an end automatically. That follows necessarily from the fact that no action lies to compel the performance of a suspensive condition. If there is no right to compel performance there

²² See par 37 of the answering affidavit at 014-12.

²³ Commissioner, South African Revenue Service v Bosch and another [2014] ZASCA 171; 2015 (2) SA 174 (SCA) para 31. See too: *Africast (Pty) Limited v Pangbourne Properties Limited* (359/2013) [2014] ZASCA 33; [2014] 3 All SA 653 (SCA) (28 March 2014), at paras 37 & 39 where the following was said:

"[37] A contract containing a suspensive condition is enforceable immediately upon its conclusion but some of the obligations are postponed pending fulfilment of the suspensive condition. If the condition is fulfilled the contract is deemed to have existed *ex tunc*. If the condition is not fulfilled, then no contract came into existence. Once the condition is fulfilled, '[t]he contract and the mutual rights of the parties relate back to, and are deemed to have been in force from, the date of the agreement and not from the date of the fulfilment of the condition, ie *ex tunc*."

[39]... Upon signature of the agreement an inchoate agreement came into being, pending the fulfilment of the suspensive condition. In the event that the suspensive condition was not fulfilled, neither party would be bound to the agreement." (footnotes excluded) (emphasis added).

can be no question of a breach warranting a cancellation of the contract.' (Footnote omitted.)"

A fortiori, there can be no question of a breach in the form of a repudiation which may be accepted by the innocent party in order to compel performance of an agreement that has not come into existence.

67. In *Di Guilio*,²⁴ Van Zyl J conveniently summarised what a claim against a surety entails. In that case the court accepted, as do I, that the invalidity of the main agreement is a special defence that is required to be pleaded, supported by evidence.

²⁴ *Di Guilio v First National Bank Ltd* 2002 (6) SA 281 (C) at paras 26-29. There the following was said:

"[26] In any claim against a surety the plaintiff must, at the outset, prove the existence of a valid contract of suretyship. He must then prove that the source of indebtedness (*causa debiti*) in terms of such agreement is one in respect of which the defendant undertook to be liable. Finally he must prove that the said indebtedness is due and payable. See the useful discussion of these requirements, with reference to relevant authorities, in *Amler's Precedents of Pleadings* (5th ed by LTC Harms, 1998) 381-382.

[27] If the defendant should place the amount of the claim, relating to its composition or calculation, in issue, the necessary evidence to substantiate such amount must be presented by the plaintiff. See *Moreriane v Trans-Oranje Finansierings- en Ontwikkelingskorporasie Bpk* 1965 (1) SA 767 (T) at 769G; *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 383A.

[28] It is trite that, if the surety should admit liability in terms of the suretyship agreement, the plaintiff would not be required to lead evidence in this regard. If the amount of the claim should likewise be admitted, no evidence of its composition or calculation would be required. If the surety should, however, deny liability on the basis that the principal debt was not due, the principal would have to prove that it was. See the *Senekal* case (par 27 above) at 383A-F. On the other hand, if the surety should raise a "special" defence such as illegality, fraud, lack of contractual capacity or lack of authority, he would be required to present evidence in support thereof. This is because the facts underlying such defence are regarded as falling beyond the ambit of the plaintiff's cause of action. See C W H Schmidt and H Rademeyer *Bewysreg* (4th ed 2000) 38-39 and the authorities cited there.

[29] Once the party bearing the *onus* of proof has made out a *prima facie* case, his opponent is burdened with an *onus* of rebuttal. Should he fail to discharge this *onus* of rebuttal, *prima facie* evidence would be regarded as sufficient evidence for purposes of discharging the main *onus* of proof. See *Senekal v Trust Bank of Africa Ltd* (par 27 above) 382H-383A; Schmidt and Rademeyer (par 28 above) 65. Even more so would this be the case if he has personal knowledge of facts or information relevant to the discharge of such *onus*, but fails or refuses to testify. Under such circumstances an adverse inference may be drawn against him. See *Galante v Dickinson* 1950 (2) SA 460 (A) at 465; *New Zealand Construction (Pty) Ltd v Carpet Craft* 1976 (1) SA 345 (N) at 349G-H; *Hasselbacher Papier Import and Export (Body Corporate) and Another v MV Stavroula* 1987 (1) SA 75 (C) at 79F-80C; *Lazarus v Gorfinkel* 1988 (4) SA 123 (C) at 134B-135C." (emphasis added)

68. For the reasons given, I conclude that the respondents were not permitted to raise the invalidity of the facility agreement in the manner in which they chose to do so, ie, belatedly in their heads of argument and as such, their point pertaining to the invalidity of the main agreement cannot be upheld.
69. It might be useful at this point to have regard to the applicant's cause of action in the application, as set out in the founding affidavit.
70. The applicant's case is that the respondents stood surety for the obligations of Leratadima, a company that had borrowed considerable amounts from VBS. Clause 3 reads, in relevant part, as follows:
- " Hereby bind myself to the Creditor as surety for and co-principal debtor in solidum with Leratadima...on the terms and conditions contained in this Suretyship Undertaking for the payment of R100 000 000.00 (One Hundred Million Rand),excluding interest, which the Principal Debtor does now or will at any future time owe to the Creditor from monies loaned and advanced. Without limiting its meaning, the word "Debt/s" wherever it appears on this Suretyship Undertaking includes every claim, indebtedness, liability, damages or any other commitment, direct or indirect of any nature from whatsoever cause without limitations, Debts not yet due and payable and unliquidated Debts."
71. The conclusion of the written suretyships was not in dispute on the papers. The suretyships are valid, extant and form the basis of VBS's claim against the sureties. In terms of clause 3 of the suretyships, the liability of the sureties was not restricted to the principal debtor's indebtedness arising only from the facility agreement, but included expansive liability for any indebtedness *of any nature from whatsoever cause* in respect of monies loaned and advanced by VBS to the principal debtor. The only limitation of liability in terms of the suretyships was in respect of the amount the sureties undertook to pay, which was limited to R100 million, excluding interest, as became common cause between the parties by the time the matter was argued. The principal debtor's liability arose from monies loaned and

advanced to Leratadima in terms of the facility agreement (including interest, costs and charges debited to the facility account) the balance of which was shown by the applicant to be due, payable and owing but which was never repaid by the principal debtor to VBS.²⁵ The conclusion of the facility agreement and its written addenda, including the express terms thereof were not disputed in the answering affidavit. That the balance of monies loaned and advanced to Leratadima was due and payable but not repaid, was likewise not refuted by the respondents in their papers. More significantly, it was not in dispute that the source of indebtedness (*causa debiti*) in terms of the suretyships was one in respect of which the respondents undertook to be liable consequent upon the principal debtor's default of payment of a debt that was due, owing and payable.

72. The respondents rely on a tacit extension of the facility agreement on the same terms as the original agreement, yet which which incorporated a new or additional term that obliged VBS to make the credit facility funds available until the ultimate completion of the supply contract (whenever that happened to occur). It is noteworthy that the version is in conflict with the terms of the written facility agreement, which expressly provided for a termination date, which was extended in writing by no more than three more months in terms of the second addendum thereto. Furthermore, the

²⁵ Although the respondents baldly denied in the answering affidavit that Leratadima failed to repay all the amounts drawn down from the facility with interest, as a result of which Leratadima remained indebted to VBS for the outstanding debt, which was both due and payable to it, such a bald denial did not engender a genuine dispute of fact. The respondents did not deny that Leratadima received the loan funding (extended to it on credit by the bank), nor did they aver or demonstrate in their papers that Leratadima had repaid all amounts drawn down from the facility. These were facts that lay within the knowledge of the respondents in their capacity as joint directors of Leratadima, given that they represented Leratadima in the conclusion of the facility agreement and addenda thereto. No basis was laid in the answering affidavit for disputing the veracity of the allegations in the founding affidavits in relation to the amount of the outstanding indebtedness at varying stages, as reflected on 'FA9'. The debt became due and payable after the termination of the facility and at the very least, upon demand. Pursuant to the statutory demand, Leratadima, admitted its liability in the amount then claimed. There was no disputation or protestation by the one or both respondents, representing Leratadima, of the fact that the debt was due and payable, as claimed in the statutory demand.

alleged tacit extension of the facility agreement on terms not expressly embodied in the written memorial offends against the 'whole agreement' and 'non-variation' clauses therein. Any agreement between the parties and which was not recorded in writing and signed by or on behalf of the parties would be unenforceable by virtue of the non-variation clause in the facility agreement.²⁶ No explanation is given by the respondents as to why, if the period during which credit facilities would be made available to Leratadima under the facility agreement was always linked to the period of manufacturing under the supply contract and its successful ultimate completion, a termination date had been expressly agreed to in the agreement read with its addenda. The further difficulty with the version is that the importation of a new or additional term regarding the duration of the facility agreement is in any event in obvious contradistinction to the allegation that the extended agreement was on the same terms and conditions as embodied in the initial written memorial, which had expressly provided for an extended termination date per the second addendum thereto. If that be so, the facility could not, as a consequence of the provisions of clause 14, have been extended in any manner other than in writing. The respondents' version in this regard, aside from being inherently implausible, is simply not legally tenable, given that it is irreconcilable with the express terms of the facility agreement, read with the addenda thereto, and is in any event in conflict with the version proffered in the heads concerning the conclusion of a new agreement (as opposed to the tacit extension of an existing agreement).

73. For these reasons I conclude that the version of a tacit extension of the facility agreement on the basis that that it would endure until the final

²⁶ See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) ("Shifren"). *Shifren* confirmed the enforceability of non-variation clauses amidst oral amendment, and was constitutionally approved in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

completion of the supply contract is not tenable²⁷ or sustainable. It follows axiomatically that the alleged repudiation by VBS of an obligation to provide credit facilities to Leratadima until such time as all STB's had been manufactured, supplied and delivered by Leratadima to USAASA under the supply contract, cannot be sustained.

74. The defence pertaining to the release of the sureties from liability under the suretyships is premised on the alleged unlawful suspension of credit facilities after VBS was placed under curatorship, in alleged breach of its obligation to make the credit facilities available until the final completion of the supply contract, which precluded Leratadima from accessing funds with which to manufacture a number of outstanding STB's under the supply contract. As stated in the founding affidavit, in March 2018 the facility was suspended by the appointed curator of VBS under powers conferred on him by the Minister of Finance, which included the powers contained in s 69(1)(c) of the Banks Act, 94 of 1990, as is apparent from the letter of appointment, annexure 'FA3' to the founding affidavit. The curator's entitlement to avoid further funds being lent and advanced to Leratadima by means of the suspension was not disputed by the respondents in the answering affidavit. In their heads, they contend that reference to s 69(3)(c) was impermissibly raised in the replying affidavit for the first time. I do not agree. The evidence tendered

²⁷ The respondents' version proposes that the bank would be obligated to extend credit to a customer even if it lacked the necessary finances resources to do so, as occurred when VBS was placed under curatorship by the Minister, inter alia, in terms of s 69(1) of the Banks Act, and notwithstanding the erosion or inadequacy of the security afforded to the bank by means of the payment mechanism provided for in the facility agreement, whereby USAASA's payments would be utilized to discharge Leratadima's indebtedness under the loan to VBS, by Leratadima's diversion of payments into its Absa bank account. The curator suspended all credit facilities at the bank pursuant to his appointment due to the bank's financial difficulties as envisaged in s 69(1)(c) of the Banks Act. In, par 12 of the replying affidavit, Mr Rooplal clarified that this was done because VBS did not, as at June 2018, have the funds that Leratadima requested be advanced to it and also because there was no longer any security to cover the debts that had already been incurred by Leratadima and inadequate security to cover the advance of further funds sought by Leratadima, precisely because Leratadima had eroded the security previously in place by causing USAASA's payments to be made into its Absa Bank account, in breach of its obligations under the facility agreement.

in the replying affidavit did not constitute impermissible new matter because it was tendered in rebuttal of the respondents' allegations in the answering affidavit that the curator *unlawfully* refused to advance further funds to Leratadima. The replying affidavit further sets out facts relating to Leratadima's breach of the terms of the facility agreement by diverting payments from USAASA to Leratadima's Absa Bank Account, for purposes of refuting the allegation in the answering affidavit that Leratadima was never in breach of the facility agreement. To borrow from the words of Leach JA in *Lagoon Beach*.²⁸

"[T]he appellant, as respondent *a quo*, did not seek to avail itself of the opportunity to deal with the additional matter ...set out in reply, and I see no reason why these allegations should therefore be ignored."

75. The respondents contend in their heads of argument that reliance by the applicant on s 69(3)(c) of the Banks Act is misplaced for the reasons provided in par 7 therein. These submissions were not pursued at the hearing of the matter and in any event do not support the supervening impossibility defence raised by the respondents to the applicant's claim. The facts relied on in the answering affidavit in support of the respondents' supervening impossibility defence, which they contend entitles them to a release from the suretyships (summarised in par 43 above) were in my view refuted in the replying affidavit, where the applicant demonstrated that Leratadima's inability to fulfil its obligations to USAASA was occasioned by the manner in which Leratadima was managed prior to its liquidation, illustrated by its diversion of payments into its Absa Bank account in breach of its obligations to pay all proceeds from USAASA into the VBS account whilst any existing indebtedness to VBS remained unsettled, including conduct relating to the cause of Leratadima's insolvency. In any event, Leratadima's outstanding obligations to USAASA were indeed fulfilled when Leratadima's liquidators

²⁸ *Lagoon Beach Hotel v Lehane* 2016 (3) SA 143 at 152 I.

procured the manufacture, supply and delivery of all remaining STB's to USAASA and received payment in respect thereof from USAASA, notwithstanding which Leratadima remained hopelessly insolvent.

76. In *Davidson*,²⁹ the Supreme Court of Appeal affirmed the legal position that governs the release of sureties from their obligations under a suretyship agreement, as follows:

"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. In the event, however, Davidson failed to prove such a breach."

77. In the present matter, the respondents based their case on the alleged breach of a contractual obligation by VBS under the alleged tacitly extended facility agreement, a version that I have already rejected as unsound and untenable. In so far as the respondents averred that their obligations in terms of the suretyships would never have arisen had the supply contract with USAASA been completed with the available revolving credit facility, no primary facts were disclosed in support thereof. The insurmountable hurdle, as regards the proposition, is that the allegations, being devoid of primary facts, remain speculative and as such, amount to inadmissible supposition.³⁰
- In any event, the fact of the matter is that the supply contract was

²⁹ *ABSA Bank v Davidson* 2000 (1) SA 1117 (SCA) para 19.

³⁰ As Lord Wright observed in *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733: '*Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.*' see also: *R v Blom* 1939 AD 188 at 202-203 and *Joel Melamed & Hurwitz v Cleveland Estates* 1984 (3) 155 (A) 164G-165C.

completed, as earlier indicated. Had the respondents (acting on behalf of Leratadima) not diverted USAASA's payments in the aggregate total amount of R102 546 219.74 to Leratadima's Absa bank account, the balance of the principal debtors indebtedness to VBS would per force have been considerably less. For all the reasons given, the release defence must fail.

78. As regards the defence raised in the respondents' heads of argument that a 'new independent credit agreement' was concluded between VBS and Leratadima, suffice it to say that this was not something that could be raised for the first time in the heads of argument. It was incumbent upon the respondents to plead this defence in the answering affidavit, supported by evidence, if they wished to rely on same. The respondents failed to do so.
79. It is also immediately apparent that this version is at variance with respondent's pleaded case in the answering affidavit viz a tacit extension of the facility agreement on the same terms and conditions as embodied in the written facility agreement, which *ex facie* the written memorial did not contain the term relating to the duration of the facility as contended for in the new credit agreement. In their heads, the respondents assert only one term of the new agreement, namely, *that the credit facility of R250 million would remain intact* (i.e. credit to that value would be extended to the principal debtor to enable it to service the supply contract) *until such time as the supply contract had been 'finalised'*. Presumably finalisation entailed the supply and delivery of all outstanding STB's under the supply contract by Leratadima with payment therefore being effected by USAASA. This begs the question: which version is correct? The tacit extension alleged in the answering affidavit or the new agreement as contended for in the heads? Assuming, for argument purposes, the correctness of the averments made under oath in the answering affidavit (momentarily leaving aside the validity of a tacit extension of the facility agreement) then the tacitly extended

facility agreement would have included its written terms and none other, having regard to the provisions of clause 14.1 thereof. But therein lies the difficulty for the respondents: clause 14.4 precluded any further extension of the facility agreement unless an agreement to extend its duration was recorded in writing, signed by both parties. As this did not occur, any tacit extension, which was contractually prohibited unless in writing, was thus unenforceable.

80. No doubt mindful of the legal implications of its pleaded version, the respondents then asserted for the first time in their heads of argument that a new and independent credit agreement had been concluded between VBS and Leratadima sometime after the lapse of the facility agreement by effluxion of time, which new agreement contained the term contended for, ostensibly to avoid the consequences of clause 14 of the alleged (tacitly) extended facility agreement. The first difficulty with the proffered argument is that 'argument is not evidence and it is not given under oath. It is merely a persuasive comment made by the parties or legal representatives with regard to questions of fact or law. Argument does not constitute evidence, and cannot replace evidence.'³¹ The second difficulty is that it is at variance with the respondents' pleaded case. The third difficulty is that a party seeking to rely on an agreement is required to plead and prove same. Such party is required in motion proceedings to provide factual particularity of whether such agreement was written or oral; who on behalf of the parties entered into the agreement; the place where it was concluded, the date on which it was concluded and all the relevant terms thereof, to enable the opposing party to be apprised of the case it has to meet and if in dispute, to enable such party to refute the version proffered by the party relying on the

³¹ See *Mhaboho T and 117 Related Cases v Minister of Home Affairs*, an unreported decision of Makhafole J in the Limpopo division, Thohoyandou, delivered on 28/05/2010 under case no's 833-1128/2007, at par 13.

agreement.³² As was affirmed recently in *Strohmenger*,³³ generally, a party must plead all facts material to the cause of action (or as in the present case, the defence sought to be advanced) against the opposite party.³⁴ In *Molusi*,³⁵ the Constitutional Court put it thus:

"It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in Sunker: 'If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.'"

81. The respondents contend in their heads of argument that VBS and Leratadima agreed that the credit facility of R250 million would remain intact to enable the latter to supply and deliver the remainder of 324000STB's to USAASA. Thereafter, VBS continued to make the credit facility available to Leratadima and VBS continued to receive funds from USAASA in respect of proceeds generated from the USAASA agreement. In other words, pursuant to the lapse of the facility agreement, the parties agreed on credit being given to Leratadima until the finalisation of the supply contract. The respondents submit that this 'is what the parties had always envisaged, and is the only interpretation that makes commercial sense.' The respondents further submit that the granting of credit to the applicant for another year after the facility agreement had lapsed 'cannot be interpreted to be an

³² It is trite that trial by ambush is not permissible. See: *Minister of Land Affairs and agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200 E ('Wevell'). The principal applies with equal force to motion proceedings.

³³ *Susara Magrietha Strohmenger v Schalk Willem Victor and Another* (Case no 1133/20) [2022] ZASCA 45 (08 April 2022), paras 9,10.

³⁴ It is trite that in motion proceedings, the affidavits constitute both pleadings and evidence. See *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793 E.

³⁵ *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at paras 27-28

indulgence on any interpretation of the facts. I disagree for reasons that follow.

82. Aside from being impermissibly raised in the heads of argument, the contended for new agreement lacks particularity in important respects, such as to where the agreement was concluded, the date on which it was concluded, whether it was written or oral, who on behalf of the parties concluded same and all relevant express, implied or tacit terms that governed same. Affidavits in motion proceedings are a combination of pleadings and evidence and they must therefore contain the factual averments, in the form of primary facts, necessary to support the cause of action or defence sought to be made out. As this defence was neither pleaded nor supported by admissible evidence, it cannot be sustained.
83. In any event, as is evident from 'FA9' to the founding affidavit, after the termination of the agreement in April 2017, a total of four further substantial payments were received from USAASA. The last draw-down on the credit facility occurred on 3 November 2017, (just over 6 months after the lapse of the facility agreement) after which date the last two of USAASA's payments were received on 8 December 2017 and 8 January 2018 respectively. The facts bear witness that VBS had accommodated the appellants, having had no contractual obligation to do so, likely because it entertained the hope of securing further payments from USAASA in reduction of the huge amount then outstanding to it, which funds, in accordance with the design of the facility agreement, had been utilised in reduction of Leratadima's indebtedness to VBS and served as a form of security to VBS to obtain repayment of the debt. In terms of the provisions of clause 14 of the facility agreement, the fact that VBS indulged Leratadima by continuing to extend credit and receive payment from USAASA, did not and could not serve as a

relinquishment of any of its rights under the facility agreement or any waiver thereof or denude its ability to rely on the terms of the facility agreement.

84. In my view, the applicant has established its entitlement to the relief sought which I intend to grant in terms of counsel's revised draft order. The general rule is that costs follow the result. I see no reason to depart therefrom. The belated abandonment of VBS's claim in relation to the respondents' liability for interest was to the advantage of the respondents and occupied minimal court time.
85. Accordingly, the following order is granted:

ORDER:

- 1 The first and second respondents are liable, jointly and severally, to pay the applicant the sum of R100 000 000.00;
- 2 The first and second respondents are liable, jointly and severally, to pay interest on the amount of R100 000 000.00 at the prescribed *mora* rate of interest per annum, calculated from date of demand on 28 November 2019 to final date of final payment;
- 3 The respondents are jointly and severally liable for the costs of this application on the scale as between attorney and client.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing:
Judgment delivered

1 September 2022
9 February 2023