

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/15789

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES
2.OF INTEREST TO OTHER JUDGES: YES
3.REVISED YES

Judge Dippenaar

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION, SA LTD

Applicant

and

MISHACK SIBIYA

Respondent

Summary: Monetary Judgment Application – Interlocutory Application - Condonation – Interests of justice – Loan Agreements – Guarantee Agreement – Interpretation - Primary obligation – Independent agreement – precludes defence on underlying agreement - Prescription – commences from demand claim notice –Issue arising after hearing- supplementary heads of argument - principles

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 24th of November 2022.

DIPPENAAR J:

[1] This application concerns a monetary judgment sought by the applicant against the respondent based on a guarantee agreement concluded by the respondent in favour of the applicant for the debts of Keka Moedi Investments (Pty) Ltd ("Keka"). Various agreements were concluded between the applicant and Keka during the period November 2015 to September 2016. These agreements were a loan agreement dated 23 November 2015, amended by a letter of amendment dated 24 Nov 2015; a subordinated loan agreement dated 23 November 2015 and a short form loan revolving credit facility agreement concluded on 16 May 2016, as amended by a letter of amendment on 1 September 2016.

[2] The applicant in its notice of motion sought payment of an aggregate amount of R84 273 918.39, made up of the following specified amounts: (1.1) in respect of the working capital loan R23 170 189.16 with interest from 27 October 2020; (1.2) in respect of a business support and workers trust loan R601 669.77 with interest from 27 October 2020; (2) in respect of the subordinated loan agreement dated 23 November 2015; (2.1) portion A of the subordinated loan R34 535 708.00 with interest from 30 June 2020; (2.2) portion B of the subordinated loan agreement R25 944 658.55 with interest from 30 June 2020. (3) in respect of the short form revolving credit facility agreement dated 16 May 2016 R21 692.91 interest from 27 October 2020; (4) Costs were sought on an attorney and client scale.

[3] The applicant's case against the respondent is predicated on a guarantee loan agreement dated 23 November 2015. The applicant's case is that Keka, of which the

respondent is the sole shareholder and director, breached the provisions of all the finance agreements and that the full amount owing by Keka became due and payable to the applicant. The applicant sent a guarantee claim notice to the respondent on 8 November 2020 in which it informed the respondent of the amounts that were required to be paid in terms of the guarantee agreement. Six certificates of balance dated 27 October 2020 were attached to the guarantee notice, certifying the amounts claimed by the applicant in the claim notice. Three certificates were provided in respect of the short form loan agreement: being (i) R 44 028 585.56 in respect of the land and building loan; (ii) R23 170 189.16 in respect of the working capital loan¹ and (iii) R601 669.77 in respect of the business support and workers trust loan². Two certificates were provided in respect of the subordinated loan agreement, being: (i) R35 535 708 in respect of portion A³ and (ii) R 25 955 658.55 in respect of portion B⁴. One certificate was provided in respect of the revolving credit agreement in an amount of R21 692.91⁵. The certificates of balance correlate to the amounts claimed by the applicant. The applicant did not claim the amount of R44 028 585.56 in respect of the land and building loan.

[4] The relevant facts are not contentious and are by and large common cause. The conclusion of the various agreements and Keka's breaches thereof are not disputed. The applicant launched a winding up application against Keka on 1 November 2017, premised on Keka's failure to make payment of certain amounts due in terms of the short form loan agreement and the revolving credit facility agreement. It relied on a claim of R44 817 773.68 supported by three certificates of balance dated 28 April 2017 and a written demand to Keka dated 29 May 2017 in which Keka was afforded a period of 14 days to pay the outstanding amount. That notice was given pursuant to the provisions of the breach clauses in the short form loan agreement and the revolving credit facility agreement. Keka opposed the application. A provisional winding up order was granted on 11 September 2018 and a final order on 10 January 2019.

¹ Claimed in prayer 1.1 of the notice of motion

² Claimed in prayer 1.2 of the notice of motion

³ Claimed in prayer 2.1 of the notice of motion

⁴ Claimed in prayer 2.2 of the notice of motion

⁵ Claimed in prayer 3 of the notice of motion

[5] The applicant further launched a provisional sequestration application of the respondent's estate on 26 June 2018, relying on the guarantee agreement and its claim of R44 817 773.68, supported by certificates of balance dated 28 April 2017, a claim demand notice sent to Keka dated 29 May 2017 and a guarantee demand notice dated 9 November 2017, sent to the respondent. These are the same claims relied upon by the applicant in the winding up application. The respondent during August 2021 in a supplementary answering affidavit raised a defence of prescription against the applicant's claims. That defence of prescription was upheld and the sequestration application was dismissed on 10 August 2021. That judgment was not appealed.

[6] In the main application, launched on 31 March 2021 and served on the respondent on 11 May 2021, the applicant claimed payment of an aggregate amount of R84 273 918.40 pursuant to a guarantee claim notice dated 8 November 2020 delivered to the respondent in which an amount of R128 302 503.95 was claimed. The difference constitutes the amount of R44 028 585.56, which the applicant conceded had become prescribed as found in the sequestration application.

[7] There are three applications which require determination: First, an application by the respondent for leave to supplement his answering affidavit; alternatively condoning his failure to timeously deliver an answering affidavit in the main application and his failure to comply with interlocutory court orders of 15 November 2021 and 10 May 2022 ("the condonation application"). Second, an application for the striking out of certain paragraphs and annexures from the applicant's replying affidavit ("the striking out application"). Third, the main application.

[8] It is convenient to first deal with the condonation application, as the question whether the respondent has a valid defence to the applicant's claims is squarely predicated on him obtaining leave to deliver the answering affidavit attached to that application.

[9] It was undisputed that the respondent, pursuant to the applicant obtaining a compelling order during November 2021, delivered a short affidavit attaching his affidavit delivered in his opposition to the sequestration application under case number 23822/2018. That affidavit was entirely defective as it did not address the applicant's averments in the main application. The applicant thus contended that the affidavit is irrelevant and that the respondent's failure to deal with its averments constituted an admission thereof as there was no rebuttal of the evidence presented.

[10] Pursuant to the appointment of the respondent's present legal representatives, the condonation application was launched. A substantial answering affidavit was attached thereto. The respondent argued that it was in the interests of justice to admit the affidavit, given that it raises a *bona fide* defence to the applicant's claim.

[11] Whilst the respondent's explanations for the delays and failures on his part are scant, what swings the pendulum in his favour is the need to consider good cause in context both of the respondent's failures and defaults and of the defences raised. The respondent relied on the *res judicata* doctrine and the principles of issue estoppel pursuant to the prescription findings of the court in the sequestration application. He further raised prescription, which requires an interpretation of various of the agreements, including the guarantee agreement which underpins the applicant's claim.

[12] The respondent's affidavit does in my view illustrate the existence of a *bona fide* defence with some prospects of success constituting a triable issue⁶, albeit that the respondent's conduct is open to criticism. It is in the interests of justice to determine the merits of the application on the full facts, specifically considering the large amounts of money involved and the importance of the matter to the parties. I am not persuaded to uphold the challenges raised by the applicant and to simply consider the case on the basis of the applicant's founding affidavit.

⁶ Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) para [16]

[13] I conclude that the condonation relief sought by the respondent in the alternative should be granted. Given the defective nature of the respondent's original answering affidavit such relief is more appropriate than simply granting him leave to supplement.

[14] The applicant was not in my view prejudiced as it delivered a comprehensive replying affidavit to the respondent's affidavit on 17 July 2022 and the matter could proceed on the allocated hearing date. It cannot however be concluded that the applicant's opposition to the application was unreasonable.

[15] During argument the respondent conceded that as he is seeking an indulgence, it would be appropriate that he pay the costs of the condonation application. I agree. Considering the respondent's conduct in relation to the matter, including non-compliance with a court order, it would be appropriate to grant a punitive costs order.

[16] I turn to the respondent's striking out application. The respondent sought the striking out of certain paragraphs of the applicant's replying affidavit⁷ on the basis that it constituted inadmissible hearsay evidence; and the striking out of certain other paragraphs⁸ and annexures of the replying affidavit on the basis that they were scandalous, vexatious and or irrelevant to the determination of the issues in dispute.

[17] The respondent in argument conceded that if those paragraphs were not evidence of the parties' intention but rather an interpretational argument, the paragraphs were not objectionable. As the applicant argued they were interpretational, that disposes of the first challenge. Regarding the respondent's other challenge, I am not persuaded that the respondent has met the necessary threshold as enunciated by the Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa*.⁹

⁷ Paragraph 12.2.8 as read with paragraphs 12.2.11, 12.2.12 and 12.2.13

⁸ Paragraphs 12.3 to 12.13 and annexures RA1, RA2 and RA3

⁹ 2015 (2) SA 1 (CC) paras [27]-[28]

[18] It follows that the striking out application falls to be dismissed. There is no reason to deviate from the normal principle that costs follow the result.

[19] I turn to deal with the merits. The prescription defence is at least partially predicated on the proper interpretation of the guarantee agreement.

[20] In sum, the applicant's case was that on a proper interpretation of clauses 3 and 11 of the guarantee agreement, demand was a condition precedent to the respondent's indebtedness, which would only be deemed to be due and payable once a certificate of indebtedness had been delivered to the respondent evidencing his indebtedness and the fact that such amount(s) is due and payable. The applicant argued that it was the intention of the parties that the due date for performance was to be determinable by the applicant and afforded it the right to postpone such determination and demand. As the date of demand is not recorded in the guarantee agreement, the applicant would be afforded an election as to the time of the demand, which ought to be within a reasonable time.

[21] The respondent's case in sum was that upon a proper construction of the relevant clauses of the guarantee agreement, the respondent became obliged to make payment to the applicant when the amounts became due for payment by Keka to the applicant in terms of the short form agreement, the revolving credit agreement and the subordinated agreement. The amounts became payable by Keka to the applicant on 13 June 2017 pursuant to a letter of demand sent to Keka fourteen days earlier on 29 May 2017 and became due and payable by the respondent to the applicant on the same date. On that basis it was argued that all the applicant's claims have become prescribed, it being common cause that the present proceedings were instituted more than three years from that date.

[22] The respondent further argued that the amounts claimed in claims 1.1 and 3 of the notice of motion were claimed in terms of an earlier guarantee claims notice dated 9 November 2017, which formed part of the claim in the sequestration application which

the court found had prescribed. It was argued that the applicant was obliged to claim all amounts under the agreements forming the subject matter of the 9 November 2017 claims notice and that on this basis the applicant's claim in claim 1.2 had prescribed. Lastly, it contended that the capital amounts presently claimed by the applicant in claims 1.1 and 3, had similarly been claimed in the 9 November 2017 demand notice and, on the applicant's own version, had prescribed.

[23] The central point of departure between the parties is whether or not the guarantee agreement is subject to the suspensive condition that the applicant would have to deliver a guarantee claims notice, put differently, whether the claims notice was a condition precedent to respondent's debt becoming due and payable and that demand could be postponed at the will of the applicant, as it contends. That requires an interpretation of the guarantee agreement upon which the applicant's claim against the respondent is based. The golden rules of interpretation are well established¹⁰ and require a contextual, purposive, linguistic approach.

[24] The relevant clauses of the guarantee agreement provide:

- “1.1.3 *“Effective Date” shall bear the meaning ascribed to that terms in the loan agreements;*
- 1.1.5 *“Finance Documents” shall bear the meaning ascribed to that term in the Loan agreements;*
- 1.1.6 *“Guaranteed Amount” means an amount calculated from time to time with reference to the Guaranteed Liabilities, and payable by the Guarantor pursuant to this Agreement;*
- 1.1.7 *“Guarantee Claim Notice” means, from time to time, a written notice delivered by IDC or its nominee to the Guarantor setting out the aggregate amount of the Guaranteed Amount claimed by IDC at that time;*
- 1.1.8 *“Guaranteed Liabilities” means all present and future moneys and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) which are now, or which may hereafter become, owing by the Borrower to IDC in terms of the Finance Documents together with all damages and all costs, charges and expenses incurred by IDC in connection with a breach by the Borrower of its obligations under the Finance Documents and which IDC is entitled to recover from the Borrower in terms of the Finance Documents, including all items which would be*

¹⁰ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

Guaranteed Liabilities but for the winding-up, absence of legal personality or incapacity of the Borrower or any statute of limitation and a reference to "Guaranteed Liability" shall be to any one or more of the "Guaranteed Liabilities" as the context requires;

1.1.14 *"Release Date" means the date upon which the IDC notifies the Guarantor in writing that the guarantor is released from its obligations under and in terms of this Agreement;*

2 INTRODUCTION

2.1 *The Borrower is obligated to IDC in respect of the Guaranteed Liabilities.*

2.2 *The Guarantor knows and understands the full terms and conditions of the Guaranteed Liabilities.*

2.3 *The Guarantor has agreed to guarantee the due, proper and punctual performance by the Borrower of the Guaranteed Liabilities and to pay the Guaranteed Amount, subject to the remaining terms of this Agreement.*

3. GUARANTEE

With effect from the Effective Date, the Guarantor hereby, irrevocably and unconditionally guarantees, as a primary obligation, in favour of IDC the due, proper and punctual performance by the Borrower of the Guaranteed Liabilities including the full, prompt and complete payment of all the Guaranteed Liabilities when and as the same shall become due whether or not any or all of the Guaranteed Liabilities are enforceable against the Borrower, and undertakes to IDC that each time a Guarantee Claim Notice is delivered to the Guarantor, the Guarantor shall within 3 (three) Business Days after receipt thereof pay all sums claimed in such Guarantee Claim Notice.

4. INDEMNITY

The Guarantor indemnifies IDC directly on demand against any cost, loss or liability suffered by it pursuant to any failure or inability to receive payment of the Guaranteed Liabilities.

5. DURATION

5.1 *This Guarantee is a continuing covering security and will commence on the Effective Date and be and remain in force until the Release Date.*

5.2 *The guarantor shall not be entitled to revoke or cancel this Agreement until the Release Date has occurred. ...*

6. ADMISSIONS AND WAIVERS

6.3 *The obligations of the Guarantor hereunder in respect of the Guaranteed Liabilities will, subject to applicable law, not be affected or diminished by any act, omission circumstance, matter or thing which but for this clause would reduce, release or otherwise exonerate the guarantor from its obligations hereunder in whole or in part, including, without limitation and whether or not known to it or IDC;*

6.4 *The Guarantor hereby waives any and all rights to rely on the prescription of all or any portion of the Guaranteed Liabilities or any obligation created by this Agreement.*

- 6.5 *Notwithstanding any indication to the contrary herein, this Guarantee does not constitute a suretyship and shall be construed as a primary undertaking giving rise to a principal obligation of the Guarantor.*

11. CERTIFICATE

The Guarantor agrees that the nature and amount of the Guarantor's indebtedness in terms of this Agreement will at any time be deemed to be adequately proved by a written certificate purporting to have been signed by or on behalf of IDC, which certificate will, in the absence of manifest error, be binding on the Guarantor and constitute prima facie proof in any legal proceedings against the Guarantor of the contents thereof and of the amount of the Guarantor indebtedness and the fact that such amount is due and payable.

[25] On a contextual reading of the guarantee agreement as a whole considering the normal grammatical meaning of the words used and the nature of the transaction, it is clear that the obligation undertaken by the respondent is a primary rather than an accessory obligation and that it is a performance guarantee. The agreement in clause 6.5 expressly states that it is not a suretyship agreement but a guarantee. Clause 3 further makes it clear that the obligation undertaken by the respondent is a primary obligation and that each time a demand claim notice is sent, payment would be made by the respondent, irrespective of whether the guaranteed liabilities of Keka are enforceable against it or not. The fact that the agreement creates a primary obligation, makes it wholly independent of the liability of Keka and whatever disputes may arise from the underlying transactions are irrelevant to the liability of the respondent under the guarantee.

[26] The principles pertaining to performance bonds are trite. The principles applicable to performance or payment bonds on the one hand and suretyships on the other are usefully summarised by Swanepoel AJ in *Investec Bank Ltd v Lombard Insurance Company Limited*¹¹ ("*Investec*"). The purpose of a guarantee is generally to protect a lender in the event of a borrower not being able to perform its obligations. Where the terms of a performance guarantee are clear, they create an obligation on the part of the guarantor to pay the lender on the occurrence of a specified event.¹² The liability of the guarantor is to pay provided only that the conditions specified in the

¹¹ 969330/2018) [2019] ZAGPPHC 251 (26 June 2019) paras [9]-[14]

¹² *Guardrisk Insurance Company Limited v Landmark Holdings (Pty) Ltd and Others* (343/08) [2009] ZASCA paras [20]-[21]

guarantee are met. The only basis on which the guarantor can escape liability is proof of fraud on the part of the beneficiary.¹³

[27] The respondent sought to distinguish *Investec* based on the facts, and argued that on a proper interpretation of the guarantee, demand was not a condition precedent and demand was not the trigger event when payment was to be made. It was argued that on a proper interpretation of the guarantee, the debt became due by the respondent when the debt became due by Keka to the applicant. I do not agree that *Investec* is distinguishable on the facts. Clause 3 read in context is in similar terms to that of the undertaking in *Investec*.

[28] On a proper contextual, purposive and linguistic interpretation of the agreement in considering clause 3, I conclude that the furnishing of a guarantee claims notice is indeed a condition precedent as argued by the applicant. The context of the provisions does not envisage that the respondent forthwith becomes liable for the guaranteed liabilities of Keka. Rather the respondent's express undertaking is to pay all sums claimed each time a guarantee claims notice is delivered to him, within a period of three days. The respondent's interpretation of the clause is strained and ignores the full wording of the express undertaking contained therein.

[29] In *Investec*, Swanepoel AJ, relying on the judgment of Swain AJA in *Casey v Firstrand Bank Ltd*¹⁴, concluded that the underlying agreement has no effect on the respondent's liability to the applicant, unless fraud can be shown and that the guarantor cannot raise any defence that the party to the agreement may have had¹⁵. Relying on *Barkhuizen v Napier*¹⁶ and *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd ("Trinity")*¹⁷ the court concluded that the parties could agree on when prescription would commence and could delay the commencement of prescription. It was concluded, based on the wording of the guarantee, when the

¹³ *Lombard Insurance Company Ltd v Landmark Holdings (Pty) Ltd* [2009] 4 All SA 322 (SCA)

¹⁴ 2014 (2) SA 374 (SCA) para [12]

¹⁵ Para [20]

¹⁶ 2007 (5) SA 323 (CC) 341C-D

¹⁷ [2017] ZACC 32 [47], [124]

guarantee would lapse. It was held that prescription arose on receipt of the written notice by the guarantor.¹⁸

[30] I respectfully agree with the reasoning and conclusions adopted by Swanepoel AJ. The same principles apply to the present case.

[31] In *Casey*¹⁹, declaratory relief was sought that the beneficiary's claim had prescribed. The appeal against dismissal of that relief was unsuccessful. It was held that as the letter of credit was valid and in force at the time demand was made by the beneficiary, prescription of the beneficiary's claim based on the underlying agreement was irrelevant. Prescription would only be relevant if the beneficiary's claim was fraudulent. As long as the letter of credit was valid, all the beneficiary was obliged to do, was to demand payment in the terms stated in the guarantee. It was further held that mere error, misunderstanding or oversight, on the part of the beneficiary, however unreasonable, would not amount to fraud.

[32] These aforesaid principles are in my view apposite to the present application. Fraud does not arise and the respondent did not contend that the applicant's demand claim notice was fraudulent. The respondent's argument principally relies on the contention that the respondent's debt to the applicant became due when Keka's debt became due and in substance relies on the argument that as Keka's debt had prescribed, the respondent's debt had similarly prescribed on the same date.

[33] The respondent's argument disregards that the obligation of the respondent under the guarantee agreement is a primary and not a secondary obligation, which in terms of the guarantee agreement exists independently of whether or not the applicant has made demand from Keka. It further fails to distinguish the guarantee agreement from a suretyship agreement. Considering the Supreme Court of Appeal's findings in *Casey* regarding prescription, the respondent's argument does not bear scrutiny.

¹⁸ Paras [26]-[27]

¹⁹ Para [16]

[34] Turning to the guarantee, in terms of clause 5, the guarantee endures until the release date. Release would occur either when Keka paid the guaranteed liabilities as defined or the applicant in writing released the respondent. The parties thus agreed that prescription would be delayed²⁰. Neither occurred and the guarantee was valid and in force at the time the applicant made demand in terms of its demand claim notice dated 8 November 2020.

[35] As stated, on a proper interpretation of the guarantee agreement, the parties agreed that the provision of a demand claims notice was a condition precedent to payment being made. In terms of the guarantee, the respondent further expressly waived the right to rely on prescription of the guaranteed liabilities. That waiver accords with the principles applicable to guarantees and is not objectionable. It is not a case where a creditor is allowed to unilaterally delay the onset of prescription. Where the parties have a clear and unequivocal intention, demand will be a condition precedent to claimability and a necessary part of the applicant's cause of action²¹. The parties themselves agreed when and under what circumstances the debt would become due.

[36] I conclude that prescription will commence from the date of delivery of the demand²². I do not agree with the applicant that it only commences three days after the demand.

[37] It follows that the respondent's arguments lack merit and it cannot be concluded that prescription commenced to run against the applicant when the debt of Keka became due and thus prescribed. The respondent's reliance on cases such as *Frieslaar*²³ does not assist his cause. The respondent's arguments perpetuate the failure pointed out in *Casey*²⁴ to distinguish between a suretyship and the autonomous nature of a guarantee, a central feature to the arguments advanced on behalf of the

²⁰ Trinity para [124]

²¹ Investec supra para [24] quoting the minority judgment of Mojapelo AJ in Trinity, supra para 47

²² Frieslaar supra

²³ Frieslaar NO v Ackerman (1242/2016) [2017] ZASCA 03 (02 February 2018)

²⁴ Para [12]T

respondent. Considering the conclusion reached, it is not necessary to deal with those arguments in great detail.

[38] It can thus not be concluded that all the applicant's claims have prescribed, as argued by the respondent. It must however be considered whether any of the claims have prescribed.

[39] It was not disputed by the applicant that its present claims under the short form loan agreement in claim 1.1²⁵ and the revolving credit facility in claim 3 constituted claims for the same capital amount and sundries first claimed by the applicant in the 9 November 2017 guarantee claims notice. In terms of that notice payment of R44 817 773.68²⁶ was demanded and certificates of balance dated 29 May 2017 were attached. These are the same claims presently pursued by the applicant, albeit that the total amounts of the certificates were different in relation to interest and other charges. More than three years expired between the demand notice and the institution of the present proceedings. The same claims were again included in the applicant's demand claim notice dated 8 November 2020.

[40] These same claims were also included in the sequestration application, where a court already found that those claims had prescribed. That judgment was not placed before me to explain the basis on which the court reached the conclusion that the claims had prescribed and the basis of that finding is unclear. No appeal was however lodged by the applicant. The applicant conceded that in light of the findings by the court in the sequestration application, its claim in respect of the land and building loan prescribed. That is dispositive of the issue.

²⁵ The capital amount of R14 621 061, 71 contained in the certificate of balance dated 28 April 2017 reflecting a balance of R15 294 761 in respect of portion B, working capital portion of the short form loan agreement, is the same capital amount underpinning the applicant's certificate of balance dated 27 October 2020 in an amount of R23 170 189.16. The differences in the certificates relates to interest and sundries

²⁶ That amount comprises of capital of R28 644 187.96, interest of R15 014 520.10 up to 29 June 2020 and sundries in an amount of R368 877.59.

[41] It follows that the applicant is not entitled to judgment in respect of claims 1.1 and 3, which fall to be dismissed.

[42] Turning to the applicant's remaining claims, it was common cause that that its claim in claim 1.2 under the short form loan agreement was not included in the applicant's 9 November 2017 demand claim notice. Payment was first demanded from the respondent in the demand claim notice of 8 November 2020. Similarly, no demand was made from the respondent under the subordinated loan agreement in the first claim demand notice, forming the subject matter of claim 2.

[43] The respondent argued that the applicant should have included all its claims under the short form loan agreement agreements to which the 9 November 2017 demand related and the applicant's claim in claim 1.2 and in claim 2 have prescribed as no demand was made then. It was further argued that such all such claims were finally adjudicated upon in the sequestration application.

[44] The respondent further argued that notwithstanding the fact that all amounts set out in agreements were referred to in a letter of demand to Keka on 5 June 2017 and became due by Keka on 13 June 2017, the applicant did not furnish a guarantee claim notice in respect of the amounts claimed in 1.2 and 2 of the notice of motion until they were demanded in the November 2020 guarantee claims notice from the respondent.

[45] The respondent raised his reliance on the *res judicata doctrine* and the principles of issue estoppel in this context and argued that the amounts claims in prayers 1.1, 1.2 and 3 of the notice of motion²⁷ were finally adjudicated upon by a court of competent jurisdiction in the sequestration application launched by the applicant against the respondent and that by virtue of the aforesaid principles, the applicant is precluded from claiming those amounts with interest from the respondent. I have already dealt with the claims in prayers 1.1 and 1.3.

²⁷ Being amounts of R23 170 189,16; R601 669, 77 and R21 692,91 respectively.

[46] I have already explained why the respondent's reliance on demands made from Keka do not pass muster, considering the autonomous nature of the guarantee agreement.

[47] No previous demand claims notice was delivered by the applicant under the subordinated loan agreement, nor under the short form loan agreement in respect of the business and workers trust loan component. These agreements are self-standing and independent. I have already concluded that prescription only commences to run from the giving of the demand claim notice, thus from the date demand was made under the guarantee claim notice dated 8 November 2020. I do not agree with the respondent that the applicant was obliged to demand payment of all its claims in the 2017 demand claim notice.

[48] The requirements of reliance on the *res iudicata* doctrine are to consider whether judgment was granted first, with respect to the same subject matter, second, based on the same grounds and third, between the same parties²⁸.

[49] The sequestration application, although between the same parties, was not aimed at obtaining payment from the respondent as is sought in the present application.²⁹ The relief sought in the present proceedings is different and the same question does not arise, nor does the same cause of action. In the sequestration proceedings, the applicant's claim was raised in order to confer *locus standi* on it to seek the respondent's sequestration.

[50] The respondent's argument that the applicant should have claimed all the amounts due by Keka under the short form loan agreement in its demand claim notice to the respondent lacks merit for reasons already advanced. I am further not persuaded that the respondent has established proper reliance on the *res iudicata* doctrine or the principles of issue estoppel, given the requirements. It cannot be concluded that the

²⁸ Lily v Johannesburg Turf Club 1983 (4) SA 548 (W) at 551-152

²⁹ Investec Bank Ltd v Lewis 2002 (2) 111 (C); Osbourne v Cockin NO and Others (549/2017) [2018] ZASCA 58 (17 May 2018)

applicant's claims claimed in prayers 1.2 and 2 were included in the sequestration application, as argued by the respondent.

[51] I conclude that this defence lacks merit and must fail.

[52] It is necessary to address a further issue which arose during the course of the proceedings when, after the hearing I drew the attention of the parties to the existence of clause 6.4 of the guarantee agreement, to which neither of the parties made reference during the hearing. The existence of the clause was not drawn to the court's attention, despite the respondent's case primarily being based on prescription and the proper interpretation of the guarantee agreement being a central issue.

[53] In the interests of justice the parties were afforded an opportunity to deliver further supplementary heads of argument pertaining to that clause and its impact on the application³⁰ and such written argument was received from both parties. Neither of the parties sought an opportunity to deliver any further affidavits.

[54] The applicant relied on clause 6.4 and argued that such clause pertaining to an anticipatory waiver of prescription was valid and did not offend public policy as emphasis of the Prescription Act is on the private interests of the parties to an obligation and not on the public interest. It invited the court to apply *Nedfin Bank Ltd v Meisenheimer*³¹ ("*Meisenheimer*") and consider foreign case law on the issue supporting the proposition that a party may waive a condition or provision in a contract which is solely for that party's benefit and is severable.³²

[55] The respondent on the other hand contended that clause 6.4 was *contra bonos mores*. He argued that on the applicant's own version an amount of R44 028 585.56

³⁰ Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd 2008 (6) SA 468 (W) para [22]

³¹ 1989 (4) SA 701 (T)

³² New Zealand Court of Appeal judgment in *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 339 at 402-402; England and Wales High Court (Chancery Division) in *Irwin v Wilson and Ors* [2011] EWHA 326 (Ch); [2011] EG 23 88 para 24

had prescribed and that the applicant had thus waived reliance on prescription. It argued that the applicant did not in its heads of argument or replying affidavit rely on clause 6.4 and that the respondent was prejudiced because the raising of the question would have entitled him to deal with it in an affidavit, the preclusion of which is prejudicial. It was further argued that it was not open to the applicant to simply annex the guarantee agreement and thereafter argue that the court could have regard to clause 6.4 thereof, absent an indication in its papers that it so intended to rely on the clause. Lastly it was argued that in terms of s17(1) of the Prescription Act³³, a court should not of its own motion take notice of prescription.

[56] In my view, the respondent's arguments are misconceived for various reasons. It was the respondent who raised the issue of prescription and advanced a particular interpretation of the guarantee agreement, and not the applicant. A proper interpretation of the guarantee agreement must by necessity involve a contextual consideration of the entire agreement as a whole and not a selective consideration of only specific clauses. As such it was incumbent on the respondent and his counsel to have drawn the court's attention to clause 6.4, even if it may be adverse to his case. Regrettably that was not done. The respondent had every opportunity to consider the guarantee agreement and advance all relevant arguments on the issue of prescription, both during the course of preparation of his papers and thereafter. The contention that the respondent is prejudiced, does not pass muster. Significantly, the respondent did not seek an opportunity to deliver any supplementary affidavits.

[57] The alleged concession and waiver argument similarly lacks merit. A court found in the sequestration application that the applicant's claim of R44 817 773.68 had prescribed. That finding is final. It is difficult to conceive how the applicant's acceptance thereafter that the amount had prescribed could be construed as a concession or a waiver. The fact that the applicant did not claim the land and building loan cannot be

³³ 68 of 1969

considered as a waiver of reliance on prescription. Moreover the express terms of guarantee agreement militate against the waiver contended for by the respondent.³⁴

[58] Our courts have held that parties are entitled to make any legal contention open to them on the facts, even though that contention was not specifically raised or relied upon in the affidavits deposed to by the parties, subject to the proviso that it should not be unfair and should only be applied if all the relevant facts are before the court³⁵.

[59] If a fundamental issue arises a court may raise an issue if it is necessary in the interests of justice and convenient to consider it, as long as a process is adopted which is fair to the parties and the principles of *audi alteram partem* are observed³⁶. In the present instance, the parties were afforded an opportunity to deal with the issue³⁷ and did so. It was self-evidently necessary to consider the prescription issue in its totality.

[60] In *casu*, the defence of prescription was expressly raised by the respondent, and thus not by the court *mero motu*. Moreover, the case made by the respondent and as responded to by the applicant requires an interpretation of the guarantee agreements. In those circumstances it cannot be concluded that those issues are not issues formulated by the parties to the litigation.

[61] Returning to *Meisenheimer* and the argument advanced by the applicant, the issue of whether an anticipatory waiver clause in an agreement is *contra bonos mores* is contentious. In *Griederich King GMBH v Continental Jewellery Manufacturers*³⁸ the court followed *Meisenheimer*, albeit in context of the renunciation of the right after the debt had arisen and not an anticipatory waiver. In *Absa Bank Bph h/a Bankfin v Louwen Andere ("Louw")*³⁹, approving *Ryland v Edros*⁴⁰, it was held that *Meisenheimer* was

³⁴ Clauses 22.3 and 22.4

³⁵ MEC for Health Gauteng v 3p Consulting 2012 (2) SA 542 (SCA) para [28]

³⁶ Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd 2008 (6) SA 468(W) para 22

³⁷ *Booi v Amthole District Municipality and Others* 2022 (3) BCLR 265 (CC) para [35]

³⁸ 1995 (4) 966 (C)

³⁹ 1997 (3) SA 1085 (C) at 1088E and 1090 A-B

⁴⁰ 1997 (2) SA 690 (C) 713 H-I

clearly wrong and should not be followed. These conflicting judgments were referred to by the Supreme Court of Appeal in *De Jager & Andere v Absa Bank Bpk*⁴¹ (“*De Jager*”), but the issue of an anticipatory waiver of prescription was not decided. *De Jager* however expressly held that prescription serves the public interest.⁴² The judgment in *Meisenheimer*, is predicated on the opposite contention.

[62] Ultimately, in light of the view I have taken of the matter, it is not necessary to enter into the debate or make any definitive finding on the issue. Clause 6.4 of the agreement must be read in context of the guarantee agreement as a whole and the respondent not being entitled to rely on the prescription of the underlying obligations of Keka. This accords with the applicable principles pertaining to the autonomy of guarantees. It is thus not a case of a blanket anticipatory waiver clause.

[63] The applicant has been substantially successful in the main application. There is no reason to deviate from the normal principle that costs follow the result. The guarantee agreement provides for costs to be paid on an attorney and own client scale⁴³. In its notice of motion, the applicant however sought costs on the scale as between attorney and client. Such an order will be granted.

[64] I grant the following order:

[1] Condonation is granted for the respondent’s failure to have timeously delivered an answering affidavit in the main application and to comply with the order of court granted on the 15th day of November 2021, directing the Respondent to file an answering affidavit by the 23rd day of November 2021, and extending the period within which the answering affidavit in the main application is to be delivered;

⁴¹ (393/98) [2000] ZASCA 193; [2000] 4 All SA 481 (A) para [16]

⁴² At para [12]

⁴³ Clause 23.2

- [2] Condonation is granted for the respondent's failure to comply with the court order dated the 10th day of May 2022, directing the respondent to file heads of argument in the manner contemplated in the order, and extending the period within which the heads of argument are to be delivered;
- [3] The respondent is directed to pay the costs of the condonation application on the scale as between attorney and client;
- [4] The respondent's striking out application is dismissed with costs;
- [5] The claims in prayers 1.1 and 3 of the notice of motion are dismissed;
- [6] Judgment is granted against the respondent for:

SHORT FORM LOAN AGREEMENT DATED 23 NOVEMBER 2015

[6.1] BUSINESS SUPPORT AND WORKERS TRUST LOAN

[6.1.1] Payment of the sum of R 601,669.77;

[6.1.2] Interest on the amount in [6.1.1] at the rate of 4% (four percent) above the prime overdraft rate calculated from 27th October 2020 until date of payment both days inclusive;

SUBORDINATED LOAN AGREEMENT DATED 23 NOVEMBER 2015

[6.2] PORTION "A" OF THE LOAN:

[6.2.1] Payment of the sum of R34,535,708.00;

[6.2.2] Real after tax internal rate of return (RATIRR) on the amount in [6.2.1] at the rate of 15% (fifteen percent) per annum reckoned from 30 June 2020 until date of payment;

[6.3] PORTION "B" OF THE LOAN:

[6.3.1] Payment of the sum of R25,944,658.55;

[6.3.2] Real after tax internal rate of return (RATIRR) on the amount in [6.3.1] at the rate of 5% (five percent) per annum reckoned from 30 June 2020 until date of payment both days inclusive;

[7] The respondent is directed to pay the costs of the application on the scale as between attorney and client.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 28 July 2022
SUPPLEMENTARY HEADS OF ARGUMENT	: 30 and 31 July 2022 : 02 September 2022
DATE OF JUDGMENT	: 24 November 2022
APPLICANTS COUNSEL	: Adv. BF Gededger
APPLICANTS ATTORNEYS	: Shaheem Samsodien Attorneys
RESPONDENTS COUNSEL	: Adv. S P Pincus SC

RESPONDENTS ATTORNEYS

: Howard Woolf Attorneys