

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 35888/2022

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| (1) | REPORTABLE: NO. | |
| [1] | (2) OF INTEREST TO OTHER JUDGES: NO. | |
| [2] | (3) REVISED: NO. | |
| [3] | 26/04/2024 | _____ |
| [4] | DATE | SIGNATURE |

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

TREVOR THABANG MOKOENA

First respondent

RONALD MNDENI NDEBELE

Second respondent

NONTLANTLA PORTIA NDEBELE

Third respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 26 April 2024.

JUDGMENT

MEIRING, AJ:

INTRODUCTION

- [1] Under two suretyships, the applicant FirstRand Bank Limited seeks an order directing the first and second respondents to pay to it two amounts, namely R5,785,407.49 plus interest, and R181,775.92 plus interest.
- [2] The first respondent opposes the application. The second respondent does not oppose it. Nor does the third respondent, who is cited only because she is married to the second respondent in community of property.
- [3] The first respondent advances three defences. The first is the dilatory special plea of *lis alibi pendens*. In his heads of argument, the first respondent casts this special plea in a second guise, too, namely that the applicant's claim breaches the prohibition of double jeopardy.
- [4] On the merits, the first respondent raises two defences. First, he says that the applicant cannot rely upon the suretyship that he signed without first having exhausted the remedial plan provided for in the loan agreement to which the suretyship is accessory. Second, he says that the applicant failed or refused to reissue to SmartPurse Solutions (Pty) Ltd, the principal debtor (to which I refer below as SmartPurse), a third-party payment processor (TPPP) certificate for the year starting 1 March 2022, which refusal, he says, means that the applicant approaches this court with unclean hands.
- [5] I deal first with two other preliminary points, before considering this range of defences.

SERVICE

- [6] Neither the second, nor the third respondent has taken any steps in this application.
- [7] On 27 October 2023, the applicant delivered a service affidavit to which a candidate legal practitioner in the employ of its attorneys of record had deposed the previous day. The object of that affidavit, the candidate says, is to

“demonstrate ... the applicant effected proper service of the application issued against the respondents in accordance with the Uniform Rules of Court”.

- [8] The candidate goes on to describe the service upon the second and third respondents. In error, he says that on 24 October 2023 it had been effected upon them. However, the sheriff’s enclosed returns of service indicate that service had indeed been effected upon both the second and third respondents through service upon the third respondent at the address 41 Integra Drive, Breananda, in Krugersdorp, just after 11:00 on 24 October 2022, four days after the application had been issued. It seems clear that the use by the candidate legal practitioner of the year 2023 is a clerical error in his description of the applicable service. (Indeed, he makes the same clerical mistake in respect of service on the first respondent.) The Krugersdorp address stated above, which the sheriff describes as the *domicilium citandi et executandi* of the second and third respondents, is indeed the address that they inscribed in manuscript at the foot of the second respondent’s suretyship agreement.

CONDONATION

- [9] This application was brought on 20 October 2022. The answering affidavit was due within fifteen days after the respondents had given notice of their intention to oppose. The answering affidavit of the first respondent was delivered only on 10 February 2023.
- [10] The first respondent seeks condonation for the late delivery of his answering affidavit. He explains that, under rule 35, he had sought a clearer copy of the loan agreement. In December 2022, Mr Ndobe, representing him, had also experienced difficulties accessing his e-mail messages because of damage wrought to his laptop computer. The first respondent avers that the lateness of the delivery of the answering affidavit has caused no prejudice. The applicant does not oppose the condonation sought.
- [11] In my view, in these circumstances, good cause has been demonstrated for condonation. It is in the interests of justice that condonation be granted.¹ Accordingly, the late delivery of the answering affidavit is condoned.

FACTS

The loan agreement and the suretyships of 12 April 2017

[12] On 12 April 2017, in Sandton, the applicant and SmartPurse concluded a written loan agreement, comprised of a loan schedule and appendix 1, namely the applicant's standard terms and conditions.

[13] Under that agreement, the applicant would advance R9m to SmartPurse, so that it might acquire Portion 12 of Erf 1159 Sunninghill, Extension 74, in Gauteng. Over 84 months, SmartPurse would repay the loan, including interest, in monthly instalments of R154,101.93. SmartPurse would register a first covering bond of R9m over the property.

[14] The first and second respondents were both directors of SmartPurse. When the applicant's Ms Ndimande deposed to the founding affidavit, Mr Mokoena was the sole director of SmartPurse. Mr Ndebele had formerly been a director, but by then he was no longer one.

[15] Also on 12 April 2017, the first and second respondents executed two separate suretyship agreements in favour of the applicant. Under them, Messrs Mokoena and Ndebele bound themselves irrevocably and unconditionally as surety and co-principal debtor, jointly and severally *in solidum* with SmartPurse, for the latter's due and punctual payment of all monies that it might then have owed or would from time to time come to owe to the applicant. The first respondent's liability under the suretyship that he concluded was capped at R9m; that of the second respondent, at R7m. They both renounced the benefit of excussion.

Further terms of the loan agreement

[16] Under the loan agreement, an event of default included SmartPurse's failure to pay an amount due under the loan agreement; its failure punctually to pay municipal fees, charges, rates or taxes (and the like) for the property (and not remedying such breaches within seven days of notice having been given); and its failure, during the term of the loan agreement, to record a trading profit in one or more years of trading (unless the applicant in writing condoned it).

[17] Were SmartPurse to commit an event of default, the applicant would be entitled to accelerate or demand payment of all the amounts owing, to call up or execute any security document, and to charge interest on the outstanding loan.

Implementation of the loan agreement and the difficulties that arose

[18] The applicant advanced to SmartPurse the loan amount of R9m. Some years into the term of the loan agreement, SmartPurse ran into difficulties.

[19] On 19 October 2021, the applicant wrote to SmartPurse, referring to clause 9.3.5 in appendix 1, which obliges the respondent to “*provide FNB with such other material information in relation to the Borrower’s financial affairs as FNB may from time to time reasonably require on 5 Business Days notice to the Borrower*”. It added that SmartPurse’s failure to provide “*the necessary information*” was an event of default under clause 14.2.12 in appendix 1.

[20] In error, that letter suggests that by then SmartPurse was in that regard already in default (“*Should the above default not be remedied within 5 (five) days or in the event of any further defaults or breaches ...*”). Be that as it may, in the applicant’s own words in the founding affidavit, SmartPurse was thus “*given until 26 October 2021 to furnish the Bank with the documents as requested*” (yet the letter does not specify that date). The applicant also observed: “*The Company [sc. SmartPurse] provided the Bank with the financial information on 21 October 2021.*” Logically, therefore, by responding timeously SmartPurse was not in default as far as clause 9.3.5 was concerned.

[21] Some months later, difficulties arose again. On 17 March 2022, the applicant sent another letter to SmartPurse. In the founding affidavit, that letter is called “*a further breach letter*”. Yet, as I read it, this was the first breach letter under the loan agreement. It included this passage:

- “3. *The current outstanding balance in terms of the loan ... is R6,298,775.87 plus interest and fees.*
4. *In terms of clause 3.4 of the Loan Agreement you have committed to repay the loan plus interest thereon within the repayment period of 84 months by way of equal monthly instalments.*
5. *As per our records you are currently in arrears on the loan repayments for an amount of R46,116.27 which amounts*

- to an event of default in terms of clause 14.2.2 of Appendix 1 of the Loan Agreement.
6. In terms of clause 9.3.10 of Appendix 1 of the Loan Agreement, the Borrower undertook to pay all rates and taxes in respect of the property, the Bank hereby requests a copy of the latest rates and taxes municipal statement reflecting evidence thereof, failure to provide this statement will amount to an event of default in terms of 14.2.6 of Appendix 1 of the Loan Agreement.
 7. In terms of clause 13.1 of Appendix 1 of the Loan Agreement you have undertaken to insure the Property to the Bank for the entire period from disbursement date to termination date of the loan and as per our records the debit order for the insurance was returned unpaid. We require confirmation that the premiums for the insurance policy are up to date and Failure to provide confirmation that insurance policy has been renewed, will amount to an Event of Default in terms of clause 14.2.20 of Appendix 1 of the Loan Agreement.
 8. In terms of clause 14.1.17 of Appendix 1 of the Loan Agreement an Event of default shall occur if the Borrower has fails to record a trading profit for one or more years. The financial information received on 21 October 2021 reflect losses for the financial year of 2020 and 2021.
 9. Should all the above defaults not be remedied within 14 (fourteen) days or in the event of any further defaults on your loan repayments or breaches on the Loan Agreement, the Bank, in terms of clause 15.3 of Appendix 1 of the Loan Agreement, will have the right without further notice to the Borrower, to:
 - 9.1 Claim full repayment of the outstanding Loan Balance;
 - 9.2 Charge interest on the outstanding Loan Balance at the default Penalty Rate of 5% from the date of default until the date on which the default is rectified; and
 - 9.3 Levy execution against the mortgaged property.”

[22] In response to that letter, on 7 April 2022 SmartPurse wrote to the applicant, *inter alia* as follows:

- “This letter serves to respond to the requests made as follows:
1. The required Financial Statements for the annual review were submitted on the 21st October 2021.
 2. Our outstanding balance on the rates and taxes is R489,872.43. We have approached the City of Johannesburg in order to make a payment arrangement on the arrears and they agreed, with the following terms:
 - R100,000.00 immediately
 - R21,659.58 over 18 months

3. *Our insurance is in place. We attach with this letter correspondence from our insurer in this regard.*
4. *It is common course that globally there has been no business taking place as a result of the Covid-19 pandemic. SmartPurse Solutions (Pty) Ltd has not been spared of this ...*

As such, I make the following request:

1. *R500,000.00 of our excess funds be withdrawn immediately in order to get our business operations back in order.*
2. *The remaining balance of approximately R6,700,000.00 be capitalized over 72 months, with equal monthly instalments.*
3. *Assistance with obtaining our TPPP Certificate in order for us to resume our operations.*

We have, as from the 1st April 2022, a total of R153,000.00 worth of rental income, which will be able to cover both the CPF facility as well as all other expenses relating to the building. In essence more than 75% of our rental income, which will be coming from third party tenants, will cover the CPF whilst we also resume our normal business operations....

We are confident that the combination of the resumption of our core business, that of being a Third Party Payment Provider, as well as the projected (including actual) rental income, we will be able to service this facility accordingly."

[23] This is an admission on the part of SmartPurse that it had fallen into breach of the loan agreement. Indeed, on 20 June 2022 the applicant dispatched yet another letter of demand, which, in relevant part, reads:

- “4. *The current outstanding balance in terms of the loan referred to in 1. above is R6,357,195.96 plus interest and fees.*
5. *The defaults as described in our letter dated 17 March 2022 have not been remedied within 14 days.*
6. *We also refer to your request contained in the letter dated 7 April 2022.*
7. *The availability of prepaid funds is subject to clause 4.5 of Appendix 1 of the Loan Agreement. It is evident that there are events of default which have not been remedied. These have been highlighted in the paragraphs below.*
8. *In terms of request 2 and 3 in your letter, the account is not in good standing due to the events of defaults that have not been remedied.*
9. *In terms of clause 9.3.10 of Appendix 1 of the Loan Agreement, the Borrower undertook to pay all rates and taxes in respect of the property. The rates and taxes are currently in arrears, this amounts to an event of default in terms of clause 14.2.6.*

10. *In terms of clause 14.1.17 of Appendix 1 of the Loan Agreement and Event of Default shall occur if the Borrower fails to record a trading profit for one or more years. The financial information received on 21 October 2021 reflect losses for the financial year of 2020 and 2021 which amounts to an event of default.*
11. *In terms of clause 9.3.6 of Appendix 1 of the Loan Agreement, the Borrower if it becomes aware of the occurrence of any fact/circumstances which may result in a Material Adverse Effect or in the occurrence Event of Default or Potential Event of Default, forthwith in writing advise the Bank. In terms of the account statistics, and information available, the company has not been able to generate revenue for the past 24 months. This amounts to an event of default, in terms of clause 14.2.32.*
12. *In the circumstances and in terms of clause 15.3 of Appendix 1 of the Loan Agreement, the Bank hereby call upon you to immediately repay the total outstanding balance in the amount of R6,357,195.96 plus interest and fees (from date hereof to date of payment, both days inclusive). Failing which we shall have no alternative but to take action as deemed fit to protect our interests. This may include handing the matter over to our attorneys for collection and realisation of all securities and credit balances held. The costs incurred in this process will be for your account and any amounts then received will also be utilised to cover these costs.”*

[24] In response to that letter, on 12 August 2022 SmartPurse wrote to the applicant reiterating the substance of its settlement proposal of 7 April 2022. The applicant rejected it.

[25] On 19 August 2022, its attorneys directed to SmartPurse a demand under section 345(1)(a) of the Companies Act, 1973. In it, the applicant listed various events of default on SmartPurse’s part. The letter ended thus: “*Accordingly we are instructed to demand, as we hereby do, repayment by Smartpurse to FNB of the indebtedness owing by Smartpurse to FNB.*” SmartPurse did not accede to the statutory demand.

[26] This led to an application for the liquidation of SmartPurse, of which I have also been seized.

[27] On 19 August 2022, the applicant’s attorneys wrote separate letters to the first and second respondents, with each enclosing the letter of demand to

SmartPurse of 3 August 2022 and in each seeking the payment of the two amounts now being sought in this application.

[28] As I say above, in opposition to the payment orders that the applicant seeks, the first respondent raises three defences. I deal with them in turn.

PRELIMINARY DEFENCES

Lis alibi pendens

[29] First, the first respondent raises the special plea of *lis alibi pendens*.

[30] In the answering affidavit, he says that, since this court is currently also seized of the applicant's application for the liquidation of SmartPurse, this application enforcing obligations under the suretyship is premature: “[T]his application cannot be heard until a determination is made ... in respect of a liquidation application launched by the Applicant against the Principal Debtor, Smartpurse Solutions (Pty) Ltd ... in respect of the same cause of action, claim and involving the same parties.” The first respondent's position is thus that this application ought to be stayed pending the final determination of the winding-up application.

[31] The judgment in the winding-up application will be issued at roughly the same time as this judgment. Yet were this special plea to be upheld, the adjudication of this application might be suspended until the final determination of the liquidation application, including appeals against whatever order is granted in it. Accordingly, it remains necessary for me to consider this special plea.

[32] The special plea of *lis alibi pendens* is “based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised”. What is more: “The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions.”²

[33] In her submissions for the applicant, Ms Mashishi relied upon Voet. Indeed, this special plea has its origins in the plea (or *exceptio*, as the Romans called it) of *res iudicata*. In book 44.2 of the Digest, which book is entitled “De Exceptione Rei Iudicatae”, Justinian deals with that *exceptio*. In Johannes Voet’s *Commentarius ad Pandectas*, a commentary on the Digest, in his observations on 44.2.7, that unarguably learned author draws an analogy (in Percival Gane’s English) from the *exceptio rei iudicatae* to the *exceptio lis pendens*:

“Exception of lis pendens also requires same persons, thing and cause. The exception that a suit is already pending is quite akin to the exception of res iudicata, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of res iudicata in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.”

[34] In *Association of Mine Workers and Construction Union v Ngululu Bulk Carriers (Pty) Limited*,³ the Constitutional Court said this:⁴

“The purpose of lis pendens is to prevent duplication of legal proceedings. As its requirements illustrate, once a claim is pending in a competent court, a litigant is not allowed to initiate the same claim in different proceedings. For a lis pendens defence to succeed, the defendant must show that there is a pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter.”

[35] Accordingly, for the special plea of *lis pendens* to have purchase, three factors must be present.⁵ There must be pending litigation between the same parties. The litigation must be based on the same cause of action. It must be in respect of the same subject-matter.

[36] Yet, the Supreme Court of Appeal has held that those requirements “*must not be understood in a literal sense and as immutable rules*”.⁶ There is scope for their relaxation.⁷ Also, even if the requirements are all made out, a court retains

a discretion whether to stay the subsequent proceedings in which the plea is raised, to allow the earlier matter first to be determined to finality.⁸

[37] While the liquidation application and this application were both triggered by the breach on the part of SmartPurse of the loan agreement, the former seeks the winding up of the principal debtor, a company. On the other hand, this application is one for a payment order against two natural persons who stood surety for SmartPurse.

[38] In the answering affidavit and in his heads of argument, the first respondent relies upon the judgment in this Division in *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC & others*,⁹ in which Rabie AJ presented an erudite exposition of the special plea of *res judicata* or issue estoppel. In his heads of argument, the first respondent quoted a paragraph (without providing its number) allegedly from that judgment, which reads:¹⁰

“[T]he requirements of ‘same persons’ did not mean only the identical individuals who were parties to the earlier proceedings, but included persons who, in law, were identified with the parties to the proceedings. Whether someone had to be regarded as a so-called privy, or as being identified with the parties, depended upon the facts of each particular case.”

[39] This exact passage has appeared as a quotation in other unreported judgments available on SAFLII. Yet, it does not appear in the report of *Man Truck*. It seems to be a portmanteau of three things: a sentence in paragraph 33 of that judgment; a citation in turn embedded in that same paragraph from *The Law of South Africa*; and, a sentence from paragraph 34. Be that as it may, the gist of the point is summarised in paragraph 38 of *Man Truck*:

“The aforementioned examples given by Voet of persons who are identified with one another for the purpose of the exceptio rei iudicatae do not form a numerus clausus.¹¹ The concept of a close corporation as a commercial vehicle with very unique features, requires, in my view, that the principles governing the exceptio rei iudicatae should, when so required by the particular circumstances of each case, be applied to the member or members of such a close corporation.”

[40] In the liquidation application and in this application, there is a marked difference between the parties, the subject-matter, and the cause of action (and, therefore, the relief) that the applicant seeks.

[41] In *Collett v Priest*,¹² De Villiers CJ held:¹³

“The order placing a person’s estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt, before an order so serious in its consequences to the debtor is given the Court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the Court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the Court asked to give any judgment, decree or order against the debtor upon any such claim.”

[42] In *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd*,¹⁴ this division (per McEwan J) applied *Collet*, holding that an application for the winding-up of a debtor’s estate did not constitute proceedings “for the recovery of a debt”. In *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd*,¹⁵ the Western Cape division also applied *Collett*:¹⁶

“Collett v Priest in fact supports the view that the legal proceedings for sequestrating a person’s estate is fundamentally and materially different from proceedings instituted for the payment of a debt due by a debtor to a creditor.”

[43] In *Electrolux*, the court went on to hold:¹⁷

“[T]he cause of action for the recovery of a liquidated debt from the respondent is different from the set of facts which give rise to an enforceable claim for the liquidation of the respondent.”

[44] Accordingly, the plea of *lis alibi pendens* cannot be sustained. There is no question of relaxation or the like. The special plea is simply not cognisable.

Double jeopardy

[45] In the same breath, the first respondent seeks to rely upon the doctrine of double jeopardy. While he asserts that it “*applies equally to civil claims*”,¹⁸ he cites no authority for this proposition. Rather, he suggests that, in so far as the doctrine is “*a general rule of the common law*”, the courts ought to develop the common law by extending the rule to apply “*equally to civil claims*”.

[46] The doctrine of double jeopardy is a cornerstone of the law of criminal procedure. It encompasses the pleas available to an accused person of *autrefois convict* (the accused was previously convicted of the same offence) and *autrefois acquit* (the accused was previously acquitted of the same offence). Those defences are framed in sections 106(1)(c) and (d) of the Criminal Procedure Act, 1977.

[47] In *R v Manasewitz*,¹⁹ the former Appellate Division (*per* Wessels CJ) described the legal nature of those pleas as being “*equivalent to a plea of exceptio rei iudicatae in our law*”.²⁰

[48] More recently, in *Molaudzi v S*,²¹ the Constitutional Court (*per* Theron AJ, as she then was) explained how in the nomenclature of *res judicata* double jeopardy is applied in the criminal context:²²

“However, the general principle of res judicata in the criminal context is that once an application for leave to appeal is dismissed, this is a judicial decision, which is final and determinative. It is somewhat different from civil cases where a defendant may raise a plea of res judicata only where the same litigant seeks the same relief on the same cause of action. Thus it appears that in the criminal context, the ‘cause of action’ is more aptly regarded as the conviction or sentence as a whole.”

[49] What the above *dicta* demonstrate is that there is no need for the courts to develop the common law as contended for by the first respondent. In the civil context, the doctrine of double jeopardy already finds expression in the special

plea of *res judicata*. The extension for which the first respondent asks would add nothing to our law.

THE DEFENCES ON THE MERITS

[50] Before addressing the two defences on the merits, I set out the basic tenets of the law of suretyship.

The law of suretyship

[51] A contract of suretyship is one under which one person, the surety, binds themselves as debtor to the creditor of another person, the principal debtor, to perform the whole or part of the performance due to the creditor by the principal debtor.²³

[52] Accordingly, a surety's liability hinges upon the existence of a principal debt. It is an accessory obligation.²⁴ A surety's obligation does not novate the principal debt. It serves simply to secure it.²⁵

[53] Unless the parties have agreed otherwise, a surety's debt normally becomes enforceable as soon as the principal debtor is in default. However, unless contractually excluded, that liability is subject to the surety's right that the principal debtor first be excused (literally: shaken down).

[54] Yet, if sureties bind themselves as surety and co-principal debtor, their liability arises and becomes enforceable at the same time as that of the principal debtor. A natural effect of being a co-principal debtor is that the surety renounces the benefits ordinarily available to them, like the benefit of excussion.²⁶

[55] I turn, then, to consider the two defences on the merits.

The applicant ought to have exhausted the domestic remedy in clause 14.2.7.1

[56] The first respondent's first defence on the merits also has a dilatory character. He contends that this application is premature since the parties have not followed the provision on a remedial plan in clause 14.2.7.1 in appendix 1 to the loan agreement.

[57] To illustrate the context of clause 14.2.7.1, I quote the first part of clause 14, up to and including clause 14.7.2.2:

“14. EVENTS OF DEFAULT

- 14.1 *An Event of Default shall occur if any of the following events, each of which shall be severable and distinct from the others, occurs (whether or not caused by any reason whatsoever outside the control of the Borrower or any other person).*
- 14.2 *The Events of Default occur if the Borrower and/or Security Providers, as the case may be:*
- 14.2.1 *fails, for any reason whatsoever, to draw down the Loan within 6 months of the date of the conditions as set out in the Agreement being fulfilled or waived; or*
- 14.2.2 *fails to pay any amount due in terms of the Agreement; or*
- 14.2.3 *fails to repay the VAT Loan Outstandings, within the time period as contemplated in the Agreement, if applicable; or*
- 14.2.4 *fails to provide all information and/or documents and/or to sign all such documents as may be required by FNB for the purposes of providing additional security and/or to pay the costs of providing such security on request; or*
- 14.2.5 *fails to comply with its obligations in regard to the lease agreements concluded in respect of the Property (or any part thereof), as envisaged in the Disbursement Conditions, if applicable; or*
- 14.2.6 *fails to pay punctually municipal service fees and consumption charges, property rates and other municipal taxes, levies and duties and interest or surcharges on these amounts in respect of the Property and not remedying such breach within 7 days of notice having been given to it to do so; or*
- 14.2.7 *fails to comply with or maintain any of the Financial Covenants contemplated in the Loan Schedule, provided that –*
- 14.2.7.1 *subject to clause 14.2.7.2 (Remedial Plan) below, the Borrower shall have 30 days from the date of any written notice given by FNB to the Borrower notifying the Borrower of such breach, to either remedy the breach in respect of that Financial Covenant or to provide FNB with a written remedial plan detailing how it will remedy the financial covenant the terms and*

*conditions of which (including but not limited to timing) shall be to the sole satisfaction of FNB (the ‘**Remedial Plan**’) if –*

14.2.7.1.1 the Borrower fails to remedy the breach within the 30 day period; or

14.2.7.1.2 the Borrower fails to provide a Remedial Plan to the satisfaction of FNB within the 30 day period; or

14.2.7.1.3 FNB approves the Remedial Plan but the Borrower fails to comply with any of the provisions of the approved Remedial Plan,

FNB shall be entitled to exercise its remedies as contemplated in clause 14.3 (Remedies) below immediately without further notice to the Borrower;

14.2.7.2 if the Borrower breaches any Financial Covenant on more than 3 occasions during the Term, the provisions of clause 14.2.7 (Remedial Plan) above shall cease to apply and FNB shall be entitled to exercise its remedies contemplated in clause 14.3 (Remedies) below immediately without notice to the Borrower ...”

[emphasis added]

[58] The notion of financial covenants, which is central to clause 14.2.7.1, is defined in appendix 1 as “*the conditions envisaged in the Financial Covenants clause of the Loan Schedule*”. Clause 10, albeit headed only “COVENANTS”, contains five conditions that are obviously financial covenants as that term is commonly used.

[59] It reads:

“10. **COVENANTS**

10.1 The Loan as a ratio to the value of the mortgaged Property may not exceed the LTV for the Term of the Loan, and FNB may reduce the Loan accordingly.

10.2 The mortgaged Property must at FNB’s request and at the Borrower’s cost be re-valued (1) by way

of informal desktop valuation upon every anniversary of the Disbursement Date, and (2) formally by FNB's valuations department every 3rd year after the Disbursement Date to determine the LTV.

- 10.3 If the LTV is exceeded, the Borrower shall, within 20 Business Days of receipt of a notice from FNB to this effect offer additional properties to FNB as security, which properties must be acceptable to FNB.*
- 10.4 Following acceptance, FNB shall immediately procure that a Bond be registered over such properties at the Borrower's cost.*
- 10.5 Should the Borrower fail to offer additional satisfactory properties to FNB as security within the aforementioned time limit, the Borrower shall be obliged to immediately repay to FNB such amount as is necessary to reduce the ratio to LTV stipulated in the Loan Schedule.*
- 10.6 Any failure by the Borrower to comply with a demand or requirement in terms of this clause will constitute an Event of Default."*

[60] Accordingly, the applicant's submission is sound, namely that the breaches of which it complains do not fall within the purview of the financial covenants in clause 10, nor indeed are they financial covenants properly and commonly so called. Indeed, if one understands what a financial covenant is, the remedy fashioned in clauses 14.2.7.1 and 14.2.7.2 in appendix 1 makes considerable sense.

[61] The first respondent's reliance on this defence is unsound. Clause 14.2.7.2 does not apply here.

Unclean hands and the TPPP certificate

[62] The first respondent's second defence on the merits is that the applicant approaches this court with unclean hands. Thus, the first respondent says that the applicant cannot permissibly benefit from its own wrongdoing.

[63] The basis for this contention is that the applicant failed or refused to issue to SmartPurse a TPPP certificate for the year starting 1 March 2022, without which SmartPurse cannot render any services. He characterises this conduct on the applicant's part as "*self-help*".

[64] In the answering affidavit, the first respondent goes on to say this:

“The reason provided by the Applicant for its refusal or failure to issue the TPPP Certificate is that the Company has committed various Events of Default and failed to keep up with its payments. This is clearly expressed in paragraph 5 of the letter dated 19 August 2022 delivered by the Applicant’s attorneys, ENSAfrica, to the Company. It is disingenuous for the Applicant to demand payments from the Company when the former’s conduct has led to the demise of the Company’s income due to its inability to render services and derive income.”

[65] He goes on to explain SmartPurse’s function in the market, to provide “integrated payment solutions” to entities, including state-owned ones. Yet, he says, that its income “subsided” in 2020 and 2021 “and also due to the conduct of the Applicant in failing to issue the Company with the TPPP Certificate for the year commencing 1 March 2022”. He adds: “I submit that the Applicant’s unlawful conduct in refusing to issue the Certificate was the main cause of the financial difficulties suffered by the Company.”

[66] Yet, as the applicant pointed out, if one considers the chronology of events, as narrated by the first respondent, when the TPPP certificate came up for renewal, on his own version, SmartPurse was already in distress. Indeed, this was so two years before March 2022 already.

[67] The applicant’s position is that the renewal of SmartPurse’s TPPP certificate was conditional upon its account being in good standing. By the time of the contemplated reissue, it was already in financial distress.

[68] Accordingly, the applicant is correct in maintaining that it cannot fairly be said that the applicant was responsible for SmartPurse’s financial distress.

[69] Whatever the precise nature of the defence of unclean hands, there is no factual basis here for its application.

[70] Accordingly, neither of the substantive defences has any substance.

COSTS

[71] In clause 25 of the suretyships, provision is made for costs that the applicant incurs in enforcing its rights under the suretyships to be awarded on the attorney-and-client scale.

[72] The costs, on that scale, follow the result.

ORDER

1. The first and second respondents, jointly and severally, the one paying the other to be absolved, are directed to pay R7,772,392.69 (Seven Million Seven Hundred and Seventy-two Thousand Three Hundred and Ninety-two Rand and Sixty-nine Cents), plus interest at the rate of prime 11.75% plus 0.50% calculated daily and compounded monthly in arrears from 3 October 2023 to date of payment, both days inclusive.
2. The first and second respondents are directed pay the costs of this application on the attorney-and-client scale.

J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 15 November 2023

Date of judgment: 26 April 2024

APPEARANCES

For the applicant: Advocate K Mashishi

Instructed by: Edward Nathan Sonnenberg Inc.

For the respondent: Mr SM Ndobe

Instructed by: Ndobe Inc.

1 *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC), at 43G–44A.
2 *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499
(SCA), at para 2.
3 2020 (7) BCLR 779 (CC).
4 At para 26.
5 *Association of Mineworkers and Construction Union v Ngululu Bulk Carriers (Pty) Limited (in
Liquidation)* 2020 JDR 0733 (CC). See also *Keyter NO v Van Der Meulen and Another NNO* 2014 (5)
SA 215 ECG, at 217E.
6 *Caesarstone*, at para 21.
7 *Caesarstone*, at para 22, quoting *Smith v Porritt and Others* 2008 (6) SA 303 (SCA).
8 *Keyter NO v Van Der Meulen and Another NNO* 2014 (5) SA 215 ECG, at 217F.
9 2004 (1) SA 454.
10 At p 455.
11 As quoted in the LAWSA quotation in paragraph 33 of *Man Truck*, they are a deceased and his heir; a
principal and his agent; a person under curatorship and his curator; a pupil and his tutor; a creditor and
debtor and creditor in respect of a pledged article if the debtor gave the article in pledge after losing a
suit in which a third party had claimed it.
12 1931 AD 290.
13 At p 299.
14 1976 (2) SA 856 (W), at 863D–865A.
15 2023 JDR 2981 (WCC).
16 At para 17.
17 At para 15.
18 At para 9 of the respondent's heads of argument.
19 1933 AD 165.
20 At 168.
21 2015 (8) BCLR 904 (CC).
22 At para 19.
23 *Caney's The Law of Suretyship*, 4th edn, pp 26–27.
24 *Huneberg v Watson's Estate* 1916 AD 116.
25 *Corrans v Tvl Government & Coull's Trustee* 1909 TS 605.
26 *Neon & Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A), at 471C–D.