IN THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 23784/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED. YES
DATE 15 February 2024
SIGNATURE

In the matter between

THE STANDARD BANK

OF SOUTH AFRICA LIMITED Applicant

and

DIKELEDI MOGAPI First Respondent

AND NINETEEN OTHERS

J U D G M E N T

WANLESS,J

Introduction

[1] This matter involves, *inter alia,* the almost eternal conflict between, *inter alia*, freedom of contract; constitutional rights; protection of commercial interests and the upliftment of previously disadvantaged persons in the South African business sector in terms of appropriate legislation. As such, it brings together two often competing but equally valuable sets of principles as encompassed in the relief sought and the opposition thereto.

[2] The Standard Bank of South Africa Limited ("*the Applicant*") seeks judgment sounding in money against no less than twenty (20) respondents ("*the Respondents*"), in varying amounts, in terms of guarantees ("*the guarantees*") furnished by the Respondents in favour of the Applicant.

[3] On the 14th and 15th of August 2023 this Court heard the Applicant's application and the Respondents' counter-application as a Special Opposed Motion. Extensive argument was placed before this Court over a period of

two (2) days. In the counter-application the Respondents seek an order that, *inter alia*, they be released from their indebtedness under the guarantees, *alternatively*, that the guarantees are unenforceable.

[4] Prior to the hearing of the matter as aforesaid, this Court convened a case management meeting with the legal representatives of the parties on 4 August 2023. At that meeting, it was agreed, *inter alia*, that the parties would prepare and deliver a joint practice note dealing with, *inter alia*, matters raised at the meeting. That joint practice note has been uploaded onto caselines.

The facts

[5] The relevant facts which are either common cause in this matter or which cannot be seriously disputed by any of the parties are the following:

5.1 the Applicant had made various banking facilities available to Force Fuel Proprietary

Limited *("Force Fuel")*;

5.2 the guarantees (each identically worded) were issued by the Respondents to the Applicant in respect of Force Fuel's indebtedness to the Applicant;

5.3 each of the Respondents were shareholders or ultimate shareholders of Force Fuel;

5.4 Force Fuel's indebtedness is in respect of monies lent and advanced and consists of an overdraft facility; medium term loan facilities and a fleet management facility;

5.5 whilst the Respondents aver, in the application papers, that they have no actual knowledge of Force Fuel's indebtedness to the Applicant the Respondents are unable to advance any factual grounds to dispute the quantum of the Applicant's claims. In addition, throughout the

argument before this Court the issue of quantum was never raised. In the premises, this Court accepts that it was common cause between the parties that the amounts claimed (together with the interest thereon) is correct and as reflected as per the Draft Order handed in at the hearing on behalf of the Applicant (to which there was no objection by the Respondents);

5.6 the entire issued share capital of Force Fuel was acquired by *"Labat"* with effect from 1 September 2018;

5.7 proceedings to place Force Fuel under business rescue commenced on or about 5 May 2020.

The defences raised by the Respondents

[6] Whilst the Applicant's cause of action is relatively straightforward the same cannot be said of the various defences raised by the Respondents in respect of the claims by the Applicant. In addition thereto, these

defences vary somewhat between those defences as set out in the Respondents' Heads of Argument; the defences as identified by Counsel for the Respondents during the course of argument before this Court and the defences identified (correctly or incorrectly) by the Applicant from the Respondents' affidavits.

The Respondents' defences as set out in the Respondents' Heads of Argument

[7] Firstly, the Respondents seek to rely on the fact that the Respondents ceased to be involved with Force Fuel when the total shareholding in Force Fuel was sold to new shareholders, namely Labat. The sale of shares to Labat took place after the Applicant (in its capacity as Force Fuel's lender) had insisted that a new shareholder be appointed to the company. Once the new shareholder was identified and presented to the Applicant the Applicant considered the sale of shares agreement and consented to such sale. The Applicant was accordingly part of the process that replaced the Respondents as shareholders of Force Fuel and thereafter proceeded to deal with Labat to the exclusion of the Respondents until Force Fuel was placed under business rescue.

[8] It is submitted on behalf of the Respondents that this notwithstanding the Applicant now seeks to recover Force Fuel's debts from the erstwhile shareholders, based on the guarantees that were given by them to the Applicant. It is submitted that those guarantees are unenforceable on, *inter alia*, the basis that it would be against public policy and the principles of justice and fairness to enforce the terms of the guarantees, having regard to the facts and circumstances of this matter on, *inter alia*, the basis that:

8.1 the loan to Force Fuel was advanced as part of the Applicant's Enterprise Development Programme, a Broad-Based Black Empowerment (*"BBBEE")* initiative which is regulated in terms of the *Broad-Based Black Empowerment Act 53 of 2003* ("*BEE Act*");

8.2 prior to the signing of the guarantees the Respondents were advised by the Applicant (through Eldon Pillay ("*Pillay*") Manager: Growth and Acquisition Finance) that the

guarantees were sought merely for administrative purposes and would not be enforced by the Applicant;

8.3 the Applicant was at all material times aware that Force Fuel was a start-up company without trading history and that Force Fuel and the Respondents were not in a position to provide collateral for the loan advanced;

8.4 upon the sale of shares to Labat the Applicant; the Respondents and Labat *agreed* that the erstwhile shareholders (the Respondents) would be released as guarantors as soon as the shares were transferred to Labat. The Applicant then dealt with Labat to the exclusion of the Respondents until Force Fuel was placed in business rescue;

8.5 also, the Applicant breached its duties and obligations towards the Respondents, as expressed in the BEE Act and the Applicant's own Enterprise Development Programme. Such

conduct was prejudicial towards the Respondents, thus entitling them to be released from the guarantees.

[9] All of the aforegoing is largely dealt with in the Respondents' Heads of Arguments as a defence based on ***public policy considerations*** and it is submitted, on behalf of the Respondents, that the guarantees are unenforceable and the application should be dismissed. If this Court is not inclined to deal with this matter by way of application then it is submitted that it would be appropriate to refer the matter to trial as there are reasonable grounds for believing that the defence relied upon by the Respondents would be established if this procedure was followed.

[10] In the alternative to the aforegoing defence the Respondents, in their Heads of Argument, submit that the Respondents were released as guarantors on account of the Applicant's breach of its obligations towards Force Fuel and the ***prejudice*** that was suffered as a result thereof. This defence is summarised hereunder.

[11] The loans that were granted to Force Fuel were granted as part of the Applicant's Enterprise Development Programme and in accordance with the injunctions of the BEE Act, as read with the BEE Codes and the Charter.

[12] These loans, submits the Respondents, were granted in accordance with the Applicant's "*business unusual policy*", in terms of which the Applicant undertook not to apply the traditional lending practices but to instead provide meaningful assistance to enhance Force Fuel's operational effectiveness and growth. More importantly say the Respondents the Applicant undertook that it would provide funding to Force Fuel without seeking collateral, *alternatively*, without enforcing the collateral that was obtained from the Respondents. These were duties and obligations which the Applicant owed to Force Fuel and the Respondents.

[13] Following thereon, it is submitted that in this matter the Applicant failed to provide Force Fuel with any support, *alternatively*, with the type of support that is usually

associated with BEE transactions and that is aimed at ensuring that BEE entities such as Force Fuel are effective and continue to grow to economic independence.

[14] Once the loans were granted the Respondents submit that the Applicant changed its attitude and treated those loans as ordinary traditional loans which they had bemoaned in their article of October 2015 and 2016 BEE Report. In this regard the Applicant, *inter alia*, proceeded to simply place Force Fuel in default even though it had religiously made capital and interest payments. At the same time the Applicant failed to provide Force Fuel with the necessary working capital despite its knowledge that fuel distribution is a cash intensive business and thus required substantial working capital.

[15] It was therefore submitted that it was correct that the Applicant owed a duty to Force Fuel and the Respondents to provide the necessary support and to act fairly and reasonably in accordance with its undertakings, as set out, *inter alia*, in the banking

facilities agreement; the BEE Act; the BEE Code; the Charter; the October 2015 article and the 2016 report.

[16] Finally, it was submitted on behalf of the Respondents that the Applicant's conduct and its breach of duties and obligations has prejudiced the Respondents on, *inter alia*, the basis that the Applicant now seeks to recover over R60 million from them in circumstances where the loss which it seeks to recover was caused by the Applicant's breach of its duties in the first place. The Applicant furthermore breached its duty to negotiate in good faith and engage with the Respondents and Force Fuel reasonably and in accordance with the principles of *Ubuntu.*

[17] Once again, in the event of this Court not being inclined to determine the issues relating to prejudicial conduct and dismissing the application, it was submitted that the proper approach was to refer the matter to trial.

[18] The third defence raised on behalf of the Respondents, as set out in the Respondents' Heads of Argument, is that there was an ***agreement to release*** the

Respondents from their obligations in terms of the guarantees.

[19] It is the version of the Respondents (denied by the Applicant) that during or about August 2018 and prior to the shares in Force Fuel being transferred to Labat on 1 September 2018 that the Applicant; Labat and the Respondents agreed that the Respondents, as erstwhile shareholders, would be released as guarantors of Force Fuel's indebtedness to the Applicant with effect from 1 September 2018.

[20] In addition to the aforegoing, it was submitted that the conduct of the parties during and after the transfer of shares indicates that a tacit agreement came into existence between Labat; the Applicant and the Respondents that the latter would be released from the guarantees and Force Fuel's liabilities upon the effective date of the sale of the shares.

[21] It is submitted by the Respondents that the Applicant does not dispute that the parties agreed that the Respondents would be released from the guarantees

upon the sale of the shares. The Respondents submit that the Applicant's contention is simply that the parties' agreement was that they would only be released once Labat had signed the guarantee. The Respondents therefore submit that the question to be determined is accordingly not whether there was an agreement between the parties in relation to the release from the guarantees but whether such agreement was conditional upon the signing of a guarantee by Labat. In this regard it is submitted on behalf of the Respondents that the Applicant bears the onus to prove that the agreement was conditional as it now alleges. Finally, the Respondents submit that the Applicant has failed to discharge such onus and that this application stands to be dismissed on the basis that the Respondents have been released as guarantors, by agreement between the parties.

[22] As in the case of the previous defences raised the Respondents submit that if this Court is not inclined to decide this issue by way of application the appropriate order would be to refer the matter to trial in order to determine whether the agreement between the parties was conditional upon the signing of a guarantee by

Labat.

The defences as identified by Counsel for the Respondents during the course of argument before this Court.

[23] At the commencement of his address before this Court, Adv Chohan SC (with him Adv Kutumela) set out the defences of the Respondents as follows:

23.1 the Public Policy defence;

23.2 the Prejudice defence;

23.3 the Agreement to Release defence.

[24] Counsel for the Respondents stressed that the undertakings given by Pillay to the Respondents on behalf of the Applicant did not constitute a separate defence but, insofar as any factual averments were made by the Respondents in relation thereto, these would influence the Public Policy and other

defences. However, any representations made by Pillay did not constitute a stand-alone defence. From the aforegoing, this Court understood that it would not be necessary for this Court to consider, *inter alia*, any issues of estoppel or ostensible authority in respect of Pillay (or indeed in respect of any other employees of the Applicant) insofar as they may constitute separate or self-standing defences to the Applicant's claims.

The defences as identified by the Applicant from the Respondents' affidavits.

[25] The defences of the Respondents as identified by Adv Gilbert (with him Adv Ramabulana-Mathiba) for the Applicant are the following:

25.1 the "*Representation*" or "*Assurance*" defence;

25.2 the "*Agreement to Release*" defence;

25.3 the "*Prejudice*" defence; and

25.4 the "*Public Policy*" defence.

[26] In addition to the aforegoing the following additional challenges were gleaned by the Applicant's Counsel from the Respondents' affidavits, namely:

26.1 that the Applicant engaged in reckless lending contrary to the *National Credit Act 2005* in advancing loans to Force Fuel and that therefor the guarantees are unenforceable; and

26.2 the guarantees given by the nineteenth and twentieth Respondents do not comply with section 46 of the *Companies Act 2008* and therefore are of no force and effect.

[27] Neither of these additional challenges formed part of the extensive argument before this Court and, in the premises, will not be dealt with in this judgment.

The arguments of the parties in relation to the defences raised by the Respondents.

[28] In broad summary the real dispute between the parties is that the Applicant wishes this Court to grant it the relief sought on a purely commercial basis and, in doing so, disregard all the defences raised by the Respondents on the basis that they are bad in law or do not sustain defences based on the facts. As to the issue of a dispute of fact, it was submitted, on behalf of the Applicant, that if this Court did not dismiss the defences of the Respondents on the basis that they did not raise valid defences in law, then there was no basis upon which this Court should refer the matter to trial. In this regard, Adv Gilbert submitted that this Court should either find in favour of the Applicant or should dismiss the application.

[29] In direct contrast to the approach adopted by the Applicant, it was submitted, on behalf of the Respondents, that the guarantees which are the central focus of the dispute, must be viewed in a much wider context, namely that of forming part of financial assistance granted by the Applicant to uplift previously disadvantaged businesspersons in the South African business sector. As such, it was submitted by the Respondents that this court should not simply view the

guarantees in the "*cold light*" of a day-to-day commercial transaction but should have regard to the various defences as put forward on behalf of the Respondents in the present matter. As already set out earlier in this judgment, in the event of this Court holding that it cannot deal with the matter by way of application then it was submitted that the matter should be referred to trial.

[30] At the outset, it must be noted that it was never specifically denied by the Applicant that the financial dealings between the Applicant and Force Fuel were carried out against the background of Black Economic Empowerment. This was true both in respect of the Applicant's affidavits and Adv Gilbert's argument presented on behalf of the Applicant before this Court. In addition, was the failure of the Applicant to deal with the conduct of its ex-employee, namely Pillay, in the Applicant's Founding Affidavit. The significance thereof and the lack of any evidence by Pillay before this Court will be dealt with at a later stage in this judgment.

The Public Policy defence (incorporating the

"*Representations*" or "*Assurance*" defence as identified by the Applicant from the Respondents' affidavits and also raised by the Respondents' Counsel as part of the Public Policy defence).

[31] The Respondents contend that the Applicant, represented by Pillay and one Desiree Anaekwe ("*Anaekwe*") assured them and/or represented that the Applicant would *"never…call on the guarantees… in the event of default by the principal borrower"* and that *"the guarantees… were a mere formality"* and that they accepted those assurances.

[32] In reply the Applicant states that Anaekwe remains available to the Applicant as a witness. Anaekwe has furnished a confirmatory affidavit and denies that any such assurances were given. It must be noted however that whilst the Applicant states that Pillay (and one Luke Kirsten) are no longer in the employ of the Applicant and the Applicant is unable to obtain a confirmatory affidavit from them, no other reason is provided therefor and this Court is provided with no information whatsoever as to what steps the Applicant took, if any,

to attempt to procure a confirmatory affidavit from Pillay.

[33] It was submitted by Adv Gilbert that it is fanciful that the Applicant's representatives would have given any such assurance or that the Applicant would have gone to the effort of drafting and attending to the execution of sixteen (16) guarantees as "*a mere formality*" or for "*administrative purposes*" only and with no intention to rely upon those guarantees.

[34] Adv Gilbert further submitted that although there are some twenty (20) Respondents in relation to sixteen (16) guarantees, there is not a single document, including any e-mail, that in any way records or suggests that the guarantees would not be relied upon by the Applicant. It is therefore fanciful to suggest that such assurances were given and were not to be acted upon without one of the twenty (20) Respondents having made any recordal indicative of such an assurance having been given. This submission on behalf of the Applicant relating to a singular lack of documentary evidence in support of the version put forward by the

Respondents is a common thread in the argument that this Court should have no regard whatsoever to the defences as raised by the Respondents and further, should not, in the exercise of this Court's discretion, refer the matter to trial.

[35] Following thereon, the submission was made that this version of the Respondents that assurances were given by the Applicant is also contrary to the documents provided by Force Fuel and the Respondents. As an example, Adv Gilbert drew the attention of this Court to a letter written by the Fifth Respondent, namely one Gordon Walters ("*Walters*") of Force Fuel on 28 February 2019 at a stage when Force Fuel was already seeking a moratorium on the repayment of capital and interest because of its financial difficulties. The point is made that no mention is made therein that the guarantees would not be relied upon by the Applicant.

[36] Furthermore, reliance was placed upon the fact that in the subsequent further letter from Walters on 27 May 2019, once again no mention is made of any assurance by the Applicant that the guarantees would

not be relied upon. The Applicant submits that rather, to the contrary, Walters, in seeking to persuade the Applicant to grant a repayment moratorium, details the security or collateral that is in place and expressly and unequivocally refers to the guarantees given by the various Respondents. Far from Walters suggesting that these guarantees were not enforceable, he in fact relied on these guarantees being in place in attempting to persuade the Applicant that it was sufficiently secured and so to persuade it to reconsider its refusal to provide a repayment moratorium.

[37] Also, Adv Gilbert referred this Court to numerous recordals of these guarantees being in place in the documentation emanating from the Applicant. These include, *inter alia*, the following:

37.1 the initial facility letter of 22 September 2016;

37.2 the Banking Facility Agreement concluded on 15 December 2016;

37.3 the amended Banking Facility Agreement of 24 May 2017; and

37.4 the draft amended facility letter of 29 November 2018.

[38] In addition to the aforegoing, Force Fuel's audited and approved Annual Financial Statements for the 14 months ending 31 August 2018 and which were approved and signed by its directors (including the Second and Fifth Respondents) on 28 June 2019 also record that these guarantees are in place. Moreover, it was also pointed out by Counsel for the Applicant that the guarantees are also recorded in the business rescue plan for Force Fuel with no indication that they would not be relied upon. Further, it was also correctly drawn to the attention of this Court that the guarantees concluded by the First, Second, Eighth and Ninth Respondents were concluded on 3 October 2016, which is before when, on the Respondents' own version, the representations and assurances were made in December 2016 that induced them to conclude the guarantees.

[39] In any event, it is submitted by the Applicant that the Respondents' further defence that the Applicant

released them from these guarantees is inconsistent with their defence that the guarantees would not be relied upon in that the Applicant would not have to release the Respondents from the guarantees if the Respondents were not bound by the guarantees in the first place. It was also pointed out by Adv Gilbert that the Respondents, in the Answering Affidavit, unequivocally assert that they were to be released as guarantors upon Labat becoming the shareholder of Force Fuel, which he submits is totally inconsistent with a defence that they were not bound by the guarantees in the first instance.

[40] As to the *lacuna* in the Applicant's evidence, namely the failure of the Applicant to place before this Court any affidavit deposed to by Pillay and to explain, at an early stage in the proceedings, what steps, if any, had been taken in an attempt to procure same, Adv Gilbert addressed this aspect by, once again, referring to that evidence that *was* before this Court and that, accordingly, this Court *could* take due cognisance of.

[41] As an example thereof, this Court was referred to the

facility letter of 22 September 2016 that records that the guarantees are required as security and which is signed by Pillay himself. Yet, says Adv Gilbert, the Respondents contend that the very person who signed the letter requiring the guarantees assured them the guarantees would not be relied upon by the Applicant. Thus, it is submitted that apart from this being fanciful (in that it amounts effectively to contending that Pillay and Anaekwe were duping their own employer bank and that the Respondents were colluding with them to do so), not one of the respondent guarantors required that the document, or any of the many other documents recording the security, be amended or qualified to reflect the assurance. Nor did any of the respondent guarantors address a single note to the Applicant over the course of several years, such as an e-mail, recording the assurance, even when Force Fuel was struggling financially.

[42] Following thereon, it was submitted on behalf of the Applicant that even if the assurance had been given the Respondents could not have reasonably relied thereon. This was simply because all the documents, spanning a period of over two years, record the contrary. There

was no "*façade of regularity and approval*" or "*totality of appearance*" created by the Applicant that either Pillay or Anaekwe were authorised to assure the Respondents that the guarantees would not be relied upon and so no scope for any ostensible (apparent) authority on their part. Adv Gilbert emphasised that the articles published by Pillay do not record that guarantees or other security obtained by the Applicant bank in transactions falling within the context of BEE banking business of the Applicant would not be enforced.

[43] The Applicant also relies on the terms of the guarantees themselves as yet another reason why the Respondents cannot raise this defence to the claims of the Applicant. In this regard, subclauses 11.1; 11.2 and 11.3 of each guarantee expressly provide that:

> "*11.1 This document constitutes the sole record of the agreement between the Bank and the Guarantor in regard to the subject matter hereof.*
>
> *11.2 No party shall be bound by any expressed or*

implied term, representation, warranty, promise or the like not recorded herein,[1] *but the provisions hereof are without prejudice to such other rights as any party may have in law.*

11.3 No addition to, variation, or unilateral or consensual cancellation of this Guarantee shall be of any force or effect unless in writing and signed by or on behalf of the Bank and the Guarantor."

[44] In the premises, it was the Applicant's submission that apart from the Respondents' version being so far-fetched and fanciful that it stands to be rejected the express terms of the guarantees preclude any reliance by the Respondents on any such representation or assurance even if it had been given.

[45] Dealing with the wider defence raised by the Respondents that the enforcement of the

[1] *Emphasis added*

guarantees is against public policy the Applicant relies, in the first instance, on the decision of the Constitutional Court in the matter of *Beadica 231 CC and Others v Trustees, Oregon Trust and Others.*[2] Whilst both parties place reliance on *Beadica* and on the principles enunciated therein the Applicant submits that to the extent that the Respondents assert that the enforcement of the guarantees is contrary to the principles of good faith or *Ubuntu* the Constitutional Court, per Theron J in *Beadica,* has made it clear that[3]:

"*There is agreement between this Court [the Constitutional Court] and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships.*"[4]

[46] The Applicant cites Theron J further where it was held[5]:

"It emerges clearly from the discussion above that the diversion between the jurisprudence of this Court and

[2] *2020 (5) SA 247 (CC)*

[3] At paragraph [79]

[4] *Emphasis added*

[5] At paragraph [80]

that of the Supreme Court of Appeal is more perceived than real. Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rules that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it."[6]

[47] According to the Applicant the Respondents' defence is nothing other than an impermissible reliance on the abstract values of fairness, reasonableness and *Ubuntu* being applied on a

[6] *Emphasis added*

free-standing basis. This is because the Respondents do not refer to any constitutional right that is being implicated as being infringed. No mention is made of any doctrine of common law that needs to be developed by the Court in performing a creative, informative and controlling function as to afford the Respondents relief.[7]

[48] It is further submitted that it is only where a contractual term or its enforcement is so unfair and unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it[8]. There is nothing against public policy in the Applicant seeking to enforce guarantees furnished by shareholders in respect of loans made to the company in which they were shareholders.

[49] The Respondents also rely on *Beadica* in support of their defence based on, *inter alia*, public policy considerations. In this regard, it was submitted that good faith and constitutional principles, particularly those encapsulated in the Bill of Rights, permeate

[7] *Beadica at paragraph [73]*

[8] *Beadica at paragraph [80]*

all law, including contract. When contracts infringe on the fundamental values embodied in the Constitution, they will be struck down as being offensive to public policy.[9]

[50] It was further submitted that public policy, as informed by the Constitution; imports "*notions of fairness, justice and reasonableness*"*;* takes account of the need to do "*simple justice between individuals*" and is informed by the concept of *Ubuntu.* Also, determining fairness in this context involves a determination whether the clause or contract sought to be enforced should be enforced in the light of the circumstances which prevented compliance with the clause.[10] This involves an enquiry whether, in all the circumstances of the particular case, it will be contrary to public policy to enforce the clause. This relates to the unfairness and unreasonableness of enforcing the impugned clause.[11]

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[9] *Beadica at paragraph [29], relying on Brisley v Drotsky 2002 (4) SA 1 (SCA) 22 and 91 - 93*

[10] *Beadica, paragraph [35]. Relying on Barkhuizen v Napier 2007 (5) SA 323 (CC) at paragraphs 51 to 58*

[11] Beadica at paragraph [37]; emphasis added

[51] Adv Chohan SC further submitted that this accords with the earlier pronouncement by the Supreme Court of Appeal ("*SCA*") in the matter of *AB v Pridwin Preparatory School*[12] where it was held that:

> "*where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it.*"[13]

[52] Following thereon, it was submitted on behalf of the Respondents that as was the case in *Beadica*, in the present matter the very purpose of the contracting parties took place within the context of a Black Economic Empowerment initiative and in the premises the purpose was to redress economic disempowerment of historically disadvantaged persons. This context requires a nuanced approach in balancing contractual autonomy and transformative constitutionalism.[14]

[53] It was also submitted that together with the other

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[12] *2019 (1) SA 327 (SCA)*

[13] At paragraph [13]; emphasis added.

[14] *Beadica at paragraph [209]*

underlying values such as fairness and justice, *Ubuntu* is one of the central values of our jurisprudence generally when adjudicating fairness in contract.[15] Furthermore, the BBBEE Act is a statute which attempts to level the playing fields

skewed by the apartheid system. It was submitted that the value of *Ubuntu* certainly resonates in interpreting the context of BBBEE.[16]

[54] The grounds upon which the Respondents rely in support of their defence in respect of Public Policy, incorporating the "*Representations*" or "*Assurance*" defence alluded to earlier in this judgment[17] have already, to one extent or another, been dealt with in this judgment when setting out and identifying the various defences raised by the Respondents to the claims of the Applicant in the present matter.[18] In amplification thereof, Adv Chohan SC, on behalf of the Respondents, did an exceptional job in setting out, both in documentary form and during the

[15] *Beadica at paragraph [210]*

[16] *Beadica at paragraph [221]*

[17] *See the heading ibid preceding paragraph [31]*

[18] *Paragraphs [6] to [27] ibid*

course of argument, all those facts, from the very beginning of the matter (even before Force Fuel came into existence) to the present state of affairs (Force Fuel being placed into business rescue and the investigations carried out in respect thereof) which were either common cause or undisputed on the application papers before this court and upon which the Respondents relied to support their various defences.

[55] It is not the intention of this Court to burden this judgment unnecessarily by setting out, *verbatim*, the facts and figures relied upon by the Respondents and so eloquently (and even concisely) placed before this Court by the Respondents' Counsel. Whilst this Court is acutely aware of the importance thereof insofar as the aforegoing are fundamental to the defences as raised on behalf of the Respondents, this Court (a) has taken due cognisance thereof and; (b) these will be dealt with, to one extent or another, by dealing with the Applicant's arguments in respect thereof. Perhaps most importantly, none of the aforegoing will be overlooked by this Court when

applying the correct legal principles to the facts in this matter.

[56] Adv Chohan SC, when presenting argument on behalf of the Respondents before this court, placed great reliance on the unreported judgment of the Western Cape Division (Cape Town), in the matter of *Standard Bank of South Africa Limited v Gounden and Another.*[19] In *Gounden* the court exercised its discretion and referred the matter to trial after considering the conduct of Standard Bank ("*the Bank*") and its involvement in the developments which lead to the company being placed under business rescue. It was submitted by the Respondents that the facts of the present matter are similar to those in *Gounden* on, *inter alia*, the basis that in *Gounden*:

56.1 the Bank had acted in a manner highly prejudicial both to the principal debtor and to the guarantors. The Respondents contended that in the circumstances they should be exempted from liability, *inter alia*, on the

[19] *(19577/2019) [2020] ZAWCHC 136 (28 October 2020)*

grounds of Public Policy;[20]

56.2 the Bank afforded overdraft facilities to the principal debtor in accordance with a model to enhance the growth of BEE enterprises. In particular, this model made provision for the Bank to obtain guarantees from a Trust, which enabled the Bank to meet its BEE obligations under the Banking Charter. This made it possible for the Bank to grant credit facilities to these enterprises which did not otherwise have access to suitable security[21];

56.3 the principal debtor was involved in the fuel business. During the course of the transaction the guarantors "dealt primarily with two individuals employed by the Bank, namely Eldon Pillay who held the position of Head: Growth and Acquisition Finance, and Luke Kirsten who was Head of Credit in Pillay's portfolio";[22]

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[20] *Gounden at paragraphs [17] and [46]*

[21] *Gounden at paragraph [21]*

[22] *Gounden at paragraph [20]*

56.4 neither Mr Pillay nor Mr Kirsten who were key to the events that took place deposed to any affidavit. Despite their obvious intimate involvement all the Bank did was to indicate in the replying affidavit that neither of these individuals were still employed by it. The Bank chose not to disclose in its papers why Mr Pillay and Mr Kirsten were no longer in its employ and why it was not possible for the Bank to nonetheless consult with either of the.[23]

[57] Having considered these facts Cloete J concluded that "*a referral to trial is warranted to prevent what may transpire to be an injustice to the respondents*"[24] and that "*it may result in an injustice to the respondents to refuse a referral to trial in the particular circumstances*".[25]

[58] It was therefore submitted on behalf of the

[23] *Gounden at paragraph [59]*

[24] *Gounden at paragraph [64]*

[25] *Gounden at paragraph [66]*

Respondents that in the event of this Court finding that it could not uphold the defence of Public Policy in application proceedings, it should refer this matter to trial as the present matter is on "*all fours*" with *Gounden*.

The Prejudice defence

[59] Whilst Adv Gilbert, at the conclusion of his argument before this court, submitted that it was this defence upon which the Respondents had relied the most, he also, at the commencement of that argument, had (as set out in the Applicant's Heads of Arguments) made the submission (correctly in the opinion of this Court) that it is somewhat difficult, from the application papers before this court, to ascertain the ambit of this defence.

[60] In the opinion of this Court the aforegoing difficulty has much to do with the nature of the defence itself and the fact that it appears to form the underlying basis for and is accordingly an integral part of the Public policy defence.

[61] The Applicant (correctly in the opinion of this Court) identifies the prejudice upon which the Respondents rely as that being the alleged breach of the Applicant to provide Force Fuel with, *inter alia*, extended overdraft facilities, thereby bringing about the commercial demise of Force Fuel to the prejudice of the Respondents. In response thereto the Applicant, once again, submits that there is no documentary evidence to support the averments of the Respondents but rather, documents have been placed before this Court which *do* support the version of the Applicant in respect of, *inter alia*, the issue of requests for overdraft facilities on behalf of Force Fuel.

[62] In any event, it was submitted on behalf of the Applicant that although Force Fuel may have wanted an increase in its overdraft facilities, it does not follow that the Applicant's refusal to furnish an increase constitutes legally cognisable prejudice that would result in the Respondents, as guarantors, being released from their obligations. Moreover, it was pointed out by Adv Gilbert that contrary to what is asserted in the Respondents'

Answering Affidavit, Force Fuel expressly recorded, in a letter to the Applicant on 26 March 2019, that the Applicant had not "*in any way breached its obligations to Force Fuel*".

[63] It was further submitted that there is no defence, in law, that prejudice caused by a creditor to a debtor releases guarantors of their obligations to the creditor in respect of the debt of that debtor. The Respondents as guarantors are not sureties and there is no "*prejudice*" defence available to them as guarantors. Further, Adv Gilbert submitted to this Court that even in the instance of sureties, such prejudice as may release a surety from a surety's obligations to the creditor must be prejudice that results from a breach by the creditor of some or other legal duty to the surety, which would typically be of a breach of the contract between the parties.[26]

[64] Adv Chohan SC, relying on *Caney*, submitted that the creditor must do nothing in the creditor's dealings with the principal debtor and the other

[26] *Bock and Others v Duburoro Investments (Pty) Ltd 2004 (2) SA 242 (SCA) , paragraphs [20] to [21], citing with approval the matter of ABSA Bank Limited v Davidson 2000 (1) SA 117 (SCA) at paragraph [19]*

sureties which has the effect of prejudicing the surety. If the creditor does the surety is released.[27] It was further submitted that, put differently, if the person guaranteed does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do and the omission proves injurious to the surety the surety will be discharged[28].

[65] In the premises, it was submitted on behalf of the Respondents that prejudice caused to the surety thus serves to release the surety if the prejudice is the result of breach of some or other legal duty or obligation.[29]

[66] According to Adv Chohan SC the common law position was later reiterated in *Jans v Nedcor Bank Ltd*[30] where it was held that "*at common law, for*

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[27] *The Law of Suretyship: Caney (4th Edition) at page 187*

[28] *Law of Contract in South Africa: Wessels (2nd Edition) at paragraph 4346; Pretorius: Release of Surety as result of Prejudice JBL, Vol 13, Part 2.*

[29] *ABSA Bank Ltd v Davidson [2000] 1 All SA 355 (A) at paragraph [19], endorsed in Bock (supra) at paragraphs 18 and 19*

[30] *[2003] 2 All SA 11 (SCA) (24 March 2003) at paragraph [30]*

example, a surety will be released if a creditor does something in his dealings with the principal debtor which has the effect of prejudicing the surety".[31]

[67] Following thereon, it was submitted that the authorities that apply to sureties apply equally to guarantors. No authority was placed before this Court as to why this should (or should not) be the case.

[68] Finally, Adv Chohan SC pointed out that it was clear on the application papers before this Court that the business rescue proceedings had concluded that the Applicant is to blame for the demise of Force Fuel. In light of the breach of the Applicant's duties to Force Fuel and the prejudice which it has caused to the Respondents and Force Fuel at large the Respondents submits that they stand to be discharged as guarantors.

The Agreement to Release defence

[69] The basis for this defence, as relied upon by the

[31] *Relying on Caney's The Law of Suretyship, 5th Ed at 205*

Respondents, has already been dealt with earlier in this judgment.[32] It was submitted by Adv Chohan SC that (a) the Applicant does not dispute that the parties agreed that the Respondents would be released from the guarantees upon the sale of the shares; (b) the Applicant's contention is simply that the agreement was that the Respondent would only be released once Labat had signed the guarantee; (c) the real question to be determined is whether such agreement was conditional upon the signing of a guarantee by Labat; (d) the Applicant bears the onus to prove that the agreement was conditional as alleged; and (e) the Applicant has failed to discharge that onus on a balance of probabilities, giving rise to the fact that this Court should dismiss this application.

[70] Adv Gilbert submitted to this Court that, apart from this defence being inconsistent with the other defences as raised by the Respondents, the Respondents were being opportunistic in attempting to create an argument that placed the onus on the Applicant to show that this agreement was

[32] *Paragraphs [18] to [22] ibid.*

conditional, whereas it was for the Respondents to prove, in the first instance, that there was an agreement that the Respondents would be released from the guarantees.

[71] It was further submitted that there is no onus upon the Applicant as alleged by the Respondents since it falls upon the party relying upon an agreement to prove fulfilment of a condition.[33] Further, it was submitted that it was common cause in the present matter that the condition was not fulfilled since Labat never signed the guarantee.

[72] In addition to the aforegoing, it was submitted that there is not a single document before this Court executed by the Applicant that states that the Applicant will release the Respondents from the guarantees and that it is farcical that the Applicant would release existing securities without being substituted. Adv Gilbert further relied upon subclauses 11.3 and 2.2 of the guarantees. On the Respondents' own version, they accept that any such release was not reduced to writing. The

[33] *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (AD) at 644G-H*

express terms of each guarantee preclude the Respondents from relying upon any release which is not in writing. Apart from subclause 11.3, which expressly provides that no consensual cancellation of the guarantee would be of any force or effect unless in writing and signed by or on behalf of the Applicant and the guarantor, subclause 2.2 of each of the guarantees further provides that:

"*This Guarantee shall only be terminated upon the full and final settlement of the Debts and full payment of the Guarantors' liabilities in terms of this guarantee, as confirmed in writing by the Bank*."

[73] The Respondents contend that the "*understanding*" that they be released as guarantors was reached during August 2018 but the documents that follow demonstrate that the guarantees remained in place. The letter from Walters on behalf of Force Fuel

dated 27 May 2018 unequivocally records the continued existence of the guarantees and seeks to persuade the Applicant to rely on those guarantees in granting a repayment *moratorium* to Force Fuel.

[74] In response to the aforegoing, Adv Chohan SC submitted that our law recognises that agreements can be concluded *tacitly* to replace previous agreements. It was further submitted that in an attempt to meet this argument the Applicant relies on the whole agreement clause in the guarantees and contends that such clause prohibits the release of the guarantors in the absence of a written agreement.

[75] The Respondents submit that there is no merit to such contention as the parties' agreement to release the Respondents was a self-standing agreement and, as such, does not constitute a variation of the guarantees. Following thereon, it was submitted that subclauses 11.3 and 2.2 which the Applicant seeks to rely upon for its contention do *not* operate to prohibit the parties from concluding agreements separate from the guarantees, as was done in terms of the August 2018 agreement. They only operate to prohibit variations or amendments of the guarantees.

The merits

[76] It is once again convenient to consider the merits of this matter, insofar as possible, in terms of the various defences as raised by the Respondents to the relief sought by the Applicant in this application.

The Public Policy defence (incorporating the "*Representations*" or "*Assurance*" defence as identified by the Applicant from the Respondents' affidavits and also raised by the Respondents' Counsel as part of the Public Policy defence).

[77] With regard to this defence and before dealing with the wider issue of public policy the first logical question to be asked and answered, if it is accepted for the purposes of argument that the assurance was indeed given by Pillay on behalf of the Applicant that the Applicant would not rely on the guarantees, is could the Respondents have reasonably relied thereon?

[78] It is once again imperative to note, in light of the submissions made by Adv Chohan SC before this Court,[34] that it is not necessary for this Court to consider the aforegoing question in the context of either estoppel or ostensible authority. In the premises, this Court shall take into consideration the facts which are either common cause or cannot be seriously disputed by either of the parties on the application papers and consider the probabilities in respect thereof.

[79] As already stated in this judgment, it can never be denied that, viewed in its totality, the genesIs of Force Fuel came about as a direct result of the development and implementation of the Applicant's policies in relation to the upliftment of previously disadvantaged businesspersons in the South African business sector. Of course, in the implementation thereof, it was also accepted that the Applicant would receive whatever "*rewards*" to which it was entitled in terms of the applicable legislation for extending favourable terms of credit. At the same time, it could never have been

[34] *Paragraph [24] ibid*

expected that the Applicant would place itself under extraordinary risk when lending large sums of money to enable projects of this nature to become realities. Lastly, both parties were fully aware that Pillay, as an employee of the Applicant, both by the position which he occupied within the structure of the Applicant and the various articles he had published, was a vehement proponent of the Applicant's policies in the upliftment of previously disadvantaged businesspersons in the South African business sector and was actively involved therewith.

[80] Against this background is the undeniable fact that the Applicant called for and obtained the guarantees from each of the Respondents. As correctly pointed out on behalf of the Applicant all of the documents spanning a period of two years

support the version of the Applicant. That is, at the end of the day, a straightforward commercial transaction. The Respondents have been unable to place before this Court a single document to support their case that the Applicant sought and obtained the guarantees from all of the

Respondents whilst never intending to act in terms of them should Force Fuel fail to discharge its liability to the Applicant.

[81] It is appropriate at this stage to deal with the reliance by the Respondents (as dealt with earlier in this judgment) on the matter of *"Gounden"*.[35]

[82] Whilst at first blush and for obvious reasons (not the least being the involvement of Pillay in both matters) it would appear that *Gounden* does provide support for the arguments put forward on behalf of the Respondents (including that of the matter potentially being referred to trial in respect of this defence) it is the opinion of this Court that, upon proper and careful consideration, *Gounden* is distinguishable from the present matter. In the first instance, in *Gounden*, there is not the lack of documents which would lay some factual basis for the version of the Respondents as is the case in the present matter. Secondly (and perhaps more fundamentally) *Gounden* is distinguishable from the

[35] *Paragraphs [56] to [58] ibid*

present matter in that in *Gounden* the defence raised was that IDC and implicated Le-Sol directors had perpetrated a fraud upon the guarantors which resulted in them giving the guarantees and being liable in terms thereof. It was further averred that Standard Bank had full knowledge of and effectively participated in the said fraud. In the premises, those facts, if established at trial, would amount to the breach of a legal duty owed by the Bank to the guarantors and would sustain a defence that enforcement of the guarantees would be against public policy. On the other hand, in the present matter, the Respondents have failed to establish that the Applicant has breached a *legal* duty such as one flowing from a contract.[36]

[83] Another distinguishing factor between *Gounden* and the present matter relates to the failure of the Applicant in both matters to place any evidence by

Pillay before the court and only explaining, in reply, that he is no longer employed by the Applicant and therefore that it has not been able to consult with him. Whilst the aforegoing is common to both

[36] *ABSA Bank Ltd v Davidson (supra)*

matters, in *Gounden* the same applies to one Kirsten who was also intimately involved in matters crucial to the outcome of the application. However, in the present matter the Applicant did file confirmatory affidavits by the employees who were involved in the matter, with particular reference to one Anaekwe. Whilst the failure of the Applicant to deal with the lack of evidence from Pillay in its Founding Affidavit and the paucity of its explanations in its Replying Affidavit, may cause some concern, this is clearly outweighed by the total lack of any documentary evidence on behalf of the Respondents (as set out above) and the failure of the Respondents to establish a legal duty breached by the Applicant.

[84] Taking all of the aforegoing into consideration, this Court finds that it is improbable that an employee or employees of the Applicant ever made the representations and that the Respondents were

ever given the assurances that the Applicant would not rely on the guarantees. These probabilities will become even more apparent when examining the other defences as raised by the Respondents.

[85] In addition thereto, subclause 11.2 of each guarantee expressly provides that "*No party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, ...*" This Court finds that the Respondents are precluded, by the express terms of the guarantees, from relying on such an assurance even if such had been given since it is not recorded in any of the guarantees.

[86] With regard to the contention of the Respondents that the guarantees should not be enforced on the grounds of public policy, as noted earlier in this judgment,[37] both parties relied on *Beadica* as support for their respective arguments as to why this Court should or should not decide this matter on, *inter alia*, the grounds of public policy.

[87] The principles as set out in *Beadica* (by which this court is obviously bound) are not disputed by either party. All the respective parties have done is to

[37] *Paragraphs [45] to [53] ibid*

simply highlight those principles which, *prima facie*, support the argument that party wishes to advance to the detriment of the other principles also encapsulated in *Beadica* (and the jurisprudence which preceded *Beadica*). This Court must not be distracted or sidelined thereby. Rather, this Court should, when applying the correct principles of law to the accepted facts, ensure the correct balance between freedom of contract and considerations of public policy, properly and fairly consider and apply, all of the relevant principles of law as enunciated in *Beadica* (which, like the present matter, was set against the background of Black Economic Empowerment).

[88] In *Beadica*, Theron J (writing for the majority) provides an extremely informative recital of the role of the Constitution, fairness, reasonableness, justice and *Ubuntu*, insofar as these impact upon our law of contract.[38] In doing so, the Constitutional Court recognised the profound impact of the Constitution on the enforcement of contractual terms through the determination of

[38] *Beadica at paragraphs [71] to [78]*

public policy.[39] Following thereon, Theron J noted that "*A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy*."[40]

[89] The learned Judge also noted[41] how an examination of our case law "*...demonstrates how abstract values have informed the development of new doctrines*." Finally, it was held[42] that:

"*The scope for the development of new common law rules in our law of contract is broad. The common law must be developed so as to promote the spirit, purport and objects of the Bill of Rights. Constitutional values have an essential role to play in the development of constitutionally-infused common law doctrines*."

[90] However, as relied upon earlier in this judgment by the Applicant, in discussing the perceived

[39] *Beadica at paragraph [71]*

[40] *Beadica at paragraph [71]; Napier v Barkhuizen 2006 (4) SA 1 (SCA) at paragraph [13]*

[41] *Beadica at paragraph [77]*

[42] *Beadica at paragraph [78]*

divergence between the Constitutional Court and the SCA,[43] it was held[44] by Theron J that:

"*...abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships*."

Rather, as further held by the learned Judge[45] abstract values (such as fairness, reasonableness and justice, all encompassed by *Ubuntu* whilst not providing the basis as set out above) "*...perform creative, informative and controlling functions*."

[91] Moreover, as also relied upon by Adv G Gilbert but worth repeating in this judgment the court in *Beadica*[46] held:

"*However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-*

[43] *Beadica at paragraph [78]*

[44] *Beadica at paragraph [79]*

[45] *Beadica at paragraph [79]*

[46] *At paragraph [80]*

standing status as contractual requirements. The application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms when the term or its enforcement would be contrary to public policy. It

is only where a contractual term or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it."[47]

[92] In dealing with the principles of "*pacta sunt servanda*" and "*perceptive restraint*" the Constitutional Court in *Beadica*.[48] sets out the former clearly as follows:

"*[83] The first is the principle that "[p]ublic policy demands that contracts freely and consciously entered into must be honoured. This Court has emphasised that the principle of* ***pacta sunt servanda*** *gives effect to the "central constitutional values of freedom and dignity". It has further recognised that* ***in general*** *public policy requires*

[47] *Emphasis added*

[48] *At paragraphs [83] to [85]*

that contracting parties honour obligations that had been freely and voluntarily undertaken. ***Pacta sunt servanda*** *is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contract through the instrument of public policy, as it gives expression to central constitutional values.*

[84] Moreover, contractual relations are the bedrock of economic activity and our economic development dependant, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] The fulfilment of many of the rights and promises made by our Constitution depends on

sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle ***pacta sunt servanda***."

[93] Having considered what, in the opinion of this Court, are the relevant principles of law applicable to the present matter and as enunciated in *Beadica*, it is clear that, insofar as the defence raised by the Respondents that the guarantees should not be enforced on the grounds of public policy, when the aforesaid principles are applied to the accepted facts of this matter (as set out earlier in this judgment) then this defence must fail. In addition to the finding of this Court that the Respondents have failed to prove that the Applicant has breached a legal duty, this Court finds that there is nothing in the guarantees or the enforcement thereof, even after careful consideration of all the

facts so carefully set out by Adv Chohan SC,[49] that would be so unfair, unreasonable or unjust that would justify the interference of this Court on the grounds of public policy. Also, the abstract values relied upon by the Respondents in the present matter do not, on their own, provide a free-standing basis upon which this court may interfere in the contractual relationship between the Applicant and Respondents.

[94] It must follow that the Respondents have failed to discharge the onus incumbent upon them[50] to prove that the enforcement of the guarantees would be contrary to public policy. In the premises (borrowing from and adding to the wording of Theron J in *Beadica*)[51] the case of the Respondents must suffer the same fate as that of the applicant in *Barkhuizen* and the applicants in *Beadica*.

The Prejudce defence

[95] The submissions made on behalf of both parties in

[49] *Paragraph [55] ibid*

[50] *Mobil Oil Southern Africa v Mechin 1965 (2) SA 706 AD*

[51] *At paragraph [95]*

respect of this defence have been dealt with earlier in this judgment.[52] As is clear therefrom there is, in the first instance, a dispute between the Applicant and the Respondents, as a matter of law, as to whether the principle that applies to a surety, namely, that a surety will be released from his or her obligations in terms of a Deed of Suretyship in the case where a creditor deals with the principal debtor to the prejudice of the surety, applies equally to the case in respect of a guarantee. That is, whether a guarantee is released from his or her obligations in terms of a Guarantee if the guarantor deals with the principal debtor to the prejudice of the guarantee. The Respondents submit that the answer to the aforegoing is in the affirmative whilst the applicant adopts the opposite position.

[96] It is the opinion of this Court that it is unnecessary for this Court to decide this point of law. This is so, since even assuming in favour of the Respondents on this point the ultimate decision of this Court pertaining to the defence of Prejudice, as raised by the Respondents, remains unaffected thereby.

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[52] *Paragraphs [61] to [76] ibid*

[97] Insofar as the previous defence (Public Policy defence) as raised by the Respondents was held by this Court to fail on the basis that, *inter alia*, the Respondents in the present matter have failed to establish that the Applicant had breached a *legal* duty,[53] that finding is equally applicable to the defence of Prejudice. In the premises, this defence must fail.

[98] Whilst the Respondents accept that for this defence (Prejudice) to succeed the Applicant must have acted in breach of an obligation the Respondents have failed to prove (a) an obligation and (b) the breach thereof, even if established. In this regard the Respondents seek to establish a contractual obligation on the part of the Applicant by reference to express, *alternatively* implied, *alternatively* tacit, material terms of two medium term loan agreements and a banking facilities agreement ("*the agreements*") entered into between the Applicant and Force Fuel. The only express term relied upon by the Respondents is subclause 18.13 of the

[53] *Paragraph [93] ibid*

"*Banking Facilities Agreement*" ("*BFA*") which has the heading "*Good Faith*" and reads as follows:

"*The Parties undertake at all times to do all such reasonable things, perform all such reasonable actions and take all such reasonable steps open to them and necessary for or incidental to be putting into effect or maintenance of the terms, conditions and/or import of the Agreement, provided that nothing herein shall prevent the Bank from exercising its rights under the Agreement in the event of the occurrence of an event of default contemplated in clause 13*."[54]

[99] The remaining terms upon which the Respondents seek to rely, namely the spirit, purport, values and objects of the Constitution, including, *inter alia*, dignity, equality, fairness and *Ubuntu*, together with obligations arising, *inter alia*, from the BEE Act (read with its Codes) and the Financial Sector Charter, are all alleged to be implied, *alternatively*, tacit terms of the agreements. In this regard, not only have the Respondents failed to clearly identify specific obligations which the Applicant is alleged

[54] *Emphasis added*

to have breached but the Respondents have failed to discharge the onus incumbent upon them to prove that the Applicant has, in fact, acted in breach thereof.

[100] Certainly, there is nothing to show, on the application papers before this Court, that the Applicant did not act *reasonably* when putting into effect or maintaining the terms, conditions and/or import of the BFA read with the guarantees. Also, sight should not be lost of the important proviso which forms part of subclause 18.13 of the BFA as set out above.[55] Clause 13 of the BFA is headed "*Events of Default*". This judgment will not be burdened further by setting out the provisions thereof. It is self-explanatory that this clause deals with the events which constitute default on the part of the borrower which entitle the Applicant to exercise its rights in terms of, *inter alia*, the BFA.

[101] At best for the Respondents, what may be ascertained from the application papers, is an allegation that there was an obligation upon the

[55] *Paragraph [98] ibid*

Applicant to support the Respondents as beneficiaries of BEE. Assuming in favour of the Respondents that such an obligation did indeed exist the Respondents appear to base the breach by the Applicant thereof on two premises. These are (i) the duty to advance a R25 million overdraft facility; and (ii) the duty to maintain the 70/30 debt: equity ratio.

[102] With regard thereto, it is common cause that, contractually, the Applicant agreed to advance only a R10 million overdraft facility. Arising therefrom the submission by the Applicant that there was a duty upon the Applicant to advance Force Fuel an

overdraft facility of R25 million is absurd, carries some weight. Further, it was always open to the Respondents (through the vehicle of Force Fuel) to reject the offer of R10 million as being insufficient. However, they accepted same; acquired the business and went on to trade for a period of approximately three years. Also, whilst on the one hand the Respondents complain (and lay the blame at the door of the Applicant) that the business could not sustain the financing that *was* made available

by the Applicant (R10 million) but nevertheless contend that the Applicant had an obligation to provide a further R15 million finance to Force Fuel. Finally, as correctly pointed out by the Applicant the Respondents have failed to place any evidence before this Court that had the further facility been provided by the Applicant the business would have survived.

[103] As to the Respondents' reliance on the Applicant's alleged duty to maintain the 70/30 debt: equity ratio, accepting for the sake of argument that such a duty even existed and that the Applicant may well have expressed a wish to change this ratio, it is

common cause in this matter that the Applicant never did so. The credit facilities were only terminated on 12 March 2021 after the commencement of business rescue proceedings on 5 May 2020 as a result of, *inter alia*, non-payment. This termination had nothing to so whatsoever with the Applicant's insistence upon a change in respect of the debt: equity ratio. In the premises, there can be no breach of this obligation by the Applicant assuming such an obligation even existed.

[104] In any event, during the course of seeking a repayment *moratorium* from the Applicant, as dealt with earlier in this judgment, Walters (a guarantor and the Fifth Respondent in this application) expressly recorded, in writing, that the Applicant had never breached any of its obligations.[56] Having regard to all of the aforegoing, this Court holds that the Respondents cannot successfully rely on the defence of Prejudice to avoid the enforcement of the guarantees and the granting of the relief sought in the Respondents' counter-application.

The Agreement to Release defence

[105] The principal points of departure between the Applicant and the Respondents in respect of this defence raised by the Respondents are twofold. Firstly, as a matter of law, whether the Respondents can rely on this defence at all and secondly, as a matter of fact, whether there was an agreement to release the Respondents from the

[56] *Paragraph [62] ibid*

guarantees and, if so, whether such agreement was conditional upon Labat being substituted as a guarantor in their place.

[106] With regard to the first question the Applicant relies upon subclauses 2.2 and 11.3 of the guarantees[57] in support of the argument that the Respondents are precluded thereby from raising this defence. As already dealt with, in passing, earlier in this judgment, this argument was countered by the Respondents on the basis that the agreement reached was a new or separate agreement. As such, it was not a variation or amendment of the original agreement and was therefore not subject to the aforesaid subclauses of the guarantees.[58]

[107] In the matter of *Ferreira and Another v SAPDC (Trading) Ltd*[59] the erstwhile Appellate Division ("*AD*") held"*...while an oral agreement varying (at least materially) in terms of a contract of the kind in question is not permissible, there is no objection to*

[57] *Paragraph [72] ibid*

[58] *Paragraphs [74] and [75] ibid*

[59] *[1983] 3 ALL SA 346 (A) 1t 356*

allowing proof of an oral agreement relating to the cancellation for the contract by which its terms as such are not placed in issue."[60]

[108] Similarly to the present matter, *Ferreira* was concerned with whether an oral agreement as pleaded constituted a cancellation of a suretyship undertaking or merely a variation of its terms. In addressing this question the AD held that the true view is that the oral agreement terminated the operation of the contract, with all its terms, *in futurum*, so as to preclude the coming into being of any further obligations. In other words, the oral agreement extinguished the contract as a source of future obligations while keeping alive obligations already approved by virtue of its operation in the past. This would not in any way involve a variation of the terms of the contract.[61]

[109] This dictum has been endorsed by the SCA in the matter of *Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company*

[60] *Emphasis added*

[61] *At 358*

(South Africa) Limited.[62] *where* it was held[63] that:

"...those observations are particularly pertinent to a contract that gives rise to continuing obligations... To allow evidence of such an agreement does not open the door to let in any dispute as to the terms of the original contract: these remain certain and unaffected by any possible dispute as to the fact or the contents of the subsequent oral agreement. ... To that extent it is an agreement for the cancellation of the contract in futurum only, and not a cancellation ab initio. Such an agreement does not constitute a variation of the terms of the contract, as such, and accordingly it is valid and can be proved without doing violence to the requirements of the original contract."[64]

[110] In order to establish a tacit agreement the conduct of the parties must be analysed to determine whether the requisite consent was reached. This was expressed by the SCA *in Klub Lekkerrus/Libertas v Troye Villa (Pty) Ltd and*

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[62] *(288/2017) [2018] ZASCA 09 (1 March 2018)*

[63] *At paragraph [13]*

[64] *Emphasis added*

Others as follows:[65]

"*To conclude – there can be little doubt on the evidence that tacitly new agreements of sale on the same term as agreement "E" and "F" had been concluded between the parties. The above references provide ample evidence of the parties' conduct justifying the inference of the parties had the requisite consensus. New agreements had therefore tacitly come into being. These plaintiffs' reliance on the non- variation clauses cannot be upheld.*"[66]

[111] The same applies to subclauses 2.2 and 11.3 which require that the release of the guarantors be in writing. The import of such clauses was considered by the SCA in the matter of *HNR Properties CC v Standard Bank of SA Ltd*[67] where it was held[68] that:

"*This [clause] does not mean that when construing a writing it is impermissible to have regard to*

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[65] *[2011] 3 All SA 597 (SCA) (1 June 2011) at paragraph [28]*

[66] *Emphasis added*

[67] *2004 (4) SA 471 (SCA)*

[68] *At paragraph [16]*

background circumstances or, in the event of ambiguity, surrounding circumstances. Nonetheless, in every case the intention to release must appear from the writing itself. It may be explicit or implicit. But if the latter, the intention to release must be apparent from the writing on an ordinary grammatical construction of the words used or, stated differently, the release of the surety must be a necessary implication of the words used."[69]

[112] As is clear from that set out above, there would be no obstacle, *in law*, to the Respondents being released from their obligations in terms of the guarantees should the Respondents prove, on a balance of probabilities, that a separate agreement was reached to that effect. Clearly the onus of proving same falls upon the Respondents.[70] The Applicant cannot rely on subclauses 2.2 and 11.3 of the guarantees as a means to counter the Agreement to Release defence as raised by the Respondents.

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[69] *Emphasis added*

[70] *Resisto (supra); Mobil Oil (supra)*

[113] The next question that arises was whether, on the application papers before this Court, the Respondents have shown that such an agreement was entered into and, if so, whether the agreement to release was conditional upon Labat being substituted as a guarantor, it being common cause that Labat never signed the guarantee. With regard hereto the submissions of the parties have, to some extent, already been dealt with earlier in this judgment[71]. __

[114] Further to the aforegoing, cognisance must be taken of the submissions made by Adv Gilbert that it is not common cause (as was submitted by Adv Chohan SC) that there was an agreement to release, whether conditional or unconditional. In that regard, he referred this court to the relevant portions of the Applicant's Replying Affidavit and submitted that the Applicant's version was clear in that regard. Rather, it is the Applicant's version that the Applicant would *"consider releasing the first to eighteenth respondents from their*

[71] *Paragraphs [69] to [75] ibid*

guarantees but only if and when Labat provided a guarantee in a sum of R90, 400, 000 in substitution of the Guarantees, together with a pledge of the shares that Labat would acquire in Force Fuel Properties. The applicant also required that the nineteenth respondent (Chronos) and the twentieth respondent (Main Street 1384) pledge their shares in Labat as security". In support of the aforegoing the Applicant relied on the *Addendum to Banking Facilities Letter*, together with the confirmatory affidavit of Anaekwe. The Applicant's reliance on the aforesaid addendum is interesting since it was put up as an annexure to the Respondents' Answering Affidavit in support of the Agreement to Release defence. It is presumed that the Applicant's reliance thereon is on the basis that same makes no mention of the release of the

Respondents from the guarantees once Labat provides a guarantee.

[115] The "*high water*" mark of the Respondents' case in respect of this defence is that the Respondents allege "*that the* ***understanding*** *between the Bank (Applicant); Labat and Force Fuel's shareholders,*

that upon the sale of (the) business, we (the Respondents) would be released as guarantors and that to the extent that the bank (the Applicant) required further collateral, it would obtain same from Labat." This "*understanding*" simply does not fit either the objective facts of the present matter or the probabilities thereof. In fact, once one strips the matter of its apparent complications and examines it along the simple lines of a straightforward commercial transaction (which must follow in light of the failure of the previous two defences as raised by the Respondents) then, once again, the singular lack of any documentary evidence whatsoever to support the case put forward by the Respondents, must be resolutive thereof.

[116] In stark contrast thereto, as already dealt with earlier in this judgment, there is *real* documentary evidence before this Court which negates any such understanding (let alone an actual or even tacit agreement)[72]. Taking the aforegoing into careful consideration and taking all of the facts of this

[72] *Paragraph [73] ibid*

matter into account, it is difficult not to accept the submissions made by Adv Gilbert that not only did the parties never enter into such an agreement but further, that it is fanciful that the Applicant would release existing securities without first being substituted.[73]

[117] This court accordingly finds that the Agreement to Release defence, as raised by the Respondents, must fail. Even if this court accepts (which it does not) that an agreement was reached between the parties that upon Labat signing the guarantee the Applicant would release the Respondents from their guarantees, it is common cause that this condition, if it existed, has not been fulfilled. In the premises, no purpose would be served in granting the Respondents the alternative relief sought, namely referring the application and counter-application, to trial.

Conclusion

[118] The defences as raised by the Respondents have failed. In each and every instance, no purpose

[73] *Paragraph [72] ibid*_

would be served in referring any of those defences to trial or any of the issues in this matter for the hearing of oral evidence. To do so would be impermissible and an incorrect exercise of the discretion vested in this Court in that regard. One cannot refer an issue to trial to look for a defence. It must exist first. The referral to trial is to allow a respondent, in the interests of justice, to raise it.

[119] There is (and this is common cause) no bar to the Applicant's claim as set out in the Draft Order handed into court. In the premises, judgment should be granted in favour of the Applicant as set out therein.

[120] With regard to the issue of costs, it is trite that a court has a general discretion in respect thereof. It is further trite that, unless exceptional or unusual circumstances exist, costs should normally follow the result. No such circumstances exist in this matter. The Applicant asks for the costs of two Junior Counsel. The Respondents were represented by Senior Counsel and Junior Counsel. This Court

is satisfied that the matter was of sufficient complexity and volume to demand the attention of two Counsel. In the premises, there is no reason to interfere with the costs order as set out in the aforesaid Draft Order.

[121] A final word. This judgment should in no way be seen to be a pronunciation of an exclusionary attitude towards, or a criticism of, the nature of the defences as raised by the Respondents in the present application. As stated at the very beginning of this judgment[74] there is often a very real tension in the commercial world between *inter alia*, freedom of contract; constitutional rights; protection of commercial interests and the upliftment of previously disadvantaged persons in the South African business sector in terms of appropriate legislation. As such, it is the often difficult task of our courts to, in applying the correct principles of law, ensure an optimum balance thereof, thereby ensuring protection of constitutional rights whilst at the same time promoting economic development. Given a different set of facts

[74] *Paragraph [1] ibid*

and presented with clearer documentary evidence, there is no reason why the defences as raised by the Respondents (in another matter) may not have received the favour of this Court (or at the very least, have resulted in the referral of the matter to trial).

Order

[122] This court makes the following order:

1. Judgment is granted against the First Respondent for:

1.1. R13 452 000.00;

1.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

1.3. costs of suit, including the costs of two Counsel.

2. Judgment is granted against the Second Respondent for:

2.1. R13 452 000.00;

2.2. interest thereon at the prescribed rate of interest of

7% per annum as from 1 April 2021 to date of final payment;

2.3. costs of suit, including the costs of two Counsel.

3. Judgment is granted against the Third Respondent for:

3.1. R4 710 000.00;

3.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

3.3. costs of suit, including the costs of two Counsel.

4. Judgment is granted against the Fourth Respondent for:

4.1. R4 710 000.00;

4.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

4.3. costs of suit, including the costs of two Counsel.

5. Judgment is granted against the Fifth Respondent

for:

5.1. R4 710 000.00;

5.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

5.3. costs of suit, including the costs of two Counsel.

6. Judgment is granted against the Sixth Respondent for:

6.1. R17 400 000.00;

6.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment,

6.3. costs of suit, including the costs of two Counsel.

7. Judgment is granted against the Seventh Respondent for:

7.1. R5 080 000.00;

7.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

7.3. costs of suit, including the costs of two Counsel.

8. Judgment is granted against the Eighth Respondent for:

8.1. R13 542 000.00;

8.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

8.3. costs of suit, including the costs of two Counsel.

9. Judgment is granted against the Ninth Respondent for:

9.1. R13 542 000.00

9.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

9.3. costs of suit, including the costs of two Counsel.

10. Judgment is granted against the joint estate of the Tenth and Eleventh Respondents for:

10.1. R5 800 000.00;

10.2. interest thereon at the prescribed rate of interest

of 7% per annum as from 1 April 2021 to date of final payment;

10.3. costs of suit, including the costs of two Counsel.

11. Judgment against the Twelfth Respondent for:

11.1. R5 800 000.00;

11.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

11.3. costs of suit, including the costs of twoCcounsel.

12. Judgment against the joint estate of the Thirteenth and fourteenth respondents for:

12.1. R6 280 000.00,

12.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

12.3. costs of suit, including the costs of two Counsel.

13. Judgment against the joint estate of the Fifteenth and Sixteenth Respondents for:

13.1. R5 800 000.00;

13.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

13.3. costs of suit, including the costs of two Counsel.

14. Judgment is granted against the joint estate of the Seventeenth and Eighteenth Respondents for:

14.1. R5 800 000.00;

14.2. interest thereon at the prescribed rate of interest of 7% per annum as from 1 April 2021 to date of final payment;

14.3. costs of suit, including the costs of two Counsel.

15. Judgment is granted against the Nineteenth respondent for:

15.1. R9 437 448.66;

15.2. Interest on R9 437 448.66 at the agreed rate of 9.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

15.3. R49 444 437.01;

15.4. Interest on R49 444 437.01 at the agreed rate of 8.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

15.5. R16 800 000.00;

15.6. Interest on R16 800 000.00 at the agreed rate of 8.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive; and

15.7. R6 607.67;

15.8. Interest on R6 607.67 at the agreed rate of 9% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

15.9. Costs of suit, including the costs of two Counsel.

16. Judgment is granted against the Twentieth Respondent for:

16.1. R9 437 448.66;

16.2. Interest on R9 437 448.66 at the agreed rate of 9.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date

of final payment, both dates inclusive;

16.3. R49 444 437.01;

16.4. Interest on R49 444 437.01 at the agreed rate of 8.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

16.5. R16 800 000.00;

16.6. Interest on R16 800 000.00 at the agreed rate of 8.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

16.7. R6 607.67;

16.8. Interest on R6 607.67 at the agreed rate of 9% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

16.9. Costs of suit, including the costs of two Counsel.

17. The judgments granted in respect of sub-paragraph 1 of each of paragraphs 1 to 14 above and sub-paragraphs 15.1 to 15.8 and 16.1 to 16.8 above are joint and several as between the Respondents,

one paying the others to be absolved.

18. The total amount recoverable by the applicant under sub-paragraph 1 of each of paragraphs 1 to 14 above and sub-paragraphs 15.1 to 15.8 and 16.1 to 16.8 above shall not exceed the sum of the following amounts:

18.1. R9 437 448.66, together with interest thereon at the agreed rate of 9.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

18.2. R49 444 437.01, together with interest thereon at the agreed rate of 8.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive;

18.3. R16 800 000.00, together with interest thereon at the agreed rate of 8.5% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive; and

18.4. R6 607.67, together with interest thereon at the

agreed rate of 9% per annum, calculated daily and compounded monthly in arrears from 24 December 2020 to date of final payment, both dates inclusive.

19. The Respondents' counter-application is dismissed with costs, including the costs of two Counsel, to be paid by the respondents jointly and severally the one paying the others to be absolved.

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B. C WANLESS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing:	14 and 15 of August 2023
Date of judgment:	15 February 2024

Appearances

On behalf of the Plaintiff:	Adv, B. M Gilbert Adv. M. Ramabulana-Mathiba
Instructed by:	Claassen Inc.
On behalf of the Defendant:	Adv. M Chohan SC Adv. Kutumela
Instructed by:	Lawtons Inc.