REPUBLIC OF SOUTH AFRICA

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

CASE NO: 44878/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) ✓ REVISED.

17/7/2017
DATE

SIGNATURE

In the matter between:

LOMBARD INSURANCE COMPANY LIMITED — Applicant

and

SCHOEMAN, ALIDA — First Respondent

SCHOEMAN, CORNELIS JACOBUS — Second Respondent

SCHOEMAN, ALIDA N. O. — Third Respondent

SCHOEMAN, CLAUDE STANLEY N.O. — Fourth Respondent

MAIER-FRAWLEY AJ

Introduction

1. The applicant instituted three claims against the respondents[1] for payment of amounts owed to the applicant by Golden Sun Retailers (Pty) Ltd ('Golden Sun') [in liquidation]. The respondents were sued in their capacities as sureties and co-principle debtors for and on behalf of Golden Sun. The first respondent was a director of Golden Sun whilst the second respondent was an employee of Golden Sun. The third and fourth respondents were cited in their nominal capacity as joint trustees of the 'Erf 260-2 Middleburg Trust'.

2. The applicant's cause of action in respect of Claims 1 and 2 is based on a Counter Indemnity executed by Golden Sun in favour of the applicant on the 6th May 2014 ('Counter Indemnity') and Suretyship agreements ('suretyships') respectively concluded in favour of the applicant by the first and the second respondents[2] and the third and fourth respondents[3] during May 2014.

3. The applicant's cause of action in respect of Claim 3 is based on the outstanding premium payable under a Facility Agreement[4] concluded with Golden Sun on the 29th April 2014 ('the Facility') as read together with the Counter Indemnity and suretyships.

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[1] jointly and severally, the one paying, the other to be absolved.
[2] signed by the first respondent on 5 May 2014 and the second respondent on 6 May 2014
[3] signed on 6 May 2014
[4] being a 'General and Commercial Guarantee Facility' in terms the applicant's Guarantee Facility Quotation, which was accepted by Golden Sun

4. The Counter Indemnity was executed in favour of the applicant against a demand guarantee[5] which was issued by the applicant[6] in favour of Sasol Oil (Pty) Ltd[7] ("Sasol') on the 6th May 2014 at the request of Golden Sun.[8] (I refer to the 'demand guarantee' interchangeably in this judgment as 'the guarantee' or the 'Sasol guarantee'). In terms of the suretyship agreements read with the Counter Indemnity, the respondents undertook to indemnify the applicant in the event that it paid a claim based on the guarantee provided by it.

Relief sought

5. In respect of Claims 1 and 2, the applicant claims payment of the amounts of R54 853 827.41 and R197 014.45 respectively, which amounts the applicant paid to Sasol pursuant to two separate demands for payment having been made by Sasol in terms of the Sasol guarantee, together with interest thereon at the agreed rate[9] and ancillary relief.

6. In respect of Claim 3, the applicant claims payment of the amount of R97 608.03, being the outstanding amount owed by Golden Sun in respect of the premium payable under the Facility, together with interest thereon at the agreed rate[10] and ancillary relief.

Grounds of opposition

7. The application was opposed on a number of grounds. In respect of claims 1 and 2, the main defence was that no valid claim had been made by Sasol

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[5] no. S 50802. The substance and legal character of the instrument as a demand guarantee, whereby an independent, primary obligation to pay arose when the conditions for payment prescribed in the instrument were satisfied, was not in dispute.
[6] as Guarantor
[7] as Beneficiary
[8] as Client
[9] the Standard Bank prime rate plus 2% (in terms of clause 3 of the Counter-Indemnity as read together with clause 1 of the suretyship Agreements)
[10] the Standard Bank prime rate plus 2% (in terms of the Facility)

under the Sasol guarantee in that Sasol's demands thereunder failed to comply with the terms of the guarantee, so it was alleged, with the consequence that no legal liability on the part of the applicant to make payment to Sasol under the guarantee arose, and therefore, neither Golden Sun[11] nor the sureties and co-principal debtors were liable to indemnify the applicant in respect of its payments.

8. Further disputes[12] related *inter alia,* to whether or not the applicant ought to have proceeded by way of action for the recovery of monies rather than by way of motion proceedings.[13]

9. The respondents sought to resist payment under claim 3 based on an interpretation that:

9.1. the premium payable by Golden Sun to the applicant in terms of the Facility and clause 11 of the Counter-Indemnity was a once off premium of R1000.00 per guarantee,[14] resulting in the liability of the respondents (as co-principal debtors and sureties), being limited to the sum of R1000.00;

9.2. the obligation to pay the premium under the Facility was a distinct and separate obligation from the obligation created therein for payment of the guarantee fees, and since the applicant founded its claim on payment of the premium in its founding affidavit, it could

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[11] Being the principal debtor

[12] Factual allegations in the founding affidavit to explain the circumstances surrounding the drafting of the Sasol guarantee were disputed on the basis *inter alia,* that Sasol had not confirmed the allegations. The respondents contended that the applicant ought not to have proceeded by way of motion in the light of the applicant having anticipated the respondents defence in its founding affidavit.

[13] In the light of the conclusion which I have reached on the main defence, in respect of which the material facts were not in dispute, it is not necessary to deal with this contention.

[14] it being common cause however that only one guarantee was issued by the applicant in favour of Sasol.

not thereafter claim for payment of the guarantee fees in its replying affidavit;

9.3. the Counter-Indemnity[15] only imposed liability upon Golden Sun for payment of 'the premiums from time to time payable to' the applicant[16] and not the guarantee fees as such, with the result that no liability arose under the suretyships for Golden Sun's indebtedness in respect of the guarantee fees payable under the Facility.

For convenience, I will refer the aforementioned grounds of opposition as 'the premium defence'.

Broader factual context

10. Golden Sun did business with Sasol in terms of which it purchased fuel, on credit, from Sasol on a 30 day credit account. Golden Sun applied to the applicant for the provision of a guarantee facility, which was initially granted with a guarantee limit of R55 million and a liability limit of R7. 5 million. Certain securities were required for the establishment of the Facility,[17] *inter alia,* a Counter-Indemnity signed by Golden Sun and Deeds of Suretyship signed by the first and second respondents and the Erf 260/2 Middleburg Trust ('the Trust') in respect of the obligations of Golden Sun in terms of the Counter Indemnity. As collateral, Golden Sun was required to deposit funds into a designated Lombard Insurance Bank account[18] in order to maintain the liability incurred against the guarantee at under R7.5 million.

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[15] clause 11
[16] being the 'premium' or 'premiums' referred to in the Facility
[17] ostensibly to back up the guarantee
[18] referred to in the papers as the 'Redemption Account'.

11. For purposes of monitoring the applicant's exposure under the Facility, Golden Sun would forward to the applicant, emails and customer account statements that it received each month from Sasol, detailing *inter alia*, the amount Golden Sun owed to Sasol.

12. At a point in time, the first respondent, acting on behalf of Golden Sun, requested that the Guarantee limit applicable to the Facility be increased to R60.5 million, which was granted.

13. On 6 May 2016, at the request of Golden Sun and in accordance with Sasol's requirements,[19] the applicant issued Demand Guarantee No. S.50802 to Sasol in the amount of R60.5 million. It is clear from the papers that the guarantee was intended to provide a source of funds for the payment of any outstanding amounts that might be due by Golden Sun to Sasol.

14. The facility was utilised by Golden Sun on a continuous basis from its inception until October 2016. On the 17th October 2016 the applicant discovered that the Sasol emails and customer account statements that it had been receiving from Golden Sun from March 2016 onwards had allegedly been fraudulently altered[20] in order to conceal the true amount that Golden Sun owed Sasol.

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[19] It was not in dispute that Sasol had dictated the terms and conditions contained in the guarantees it would accept from clients (including the applicant), which had to conform to the Sasol Template, as amended from time to time, and that the demand guarantee forming the subject matter of these proceedings was based on and conformed with the terms of the amended Sasol Template.

[20] The first respondent, who deposed to the answering affidavit on behalf of the respondents, disavowed personal knowledge of the fact that fictitious customer account statements had been forwarded to the applicant, contending that an employee of Golden Sun had acted on a frolic of her own in so doing during the relevant period. See: para 73.2 at p337 and 73.4 at p338 of the papers.

15. Following upon this discovery, Sasol lodged two claims[21] under the Sasol Guarantee for payment. The first claim was lodged by Sasol on 20 October 2016 and was paid by the applicant on 27 October 2016.

16. On 25 October 2016 the applicant demanded payment by Golden Sun of *inter alia,* the amounts contained in its claims 1, 2 and 3 which Golden Sun failed to pay, resulting in this application.

17. The second claim was lodged by Sasol on the 31st October 2016 and was paid by the applicant on 7 November 2016.

18. On 1 November 2016 Golden Sun was placed in final liquidation at the instance of the Applicant.

19. In terms of the Counter-Indemnity, Golden Sun undertook and agreed to pay the applicant, on demand, any sum which the latter may have been called upon to pay under the guarantee, whether or not Golden Sun admitted the validity of such claims against the applicant under the guarantee.[22]

20. In terms of the suretyships, the respondents bound themselves as sureties for and co-principal debtors jointly and severally with Golden Sun, in solidum for the due payment by Golden Sun to the applicant, *inter alia,* of 'all or any amounts which Golden Sun may be liable to pay the applicant under the Indemnity' and agreed to pay to the applicant, on demand, '*any sum or sums of*

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[21] by demand made on each occasion in letters addressed by Sasol to the Manager of the Applicant and delivered to the applicant at its business address, being Ground Floor, Building C, Sunnyside Office Park, 2 Carse O'Gowrie Road, Parktown, Johannesburg (the applicant's principle place of business).

[22] Clause 2 of the Counter-Indemnity provided by Golden Sun, reads: "*...I/we further undertake and agree to pay to the Insurance Company on demand any sum or sums of money which the Insurance Company may be called upon to pay under the Guarantees, whether or not ...I/we admit the validity of such claims against the Insurance Company under the Guarantees.*" Further, in terms of clause 4 there of "*...My/Our liability to the Insurance Company under these presents shall be unlimited.*"

money which the Insurance Company may be called upon to pay under the Guarantee... whether or not the Client [Golden Sun] or *me/us admit the validity of such claims against the Insurance Company under the Guarantee.'*[23]

21. Sasol provided the applicant with its standard demand guarantee template (the Sasol template) against which it was willing to sell fuel products on credit to clients, at the inception of its business relationship with the Applicant. The applicant accepted the terms and conditions contained in the Sasol template, as drafted by Sasol, and issued demand guarantees to Sasol in terms thereof. The Sasol Template was subsequently varied at the request of and for the benefit of the applicant by the insertion of an additional clause (the amended Sasol template).[24] The amended Sasol template had been utilised by the applicant, and demand guarantees were issued to Sasol in respect of other clients of the applicant, prior to Golden Sun's application to the applicant for a credit facility.

22. Sasol would only accept demand guarantees that conformed to its templates. Any deviation therefrom would result in Sasol rejecting the demand guarantee. Save for changing the names of the parties, the amount of the guarantee and the date thereof, the applicant had no latitude to change any of the terms and conditions contained in the amended Sasol template.

23. Sasol's demands for payment under demand guarantees issued by the applicant had, over a preceding 10 year period, always been made at the applicant's business premises, as in the present instance. Within the purview

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[23] See: para 2 of clause 1 of the suretyships

[24] The wording of the additional clause, which is contained in clause 2.2 of the Sasol guarantee, is not relevant to these proceedings.

of the contractual relationship between the applicant and Sasol,[25] it had never been incumbent upon the applicant to send a representative to the premises of Sasol to receive demands for payment at the premises of Sasol.

24. Golden Sun did not at any stage provide the applicant (or Sasol) with any mandate regarding the terms and/or conditions that were to be contained in the Sasol guarantee.[26]

The Demand Guarantee

25. Subject to the maximum provided for (R60.5 million), the applicant bound itself (as Guarantor) in favour of Sasol (as Beneficiary) to pay, on demand, all amounts 'presently due and payable or which may become due and payable' by Golden Sun (the client) to Sasol 'arising out of any cause whatsoever'.[27]

26. In terms of clause 1 of the Sasol guarantee:[28]

"

> *Payment shall be made under this guarantee upon receipt by the Guarantor, at the above stated address, of the Beneficiary's first written demand, which demand will state that the amount of R60 500 000.00 (SIXTY MILLION FIVE HUNDRED THOUSAND RAND) or any lessor portion thereof, is now due and payable by the Client to the Beneficiary..."*

27. The only address which appeared above clause 1 in the guarantee was Sasol's address, namely, 32 Hill Street Randburg, 2125 ('Sasol's address').

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[25] The contract embodied in the guarantee, being an independent and autonomous contract between the Guarantor and the Beneficiary. See: *Compass Insurance Co Ltd v Hospitality Hotel developments (Pty) Ltd* 2012 (2) SA 537 (SCA) at para [14]

[26] (other than in respect of the amount for which it had to be issued to the named Beneficiary).

[27] As per the first but unnumbered paragraph of the Sasol guarantee

[28] In terms of clause 4 thereof, the Guarantor's liability was principle in nature and not accessory to the liability of the Client, would not be affected by any agreement or arrangement made between the Client and the Beneficiary, and was payable on demand. Further, the Guarantor was not obliged to determine the validity of the demand or the correctness of the amount demanded, not would the Guarantor become party to any claim or dispute of any nature as alleged by any party.

28. It was common cause that Sasol's demands were delivered by hand to the applicant's business address[29] where they were in fact received by the applicant.

29. It goes without saying that Sasol's written demands were not received by the applicant at the address stipulated in the Sasol guarantee.

30. Both demands were addressed to the applicant at the applicant's address.

31. The first demand, dated 20 October 2016, read:

> "
> ...
>
> Lombard issued the above mentioned guarantee of R60 500 000.00...on 5 May 2014 to Sasol Oil (Pty) ltd.
>
> We advise that Golden Sun Retailers (Pty) ltd has an outstanding balance of R60 096 097.08 on their account with Sasol Oil (Pty) Ltd. We hereby lodge a claim for the outstanding balance on the above guarantee due to non-payment.
>
> The above mentioned amount is a lesser portion of the guaranteed value and is not the full and final balance outstanding. A second claim may be submitted as and when the outstanding billing is finalised...
>
> ..."

32. The second demand, dated 31 October 2016, read:

> "
> ...
>
> Lombard issued the above mentioned guarantee of R60 500 000.00...and paid an amount of R60 096 097.09 to Sasol Oil on 27 October 2016 due to the default by Golden Sun Retailers (Pty) Ltd...

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[29] set out in n 21 *supra*

> Subsequent to the above an additional claim is hereby submitted against the above guarantee for an amount of R197 014.45 which is owing by Golden Sun...
> ..."

33. The applicant however considered Sasol's demands good and compliant, hence, upon notice of first demand on each occasion, made payment to Sasol of the amounts claimed.

Compliance with the requirements under the Demand Guarantee

34. The respondents opposed the merits of the applicant's first and second claims on the basis that the demands made by Sasol were not in compliance with the terms of the guarantee solely by reason of the fact that the demands were received by the applicant at its applicant's business address (in Parktown).

35. It was contended on behalf of the respondents that since Sasol did not make demand of the applicant at its own business address, being 32 Hill Street, Randburg, where the demands were to be received by the applicant in terms of the guarantee, there had been no compliance, let alone strict (or even substantial compliance) with the express terms of the guarantee. Consequently no obligation arose on the part of the applicant to make payment of Sasol's demands upon receipt by the applicant of the demands. The applicant was only obliged to pay a claim under the guarantee if the claim was made in accordance with the terms of the guarantee. The respondents reasoned that because the claim did not fall within that purview, the applicant was not obliged to pay and consequently, neither are any of the respondents. Reliance was placed on several reported cases[30],

[30] referred to in n 14 of the written heads of argument presented on behalf of the respondents

amongst others, *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd)*[31] and *OK Bazaars (1929) Ltd v Standard Bank of South Africa Limited*[32] in support of the contention that liability of the guarantor (*in casu* the applicant) to the beneficiary (*in casu* Sasol) would only arise if the requirements to be met in making demand were complied with.[33]

36. In written heads of argument presented on behalf of the applicant, it was submitted that the essential requirement was for the applicant to receive Sasol's demands,[34] with which aspect there had been strict compliance, and the fact that they were received, albeit at the applicant's address as opposed to Sasol's address, in any event constituted substantial compliance with the overall requirement, given the particular circumstances of the case and the construction of the Sasol guarantee. The respondents defence was said to be '*highly technical in nature,*' being one which required a 'standard of exact compliance with a requirement that was not contained in any mandate given to the applicant by Golden Sun' (*in casu* the client).

37. During oral argument presented in court, the applicant's counsel contended that upon a proper construction of the guarantee, and when regard is had to

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[31] 2010 (2) SA 86 (SCA) at paras 19 & 20, where it was held *inter alia*, that:
"[19]...The guarantee creates an obligation to pay upon the happening of an event...and it is to the guarantee that one should look to determine the rights and obligations of' the Guarantor and the Beneficiary.
"[20] The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks...the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller)...The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary..." (own emphasis)

[32] 2002 (3) SA 688 (SCA) at para 25, where it was stated, in reference to letters of credit, that:
"...if the presented documents do not conform with the terms of the letter of credit the issuing bank is neither obliged nor entitled to pay the beneficiary without the customer's consent...there is, of course, no doubt that the bank has to comply strictly with the instructions that it is given by its customer. It is not for the bank to reason why. ...the Bank must conform strictly in the instructions which it receives. ..." (own emphasis)

[33] See also: *Firstrand Bank Ltd v Brera Investments CC* 2013 (5) SA 556 (SCA)

[34] it being common cause between the parties that Sasol's demands had indeed been received by the applicant, albeit at the applicant's address and not at the premises of Sasol.

the peculiar facts of the matter, compliance with the address requirement under the Sasol guarantee was not necessary.

38. As I understood the argument, the facts of the present matter were submitted to be distinguishable from other cases wherein the terms of guarantees considered had been mandated by the client. The terms of the Sasol guarantee in the present matter were not mandated by the client (Golden Sun) so that the underlying rationale for compliance, namely, to ensure that the issuer thereof complies exactly with the instructions given to it by its client had no bearing on the present matter, there being no rights or interests of Golden Sun (qua client) that would (or could) in such circumstances have been prejudiced by any non-compliance, and any lack of exact compliance with the address requirement would not either have increased the client's risk or exposure under the Sasol guarantee. This coupled with the facts and/or submissions that:

(i) the address requirement did not create a right or a benefit of which Golden Sun was entitled to avail itself, having been inserted by Sasol as the author of the Sasol Template;

(ii) Sasol was the only party who could conceivably derive a benefit from the address requirement, the benefit being that it would not have to send a representative from its address in Randburg to the applicant's address in Parktown in order to deliver the demand;[35]

[35] the place of delivery effectively being the ultimate place of receipt.

(ii) Sasol had not insisted that the applicant attend at its premises to receive its demands under the Sasol guarantee and therefore did not rely on the address requirement;[36]

(iii) in any event, Sasol's demands, whether received by the applicant at Sasol's address or that of the applicant, would still have been exactly the same demands in substance and in content; and

(iv) it had not been alleged by the respondents in the answering affidavit that the address at which Sasol's demands were to be received, was vital for their protection;

meant that exact compliance with the address requirement was not called for.

39. As regards compliance with the requirements of a credit guarantee, in *Kristabel Developments (Pty) Ltd v Credit Guarantee Insurance Corporation of Africa Limited*,[37] Satchwell J summarised the legal position, thus:

> " The distinction between performance...guarantees and letters of credit has been explained in *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyds Rep 146 at 159 where Hirst J said that the "contrast" between a letter of credit and a performance guarantee was "sound", since with the former the bank deals with the documents themselves, whereas with the latter the guarantor can rely on a statement that a "certain event has occurred". This statement was approved by the Court of Appeal in *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 (CA) at 501 where Staughton LJ said that **there is less need for a doctrine of strict**

[36] It was submitted that the peculiar facts supported the necessary conclusion that Sasol, being entitled thereto, waived its right and benefit to deliver the demand at its own premises. As explained during oral argument presented on behalf of the applicant, the issue of waiver was merely brought up in the context of the circumstances surrounding the drafting of the guarantee and how the Guarantor and Beneficiary had acted upon their rights and obligations thereunder.
[37] (23125/2014) [2015] ZAGPJHC 264 (20 October 2015) at paras 29-30

compliance in the case of performance bonds. But he said also that 'it is a question of construction of the bond'.

Accordingly, the English courts (followed by the South African courts) have, thus far, taken the approach that there is a difference or 'contrast' between a guarantee where the call is simply based on the say-so statement of the one party that an event has occurred and between letters of credit where the bank is in possession of documents (such as bills of lading) establishing the foundation of the call. The courts have indicated that the more 'strict' compliance is required of the banks and of the documents presented to activate letters of credit because the banks themselves are in a position to evaluate the call by perusing the various documents. **No mention has been made of the degree of rigour or compliance in the case of performance guarantees.** " (own emphasis)

40. In *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank*[38] Staughton LJ held that

"...

The degree of compliance required by a performance bond may be strict or not so strict. It is a question of construction of the bond. "

and Sir Denys Buckley said:[39]

"...

I am in entire agreement with the proposition that to discover what the parties intended should trigger the indemnity bond involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties in that respect. ..."

41. In *Frans Maas (UK) Ltd v Habib Bank AG Zurich,*[40] a case decided subsequent to *Siporex* and *IE Contractors,* the court, in considering the contrast between

[38] [1990] 2 Lloyd's Rep 496 (CA), para 58 at 501
[39] At 503
[40] [2001] Lloyd's Rep Bank 14

letters of credit and performance bonds,[41] accepted the principle that strict compliance might not be necessary for performance bonds, [42] subject to the rider that 'there should be no ambiguity, no risk of the bank being misled, and no risk of it being confused or otherwise prejudiced.'[43]

42. In *Compass Insurance Co Ltd v Hospitality Hotel developments (Pty) Ltd*[44] the Supreme Court of Appeal left open the question of whether or not 'strict' compliance was required of a beneficiary under a performance guarantee.[45] The court did not find it necessary to decide that question, since it found that the requirements to be met by the beneficiary in making demand under the guarantee it considered were absolutely clear and there had in fact been no compliance, let alone strict compliance with the terms of the guarantee. One of the terms of the guarantee required *inter alia*, a statement that the agreement had been cancelled due to the subcontractor's default and that the letter of cancellation be attached to the demand. A copy of the letter of cancellation had not been attached to the demand. The court found that there had been no compliance at all because there had, in fact, been no cancellation at the time that the letter of demand was sent and therefore the letter of cancellation could never have been attached (though the demand did state that the agreement had been cancelled).

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[41] namely, that with letters of credit, '..the bank is ...dealing with the very documents themselves, and is obliged to compare with meticulous care those tendered with those described in the mandate', whereas with performance bonds 'the bank is dealing with no more than a statement in the form of a declaration to the effect that a certain event has occurred...'

[42] The decision in that case turned on the interpretation of the guarantee itself. The court held (at para 60) that since the underlying sale agreement was itself referred to in the guarantee, it was legitimate when interpreting same, to take into account the purpose of such agreement as part of the surrounding circumstances. Applying principles of construction, the court concluded that the demand in question did not comply with the terms of the guarantee.

[43] At para 57 p25

[44] 2012 (2) SA 537 (SCA) at para 13. Lewis JA observed that the decision in *Frans Maas* '...turned... on the interpretation of the guarantee itself, and while observing that strict compliance might not be necessary for performance bonds (citing *Siporex* and *IE Contractors*), the court held that the demand in question did not comply with the terms of the guarantee. ...'

[45] South African cases frequently refer to 'demand guarantees' interchangeably as 'performance guarantees'.

43. Subsequent to *Compass supra,* courts in the Gauteng Local Division have found that substantial compliance in respect of a demand guarantee is sufficient. In *Kristabel supra,* Satchwell J found that the demand was substantially compliant despite the fact that the language used in the demand was not identical to that used in the guarantee. In *University of the Western Cape v Absa Insurance Company Ltd,*[46] the guarantee required that demand be made by the employer whereas it had been made by the principal agent. It was therefore argued that the applicant had not strictly complied with the terms of the guarantee. Fourie J found that the reference to the 'employer' in the demand guarantee could include the employer's agent, based on the application of principles relating to agency.

44. In *Compass supra,*[47] the court underscored the need for compliance:

> " It should not be incumbent on the guarantor to ascertain the truth of the assertion made by the beneficiary...the guarantor should not have to establish whether a contract has in fact been cancelled. That is why a copy of the notice of cancellation, if there has in fact been cancellation, is required to be attached to the demand...The very purpose of a performance bond is that the guarantor has an independent, autonomous contract with the beneficiary and that contractual arrangements with the beneficiary and other parties are of no consequence to the guarantor."

45. In *Standard Bank of South Africa Ltd v Council of the Municipality of Windhoek,*[48] ('the Namibian case') the court highlighted various reasons for compliance,[49] stating:

> " [23] A banks obligation to honour a demand guarantee arises only as and when the beneficiary seeks payment in *accordance with the terms of the guarantee.* It must be borne in mind that guarantees are issued by banks to beneficiaries on

[46] (100/2015) [2015] ZAGPJHC 303 (28 October 2015) at para 5
[47] at para [14]
[48] 2015 JDR 2331 (NmS) at paras [23]-[25]; a decision of the Namibian Supreme Court of Appeal having persuasive force.
[49] which remarks I shall bear in mind when determining the issue of compliance in the present matter.

specific terms mandated and approved by their clients (often referred to as 'account parties'). Although banks may generally be inclined to honour such guarantees on demand to protect their commercial reputation, those considerations are counterbalanced by the need not to compromise the rights and interests of their clients beyond the parameters of the commitments acceded to in the demand guarantee. As it is, demand guarantees, by their nature and application, impose heavy risks on account parties...(a) The autonomous nature of demand guarantees deprive them of the right to resist payment of the guarantee on grounds which would otherwise be well-founded had the demand been based on the underlying agreements – the obligation to pay demand guarantees is not even extinguished if the underlying agreement is cancelled on valid grounds...(b) In the absence of fraud, the question whether or not there has been compliance with the requirements of the demand guarantee by the beneficiary, is apparently for the bank alone to determine when the demand is made and it is not open for the account party to seek an interdict to restrain the bank from paying on grounds of non-compliance with the required demand...(c) the counter-indemnity sought from an account party will invariably be on wider terms than the liability of the bank under the guarantee itself...(d) The account party is financially exposed to the possibility of unfair demand or abuse of the guarantee; ...

[24] These considerations highlight the place and importance of the principle of strict compliance to demand guarantees, subject, of course, to the 'caveat that the degree of compliance required by each particular bond always depends on its true construction'. ...

[25] When faced with a demand for payment, it seems to me that a bank has a general duty towards the client on whose mandate it had issued a demand guarantee, first, to construe the guarantee and assess what the beneficiary has to do so as to make a valid demand under it and, then, to assess the demand and, if required, associated declaration in order to determine whether the beneficiary has complied with those obligations. ... " (footnotes omitted)

(own emphasis added)

Did Sasol's demands comply with the terms of the guarantee?

46. As pointed out in the Namibian case,[50] the events 'created multiple contractual and other legal relationships between persons or individuals to which only some – and not others – were privy to. This should be borne in mind when examining the conduct and decisions of parties at the time.' In reference to the facts of the present matter, the client (Golden Sun) was a stranger to the contractual relationship between the guarantor and the beneficiary, the terms of the mandate the beneficiary had given to the guarantor; the circumstances that had given rise to the formulation of the guarantee and the eventual issuing thereof in their stated terms. Hence it could not answer to the allegations as regards the conclusion, terms and conditions or execution thereof.

47. The unrefuted facts of the matter support a finding that whilst the applicant issued the guarantee up to a maximum amount to Sasol at the request of Golden Sun, it did not do so on any terms that were either mandated or approved by the client (Golden Sun), who had no input in the negotiations and agreement between the applicant and the beneficiary concerning the terms on which payment would be made by the guarantor. Thus, Golden Sun was not privy to, nor did it stipulate the requirement that demand under the Sasol guarantee was to be made at Sasol's own address.

48. There is, in my view, little to gain from attempts to divine the essential distinction between letters of credit, on the one hand, and demand guarantees, on the other; neither is it of any real assistance to discern whether 'strict' or 'substantial' compliance will suffice in the present matter. The issue to be determined is simply whether there was compliance with the terms of the guarantee[51] under circumstances where the beneficiary's demands for payment were made to the guarantor at its address, rather

[50] *Standard Bank of South Africa Ltd v Council of the Municipality of Windhoek, supra* at para 10
[51] It is a question of ascertaining what the provision requires.

than at the address of the beneficiary as stated in the Sasol guarantee. This is a matter of construction, on the basis and in the manner laid down, *inter alia,* in the *Natal Joint Pension Funds* decision.[52]

49. The event on which the applicant's liability depended was set out in the guarantee as (i) the receipt by the applicant (at Sasol's address) of Sasol's first written demand (ii) containing a statement that the amount of R60 500 000.00 or any lesser portion thereof was due and payable by the Client to the Beneficiary.

50. When considering the peculiar factual matrix within which the issue of a proper construction of the Sasol guarantee must be considered[53], the guarantor's receipt of the beneficiary's demand containing the required statement, was the event on which liability depended (underlining own emphasis). The demand had to conform with the requirements of the guarantee, the provisions of which were negotiated and agreed between the guarantor and the beneficiary, absent any input or mandate from the client. It would not have mattered if Sasol were to have insisted that a representative of the applicant attend at Sasol's premises to receive its written demand, if the demand did not contain the required statement, for then the event upon which payment depended, would still not have occurred. If the demand containing the required statement was received by the applicant at Sasol's premises, the applicant would have been obliged to pay the demand. If the demand containing the required statement was

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[52] Referred to in n 53 below. To determine this issue, it is necessary to construe the terms of the guarantee in their appropriate contractual setting, regard being had to the commercial purpose of the particular provision and the provisions of the guarantee as a whole whilst bearing in mind the innate defining features of a demand guarantee as succinctly tabulated in the Namibian case referred to in para 45 of this judgment.

[53] The principles upon which a document is to be interpreted, are set out in *Natal Joint Muncipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F; Lloyds of London v Skilya Property Investments (Pty) Ltd [2004] 1 ALL SA 386 (SCA) at para [14] and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 SCA

received by the applicant somewhere other than at Sasol's premises, the material content would have remained the same. Stated differently, the very substance or gravamen of the call for payment would have remained unaffected by the place at which the demand was received. The receipt of the demand was the essential requirement, not the place of receipt.

51. In the absence of proper demand having been made in the sense envisaged above, the applicant's liability under the guarantee would not have been triggered. As long as proper demand was made and received, the place at which it was received did not affect or compromise the rights and interests of the client beyond the parameters of the commitments acceded to in the demand guarantee. I am therefor in agreement with the submission made by the applicant's counsel that whether the letter of demand was received by the applicant at Sasol's address or whether it was received at the applicant's address did not expose Golden Sun[54] to any additional risk.

52. The purpose of a demand is to inform the recipient (in this instance, the guarantor) that payment is being requested. It is actioned by delivery in one or other manner, be it by hand, mail fax or email, and is designed to inform the recipient that it is required to meet its obligations. For the recipient to know that such a call is being made, the demand has to be received by it. Once it is in fact received, where and even how it was received holds little if any significance 'in the grand scheme of things'.[55] To hold that it was an essential requirement for the guarantor to attend at the beneficiary's premises to receive the latter's demand would, in the circumstances, amount to an insensibility.[56]

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[54] or by extension, the respondents

[55] meaning that when one puts things into perspective, taking everything else into account, sometimes what has previously been considered significant isn't quite significant.

[56] See: *Natal Joint Muncipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F where the following was said:

53. I am fortified in my conclusion by the recent English decision in *MUR Joint Ventures BV v Compagnie Monegasque De Banque.*[57] There the court had occasion to determine, *inter alia*, whether the demand made in that case had to fail as it was not sent by registered mail, as required in the demand guarantee. The relevant part of the demand guarantee read as follows: "...provided that the Bank's obligation under this Guarantee to make a Guaranteed Payment shall arise forthwith upon written demand sent to the bank by way of registered mail to the above mentioned bank's address. ..." The demand was sent by courier, fax and email but not by registered mail. In dealing with this aspect, the following was stated:[58]

> " Finally, there was the point that the first demand was not sent by registered mail, as required by clause 1 of the Guarantee. Ms Kagan submitted that this was a condition precedent to the first demand taking effect. It was not met and therefore the first demand was not a valid demand. End results, she said, are nothing to the point.
>
> In my view this requirement in clause 1 is directory, not mandatory. That is because the guiding principle is one of effective presentation of a demand. The first demand and all its attachments were sent by a variety of means, including couriering. The importance of registered mail is that the communication in question is signed for by the recipient and signature precludes any suggestion that it was not received. In this

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"*Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.*"
and
Lloyds of London v Skilya Property Investments (Pty) Ltd [2004] 1 ALL SA 386 (SCA) at para [14] where it was stated:
"*Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by [the provision in their agreement]. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by [that] provision.*"

[57] [2016] EWHC 3107 (Comm) (02 December 2016)
[58] *MUR supra* at paras 42 & 43

case there is no question but that the demand and its attachments were received by the Bank. Presentation of the first demand was effective. ..." (Own emphasis)

54. On the reasoning employed in *MUR supra,* effective presentation of the demand occurred. I am therefore in agreement with the submission made by the applicant's counsel that the most probable inference to be drawn from the wording of the Sasol guarantee, the surrounding circumstances and the purpose of the demand, for the insertion in the guarantee itself of an address for the receipt of the demand, was to ensure that Sasol's demand was received by the applicant.

55. It follows therefrom that there was sufficient compliance with the terms of the Sasol guarantee, given that the demand was made at one address rather than another, under circumstances where such demand, wherever it occurred, was in fact presented to the correct party.

The premium defence in respect of Claim 3

56. The applicant claims payment of the sum of R97 608-03. Claim 3 is in respect of the premium payable to the applicant arising out of the provision of the Sasol guarantee, and is based on the amount of R181 500-00 (excluding VAT) contained in the applicant's Tax Invoice ('invoice') addressed to Golden Sun, dated 1 August 2016,[59] less interest previously credited to Golden Sun.

57. In its founding affidavit, the applicant alleged that Golden Sun undertook to pay the premium, calculated over a six month period, in terms of the Facility and clause 11 of the Counter Indemnity. After the conclusion of the Facility and before the issue of the Sasol guarantee, the parties agreed that Golden Sun would be invoiced quarterly in advance (i.e. every 3 months instead of

[59] the invoiced period is from 6 August 2016 to 6 November 2016.The invoice appears at p255 of the papers

every 6 months) in respect of the premium, and the applicant accordingly invoiced Golden Sun 'every 3 months in advance in respect of the premium upon which Golden Sun would make payment to the Applicant'.[60] The applicant's invoice recorded an amount of R181 500-00 (excluding VAT) [61] payable in respect of a 'Guarantee/Bond charge'.

58. In the replying affidavit,[62] the applicant explained as follows:

> " The Guarantee Fees for a Funded Guarantee was 1.2% p.a. (excluding VAT). The Guarantee Fee was the Premium payable by Golden Sun to the Applicant from time to time. The Sasol Guarantee, provided at Golden Sun's specific request, was a Funded Guarantee in the amount of R60 500 000-.
>
> ...
>
> The Guarantee Fee amount for the duration of the Sasol Guarantee would be calculated as follows on a quarterly basis:
>
> R60 500 000.00 x 1.2% p.a) / 4 = R181 500-00 (excl VAT)
>
> Since the inception of the Facility and the furnishing of the Sasol Guarantee, the Applicant has invoiced Golden Sun for the amount of R181 500-00 plus VAT on a quarterly basis.
>
> Golden Sun has effected payment of the invoiced amount of R181 500-00 plus VAT on a quarterly basis; either by way of set off (against interest earned by and credited to Golden Sun in the Redemption Account) or by a combination of set off and direct payment. "[63]

59. The respondents denied liability to pay the amount claimed. The denial was premised upon their alleged difficulty in comprehending precisely what

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[60] The applicant invoiced Golden Sun for the amount of R181 500-00 plus VAT on a quarterly basis.
[61] which amount, inclusive of VAT was R206 910-00. The manner in which payment of the premiums was actioned every quarter from the inception of the facility and the issuing of the guarantee was set out in paras 45 to 47 at pp261 of the papers.
[62] See: paras 40 to 44 at p360 of the papers
[63] The respondents did not seek to counter these allegations by means of an additional affidavit, filed with leave of court.

Golden Sun's obligation was in respect of the premium to be paid;[64] an interpretation *ex post facto* that the premium was a once-off premium of R1000-00;[65] and that in terms of clause 11 of the Counter Indemnity read with the suretyship agreements, Golden Sun, and consequently the respondents, were only liable to the applicant for 'premiums from time to time payable to the applicant' and not for the 'guarantee/ bond charge' in respect of which Golden Sun was invoiced. [66]

60. The applicant further alleged[67] that:

> " The Respondents are attempting to convince the ...Court that the Applicant entered into a commercial transaction with Golden Sun, whereby it issued the Sasol Guarantee incurring an exposure of R60 500 000-00 for an indefinite period of time, for a once off premium of R1000-00.
>
> There is absolutely no commercial rational for such a transaction and the Applicant would never enter into a transaction on that basis.
>
> The Guarantee Fee and the premiums referred to in the Counter Indemnity are one and the same. There was no other fee or premium that the Applicant invoiced Golden Sun for or that Golden Sun paid. "

61. The applicant alleged that the 'Guarantee Fees for a Funded Guarantee was 1.2% p.a (exluding VAT). The Guarantee Fee was the Premium payable by Golden Sun to the Applicant from time to time.'[68]

62. The following, in relevant parts, is recorded in the Facility:

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[64] See: para 35 p328 of the papers
[65] See para 36 at p329 of the papers
[66] See paras 40- 42 at pp329-330 of the papers
[67] See: paras 50, 51 & 53 at p 262 of the papers
[68] See: para 40 at p 360 of the papers

FACILITY VARIABLES	
Facility limits:	
Guarantee limit:	R55 000 000.00 ...
Liability limit:	R7 500 000.00 ...
Guarantee fees:	
Funded Guarantees:	1.2% ... p.a. (excluding VAT)
Validity period of facility	12 months, renewable six monthly ...
Maximum guarantee period:	ad hoc
...	
INVOICING	
Minimum premium per guarantee:	R1000.00 ... (excluding VAT)
Minimum Invoice period:	6 months
Invoice period:	Premiums will be based on the nearest Number of whole months of the guarantee duration and is renewable six monthly on the specified renewal month
Payment conditions:	Payment is due on the date of invoice. Overdue amounts (over 45 days) shall bear interest at Standard Bank's prime rate plus 2%
...	

63. Clause 1 of the Counter Indemnity, reads:

" I/We, the undersigned,

GOLDEN SUN RETAILERS (PTY) LTD

...

Indemnify the Insurance Company and hold it harmless from and against all and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature, including legal costs as between attorney and client which it may at any time sustain or incur by reason or in consequence of having executed, or hereafter executing any Guarantees on my/our behalf. "

64. Clause 2 of the Counter Indemnity, reads:

> " And I/we further undertake and agree to pay to the Insurance Company on demand any sum or sums of money which the Insurance Company may be called upon to pay under the Guarantees, whether or not the Insurance Company at such date shall have made such payment, and whether or not I/we admit the validity of such claims against the Insurance Company under the Guarantees. "

65. Clause 11 of the Counter Indemnity, reads:

> " I/We further undertake to pay, on submission of an account therefore, the premiums from time to time payable to the Insurance Company. "

66. In terms of clause 1 of the respective suretyship agreements, the first and second respondents and the trustees for the time being of the Erf 260-2 Middleburg Trust (third and fourth respondents) bound themselves as sureties for and co-principal debtors jointly and severally with Golden Sun (the Client) *inter alia,* for the due payment by Golden Sun to the applicant of 'all and any amounts which the Client may be liable to pay the Insurance Company under the Indemnity' and further undertook and agreed to pay the applicant on demand any sum or sums of money which the applicant 'may be called upon to pay under the guarantee whether or not' Golden Sun or the respondents 'admit the validity of such claims against the applicant under the Guarantee'.

67. The respondents contended that since the premium was not recorded in the Facility as a monthly premium, at best for the applicant therefore, a once-off

premium of R1,000-00 was payable by Golden Sun[69] and thus the liability of the respondents is limited to the amount of R1,000-00.

68. Golden Sun's liability for payment of the premium and whether or not the premium referred to in the facility and Counter Indemnity constituted the guarantee fees[70] payable in respect of the issuing of the Sasol guarantee, must be determined in accordance with established principles relating to the interpretation of contracts. These principles were recently re-affirmed by the SCA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd,*[71] where it was stated, in relevant parts:

> " ...This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. ...a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention. ...A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing. " (own emphasis)

69. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk,*[72] Wallis JA stated that:

> " ...Whilst the starting point remains the words of the document...the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all ...the circumstances in which the document came into being. ... " (own emphasis)

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[69] In terms of clause 11 of the Counter Indemnity
[70] As alleged by the applicant in para 40 at p360 of the papers
[71] 2016 (1) SA 518 (SCA) at paras 27-29
[72] 2014 (2) SA 494 (SCA) at para 12

70. The respondents concede that Golden sun was liable for payment of 'a premium'[73] to the applicant. In respect of the premium, the Facility records the '*Minimum* premium' payable per guarantee. There was only one guarantee issued in the present matter. The Oxford English dictionary[74] defines the word 'minimum' as: '*The least or smallest amount ... required.*'

71. In respect of the 'Invoice period', the Facility records that '*premiums* will be based on the nearest number of whole months of the guarantee duration'. (own emphasis) Ex facie the document, more than one premium is envisaged during the contract period. Likewise, in clause 11 of the Counter Indemnity, Golden Sun undertook liability for payment of the '*premiums from time to time payable*' to the Insurance Company. The use of the plural denotes that more than one premium was envisaged by the parties as opposed to a once-off payment as contended by the respondent.

72. Dictionary meanings of 'premium' include, *inter alia*: 'An amount paid or required, *often as an instalment payment* for an insurance policy'[75] or an amount paid '*regularly*'.[76] (own emphasis)

73. It seems clear that the guarantee fees were payable by way of premiums (instalments) on a quarterly basis per annum. Any interpretation to the contrary would amount to unbusinesslike commercial irrationality in the particular context and circumstances.

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[73] See: paras 36 & 37 at p329 of the papers
[74] See: https://en.oxforddictionaries.com/definition/minimum
[75] See: The Free Dictionary: (http://www.thefreedictionary.com/premium)
[76] See: The Collins English Dictionary (https://www.collinsdictionary.com/dictionary/english/premium)

74. Although there was inconsistency in the terminology used in the Facility, Counter Indemnity and invoice,[77] when the aforesaid documents are read together, the most commercially sensible meaning in respect of the references to 'premium', 'fee' and 'charge' in the documents is that they all relate to the compensation the applicant was to receive for issuing the Sasol guarantee.

75. It had been agreed with Golden Sun that the applicant would invoice Golden Sun every 3 months in respect of its charges. This is corroborated by the 3 month period detailed in the applicant's invoice. Golden Sun was duly invoiced on this basis. Golden Sun effected payment of the invoiced amount of R181 500-00 plus VAT every 3 months (except for the outstanding invoice in question). Further, the fact that premiums would be based on the 'nearest number of whole months of the guarantee duration' in the Facility indicated that a calculation was envisaged by the parties as a necessary step prior to the establishment of what the premiums payable to the applicant would be. I am in agreement with the submission made by the applicant's counsel that if, after the calculation was completed , it was established that the premium was less than R1 000-00 (the minimum premium payable), then Golden Sun would have been obliged to pay the applicant a minimum premium of R1 000-00.

76. For all the reasons given, it follows that judgment should be given in favour of the applicant.

Costs

[77] The documents refer to 'premium', 'fees ' and 'charge'

77. In *Mancisco & sons CC (in liquidation) v Stone*[78] Flemming DJP reiterated the general principle that an award of costs is principally a discretion which must be judicially exercised in the sense that it must be guided by established and known considerations. The award of costs rests upon the object of reimbursing a person for costs to which he was wrongly put. See: *Texas Co (SA) Ltd v Cape Town Municipality.*[79]

78. That underscores the basic principle that a successful party should get its costs. There are no considerations compelling me to deviate therefrom. In terms of the suretyship agreements, the respondents are liable for costs on the attorney and client scale.

79. In the result, I grant an order in the following terms:

1. The First and Second Respondents, together with the Third and Fourth Respondents (in their nominal capacities as Trustees of the ERF 260-2 MIDDLEBURG TRUST) are ordered to pay to the Applicant, jointly and severally, the one paying the other to be absolved:

1.1 In respect of Claim 1:

1.1.1 the sum of R54 853 827-41 (fifty four million eight hundred and fifty three thousand and eight hundred and twenty seven rand and forty one cents);

1.1.2 interest on the aforesaid amount at the Standard Bank prime rate plus 2% calculated from the 27th October 2016 to date of final payment;

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[78] 2001 (1) SA 168 (W) at 181D – 182B.
[79] 1926 AD 467 at 488

1.2 In respect of claim 2:

1.2.1 the sum of R197 014-45 (one hundred and ninety seven thousand and fourteen rand and forty five cents);

1.2.2 interest on the aforesaid amount at the Standard Bank prime rate plus 2% calculated from the 7th November 2016 to date of final payment;

1.3 In respect of claim 3:

1.3.1 the sum of R97 608-03 (ninety seven thousand six hundred and eight rand and three cents);

1.3.2 interest on the aforesaid amount at the Standard Bank prime rate plus 2% calculated from the 7th November 2016 to date of final payment;

1.4 In respect of claims 1, 2 and 3:

1.4.1 costs of the Application, on the scale as between attorney and client.

MAIER-FRAWLEY AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	6 June 2017
Date of judgment:	17 July 2017
Judgment delivered	19 July 2017
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