


Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 23807/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. YES
17 October 2022	
DATE	SIGNATURE

STATUSFIN FINANCIAL SERVICES (PTY) LTD
Plaintiff
(REG NO: 1999/019726/07)

and

JOHANNA HELENA JOESINA CARSTENS First
Defendant
(ID NO: [...])

PHILIPPUS LODEWIKUS BADENHORST N.O Second
Defendant
ID NO: [...]

JUDGMENT

NEUKIRCHER J

[1] In this matter the 1st and 2nd defendants bound themselves as surety and co-principal debtors for the fulfilment of the obligations of one David Richard Martin Carstens (the insolvent) towards the plaintiff. The insolvent was finally sequestrated by order of this court on 25 September 2014. The 2nd defendant is the executor of the deceased estate of the second surety who passed away on 25 September 2018. In order to avoid any confusion, in this judgment the second surety is referred to as the 2nd defendant. The plaintiff seeks judgment against the defendants for payment of R27 776 142-76 plus simple interest and costs, as well as execution against the immovable properties put up by the defendants as security for the principal debt.

THE DEFENCE

[2] The facts in this matter, and the sequence of events, are common cause. On the pleadings, the following defences are raised:

- 2.1 that this court has no jurisdiction to hear this matter as the parties and the cause of action are all within the jurisdiction of the North-West Province;
- 2.2 whether the insolvent actually is in breach of the main agreement;
- 2.3 that the Acknowledgement of Debt (AoD) and Consolidation

Agreement that forms the basis of the principal debt is void *ab initio* as the (alleged) suspensive conditions have not been fulfilled;

2.4 that the AoD and Consolidation Agreement falls foul of Regulations 29 and 31 of the National Credit Act 34 of 2005¹;

2.5 that whilst 1st defendant admits signing the suretyship, she alleges she did not know what she was signing and in addition even if the suretyship is enforceable, that she acted to her prejudice and has been released from the suretyship.

[3] In their practice note, handed up at the commencement of this trial, the defendants confirmed that these defences were extant apart from one – they abandoned the special plea of jurisdiction.

[4] In closing argument, I was informed that the defences raised in regards of the National Credit Act were also abandoned and that, whilst the defendants do not abandon any of their other defences, they would focus only in argument on the issue of whether the AoD and Consolidation Agreement was *ab initio* void.

HOUSEKEEPING

[5] Whilst the summons seeks judgment in the amount of R 27 776 142-76, at conclusion of trial an amended amount of R22 556 651-19 was sought. This was because the original quantum had included interest that had been compounded and capitalised monthly. However, once

¹ This was abandoned in Defendant's closing heads of argument

the insolvent had been sequestrated only simple interest could be charged on the debt and thus the claim was recalculated and the amended amount provided².

- [6] The parties were *ad litem* that as execution is sought against immovable properties which are not the primary residence of either defendant, Rule 46A is not applicable.³

THE FACTS

- [7] As stated, most of the facts of this matter were common cause. They appear from the papers, as amplified by the evidence of plaintiff's witnesses.

7.1 The plaintiff called the following witnesses:

7.1.1 Ms Lynette Douglas who was employed as the Legal Adviser in the group of companies of which plaintiff is part. She drafted almost all of the relevant documents;

7.1.2 Mr Francois DuRand who was the Head of Legal Services in 2012 and in who's presence the 2nd defendant signed a suretyship and a consent to register a mortgage bond on 29 October 2012. He also witnessed the 1st defendant's signature on a consent to register a mortgage bond on 29 October 2012;

7.1.3 Mr Johan Fourie who was a credit manager at plaintiff in 2012 and who's evidence mirrored that of Mr DuRand as

² Rossouw v FirstRand Bank 2010 (6) SA 439 (SCA)

³ ABSA Bank v Molcebe & related cases 2018 (6) SA 492 (GJ); Standard Bank of South Africa (Pty) Ltd v Hendricks & Another & related cases 2019 (2) SA 620 (WCC)

they went together to the 1st defendant's farm and residence to obtain both defendants' signatures on the suretyships and consents to register mortgage bonds over the defendants' immovable properties;

7.1.4 Mrs Petro Erasmus who was plaintiff's financial manager at the time and who witnessed the 1st defendant signing the suretyship and who handwrote the 1st defendant's consent for the registration of a mortgage bond over her farm Sweet Home; and

7.1.5 Mr Kobus Viljoen who, on 11 March 2012 went to visit the insolvent at his farm in Ventersdorp to verify the assets over which plaintiff held a Notarial Bond. It was he who raised the alarm at the time that most of these valuable assets had disappeared.

7.2 The defendant elected not to call any witnesses and to close their case.

[8] The plaintiff specialises in the granting of credit to farmers to enable the latter to establish crops. In pursuance of this objective, and between 2011 and 2013, the plaintiff granted credit to the insolvent, the history of which appears clearly from the particulars of claim. It is important to note that at no stage was any evidence put before court that any monies advanced to the insolvent, in terms of any of the agreements, was not paid. In fact, the contrary is apparent.

THE AGREEMENTS

- [9] In November 2011 the plaintiff granted a credit facility to the insolvent to establish crops of sunflower⁴, yellow maize⁵ and white maize⁶. The facility in question is called a “Production Credit Account” (PCA) and consists of an application in writing by the insolvent and a quotation in regards to the application by plaintiff to him. The quotation sets out the terms on which each facility will be granted and features, for example, the principal-debt (or total amount of the facility), how the principal debt is calculated⁷, the fees charged, the applicable interest rate and the date by which the facility was to be repaid. It is signed by the insolvent and officials of plaintiff and is henceforth referred to as “the 1st agreement”.
- [10] In regards of the facilities set out in paragraph 9 supra, the insolvent was to repay the total debt in one payment of R10 930 671-75 on 31 July 2012. However, he failed to do so.
- [11] As a farmer only has a short window within which to establish his crops, the insolvent applied for further production credit in September 2012 – this facility was refused by plaintiff because the insolvent could not provide sufficient security. However, on 22 October 2012 a meeting was held at plaintiff’s office in Brits between Ms Douglas and the

⁴ The facility was for R831 600

⁵ The facility was for R902 272

⁶ The facility was for R9 733 472

⁷ For example, the facility for the white maize crop consisted of: seed (R1 429 951-83), fertilizer (R2 854 364-69), sprays (R863 108-65), fuel (R2 349 916-05), crop insurance (R751 973-14, repairs (R313 322-14), wages (R662 538-64), “verkansing” (R104 026-48) & “other” (R404 270-38)

insolvent which resulted in him signing a Written Acknowledgement of Debt and Consolidation Agreement (the 2nd Agreement)⁸.

[12] In the 2nd agreement:

12.1 the insolvent acknowledged his indebtedness in the amount of R12 640 052-18 arising from the 1st agreement. He also acknowledged the interest of prime plus 6% per annum⁹ from 23 October 2020 and account costs;

12.2 the parties agreed that the plaintiff would give the insolvent an extension of time within which to pay the debt set out in 12.1 subject to¹⁰ the following:

12.2.1 the plaintiff would lend an amount of R26, 5 million to the insolvent which was equal to:

- a) the insolvent's exiting debt to ABSA Bank of ± R10,8 million;
- b) the insolvent's existing debt to Fincrop of ± R2,1 million
- c) the debt set out in paragraph 12.1 supra

and these would be known as "the consolidated debt".¹¹

12.2.2 plaintiff would procure the following security for the consolidated debt:

⁸ Interchangeably also referred to as "the AoD and Consolidation Agreement"

⁹ This clause reads "Base interest rate on conclusion of agreement (prime interest + 2,50%). In the event of default, interest shall be charged at a higher rate equal to prime interest rate + 6%. The interest rate varies according to the fluctuation in the prime interest rate."

¹⁰ The 2nd agreement uses the following specific wording "... onderhewig aan die voorwaardes soos hierander uiteengesit..."

¹¹ The *ratio* behind the consolidated debt was that the facility of R26,5 million would not only extend the repayment of the existing debt between the plaintiff and the insolvent, but the insolvent's outstanding debt to ABSA Bank and Fincrop would be paid taken over by the plaintiff who would pay out those two creditors and the insolvent would be indebted only to the plaintiff

- a) a first mortgage bond in the amount of R1 800 000.00 over the Remaining Extent of Portion [...] of the farm C[...], registration division IP, Province of North West, in extent 144,8349 hectares and held by deed of transfer [...];
- b) a first mortgage bond in the amount of R400 000.00 over the farm V[...], registration division IP, Province of North West, in extent 40,9531 hectares and held by deed of transfer [...];
- c) a first mortgage bond in the amount of R2 200 000.00 over Erf [...], M[...], registration division JR, Province of Gauteng in extent 504m² and held by deed of transfer T12[...];
- d) a first mortgage bond in the amount of R10 400 000.00 over the Remaining Extent of Portion [...] of the farm S[...], registration division IP, Province North West, in extent 694,9800 hectares and held by deed of transfer [...];
- e) a special and general notarial bond in the amount of R5 million over Mr Carsten's movables;
- f) the 1st defendant would agree (as existing surety) to register a first mortgage bond in the amount of R6 400 000.00 over Remaining portion of Portion [...] of the farm S[...], registration division IP,

Province North West, in extent 489,0026 hectares and held by deed of transfer [...];

g) the 2nd defendant would:

(i) bind herself as a surety and co-principal debtor in favour of the plaintiff for an unlimited amount for the insolvent's debts before 29 October 2012; and

(ii) consent to the registration of a first mortgage bond in the amount of R8 million over the Remaining portion of the farm K[...], Registration Division IP, Province of North West, in extent 736,5247 hectares and Portion [...] of the farm V[...], Registration Division IP, Province of North West, in extent 3 0776 hectares held by Deed of Transfer [...]and [...];

h) Wolwepan Feedlot must bind itself as a surety and co-principal debtor in favour of the plaintiff for the payment of the debts of the insolvent, before the close of business on 29 October 2012;

12.2.3 the insolvent must sign a Term Loan Agreement (TLA) for the payment of the consolidated debt in the amount of R26 500 000.00 plus interest at a rate of the prime interest rate plus 1%, calculated daily and capitalised monthly, in a term loan of annual payments of approximately R4 200 000.00, repayable

over a period of 10 years, before the close of business on 29 October 2012.

[13] The insolvent signed a document titled “Application for Loan Agreement – (Individual)” on 29 October 2012. It was witnessed by Ms Erasmus. The application contains the terms and conditions of the loan agreement which the insolvent also signed on the same date.

[14] The plaintiff then sent a “Quotation – Application for Loan Agreement” to the insolvent. This was signed by him on 10 December 2012. The insolvent’s signature was again witnessed by Ms Erasmus. As with the 1st agreement, the “Quotation” sets out the amount of the loan¹² plus interest and other costs, bringing the total loan value to R41 511 257-35. The interest rate is recorded as prime plus 1%¹³ and the instalments of R4 151 219-60 commenced on 31 August 2013 and ended on 31 August 2022.

[15] According to Ms Douglas’ evidence, it was only once the insolvent had signed this quotation on 10 December 2012 that the agreement came into existence. In fact, it appears that this is the case in respect of all the agreements – they have legal effect upon signature of the quotation.

[16] Then, on 10 December 2012 the insolvent applied for credit to

¹² Which is recorded as R26 million and not R26,5 million

¹³ And if the insolvent is in default, it is again prime plus 6%

establish a white maize crop¹⁴ and a sunflower crop¹⁵. Whilst the application was approved by plaintiff on 17 January 2013, the quotations were signed on 17 July 2013. The amount was repayable on 31 July 2013 (the 3rd agreement).

[17] Then, on 25 March 2013 the insolvent again applied to plaintiff for a production loan to establish a sunflower crop¹⁶ and a white maize crop¹⁷. On 28 March 2013 the loan was approved and was repayable on 31 July 2013. It is common cause that the agreement was concluded and the funding made available (the 4th agreement).

[18] The 5th agreement was concluded on 3 September 2013 when the insolvent signed a written application to procure an extension of time within which to repay his outstanding indebtedness to plaintiff. According to that document the loans immediately payable amounted to R2 279 956-68 and those “payable later” to R38 288 241-47¹⁸. According to this, an extension was sought until 31 July 2014 to pay the amount. Importantly, in this application for extension, the insolvent admitted that these amounts were “*truly and legally owed*” at date of application being 3 September 2013. According to the plaintiff, the extension was granted and arrangements were made that the insolvent would sign the quotation on 11 March 2014.

¹⁴ The amount was for the amount was for R1 617 000-00

¹⁵ The amount was for the amount was for R1 290 891-60

¹⁶ The amount was for the amount was for R1 249 586-00

¹⁷ The amount was for the amount was for R228 884-00

¹⁸ This amount being recorded in regards of the Term Loan Agreement ie the 2nd agreement

[19] However, when Mr Viljoen and Mr Prinsloo went to the insolvent's farm to obtain his signature, a chain of events was set in motion that culminated in Wepener J granting a final order of sequestration against him on 25 September 2014.

[20] In a nutshell, on 11 March 2014 Mr Kobus Viljoen and Mr Prinsloo went to the insolvent's farm to verify the assets that plaintiff held under its notarial bond. They did so firstly as plaintiff required this for purposes of finalisation of the 5th agreement, and secondly to obtain the signature of the insolvent on the quotation in respect of the 5th agreement.

[21] The uncontested evidence during this trial¹⁹ was that they arrived at the insolvent's farm at ± 10h30. Their superficial investigation revealed that many of the farm implements held under the notarial bond were missing, and that although they had been told that no harvest had been planted, they saw that 50 – 60 hectares were under crop. They were told by the insolvent's father that the insolvent had sold assets as "*he had had no choice*". A further inspection of the lands later revealed that many crops had been damaged by cattle that had breached cut fences and the standing crop had been harvested and sold in stealth. Upon investigation, assets were discovered hidden in fields and at an adjacent farm and most had been sold off for a fraction of their value.

[22] The evidence by Ms Douglas was that, as a result of this, the plaintiff

¹⁹ Mr Viljoen was not cross-examined at all and his evidence was not placed in dispute.

had to bring several proceedings – for example: to perfect the notarial bond to interdict the sale of implements and to sequestrate the insolvent. The application to sequestrate the defendants was unsuccessful before Rabie J and was dismissed on 15 October 2015 due to the defences raised therein which were also raised in this trial. That court found that there was a genuine dispute of fact which meant that one version could not be preferred above the other on the papers – this appears to be the reason that the applications were dismissed.

[23] The evidence of Ms Douglas is also that the plaintiff had proven a claim in the insolvent estate and had received a dividend of R20 109 451-91 and was liable to pay a contribution of R25 826-32. On 19 May 2017 the plaintiff received a further dividend of R5 583 625-59. She confirmed that the original Certificate of Balance was provided under her hand, as was the updated Certificate of Balance.

THE SURETYSHIPS

[24] On 4 March 2018 summons was issued out against the defendants. As stated, they are sued as the sureties for the debts of the insolvent pursuant to the first 4 agreements. The plaintiff's evidence in regard of these suretyships was given by Douglas, Erasmus, DuRand and Fourie. All 4 witnesses impressed me: they were clear in their answers, they did not prevaricate and where they could not remember events they said so. 10 years having passed, it is hardly surprising that the

minutiae of details²⁰ could not be recalled²¹.

[25] The sequence of the events regarding the signing of the two suretyships is the following:

The 1st defendant

25.1 The 1st defendant does not dispute that she signed a Deed of Surety in favour of the plaintiff and for the debts of the insolvent on 27 September 2012. Mrs s evidence was that she took her the Deed of Surety to sign and is a witness to her signature;

25.2 paragraphs 6 and 7 of the suretyship read as follows:

“6. *The amount of the Surety/ies’ obligations to STATUSFIN (including interest and costs) shall at any time be determined and proved by means of a certificate signed by any director, manager and legal advisor of STATUSFIN. It shall not be necessary prove the appointment of the person signing the certificate on behalf of STATUSFIN and the certificate shall be binding and shall be prima facie evidence of the amount of the Surety/ies’ obligations to STATUSFIN and it shall be valid and of force as a liquid document in any competent court for the purpose of obtaining judgement against the Surety/ies.*

7. *The Surety/ies- admit and agree that all admissions of liability, made by the Principal Debtor, shall be binding on*

²⁰ For example, whether the table they sat at was round or hexagonal or oblong, how many chairs were at the table, the detail of the decorations in the room – to name but three

²¹ Khumalo v MEC for Education: KwaZulu Natal 2014 (3) BCLR 333 (CC) at par 48

the Surety/ies as if the Surety/ies expressly consented thereto.”;

25.3 on the same date, Erasmus penned a handwritten document which 1st defendant also signed in her presence, which reads as follows:

“27 September 2012

Die Risiko Bestuurder

Geagte Meneer

Hiermee verleen ek die ondergetekende Johanna Helena Joesina Carstens²², toestemming dat ’n verband op my eiendom, nl Sweethome, geregistreer mag word vir sekuriteit op my seun DRM Carstens, se lening by StatusFin Finansiële Dienste.

Dankie byvoorbaat

JHJ Carstens

ID: [...]”

25.4 on 29 October 2012 DuRand and Fourie went to the farm S[...]in Ventersdorp in order to obtain a suretyship from the 2nd defendant in favour of plaintiff and in regard to the insolvent’s debts. It contains the same clauses as that set out in paragraph 25.2 (supra)²³;

²² The name “Joesina” was incorrectly spelled “Josina” and Ms Erasmus’ evidence was that the 1st defendant checked the document and corrected the spelling of her name

²³ Which are to be found at paragraphs 1 and 7 of the suretyships

25.5 on 29 October 2012 and in front of DuRant and Fourie, and as witnessed by them on the document, the 1st defendant signed a “Toestemming tot Registrasie van Verband”. That document reads as follows:

“ Ek, die ondergetekende,

JOHANNA HELENA JOESINA CARSTENS

Met identiteitsnommer [...],

stem hiermee toe tot registrasie van 'n eerste verband in die bedrag van R6 400 000.00 ten gunste van Statusfin Finansiële

Dienste (Edms) Bpk, oor Resterende Gedeelte [...] van die

Plaas S[...], Registrasie Afdeling I.P., Provinsie Noordwes, groot 489,0026ha, gehou kragtens akte van transport [...],

as sekuriteit vir enige en alle huidige en toekomstige verskuldigheid teenoor Statusfin van DAVID RICHARD MARTIN

CARSTENS met identiteitsnommer [...].”

25.6 The mortgage bond over the 1st defendant's property was registered in the Deeds Office. There is a Power of Attorney signed by 1st defendant on 9 November 2016 in which she specifically gives the plaintiff's attorneys authority to pass the security over her property in favour of the plaintiff. The power of attorney was witnessed by, *inter alia*, Erasmus;

25.7 it was Erasmus' evidence, as it was that of DuRand and Fourie, that the 1st defendant signed the documents in front of them and they witnessed them *pari passu*. Although Erasmus stated that

she did not have a specific recollection of these signings, she was adamant that all signatures were always appended at the same time - there was no evidence to suggest otherwise.

The 2nd defendant

25.8 It was both DuRand's and Fourie's evidence that the 2nd defendant signed the suretyship and permission to register the mortgage bonds in the 1st defendant's house, in the dining room and with them as witnesses on 29 October 2012;

25.9 the Deed of Suretyship has a mistake with regard to the spelling of the 2nd defendant's names: they are written as "*Johanna Jousiena Helena Ras van Antwerp*" instead of "*Johanna Helena Joesina Ras van Antwerp*". According to DuRand and Fourie, the 2nd defendant herself completed her name on the suretyship on 29 October 2012 and thus any mistake evinced by the document was that made by the 2nd defendant herself;

25.10 the power of attorney as regards the Mortgage Bond was signed by the 2nd defendant on 9 November 2012 in front of Erasmus – although she doesn't specifically recall the event, she testified that she would not append her signature as a witness if the document wasn't signed in her presence;

25.11 no evidence was presented to the contrary, save that the defendants attempted to introduce cross-examination on the manner in which the 2nd defendant's handwriting was expressed on

each of the 3 documents she signed. In effect, counsel attempted to cross-examine on the manner in which the letter “w” was written on the documents. I upheld an objection on this issue as no handwriting expert had been employed by the defendants in terms of Rule 36(a) and these *minutiae* fall, in my view, within the purview of an expert²⁴.

[26] Given that DuRand, Fourie and Erasmus witnessed the 1st and 2nd defendants signing not only their respective suretyships, but also the permissions to register a bond and the powers of attorney, it is difficult to imagine how the defences raised in respect thereof can stand: had it simply been the issue of the suretyships, one may have perhaps lent a modicum of credence to the defence, but on 9 November 2012, both then sign their respective powers of attorney and bond documents which are the final process required to register plaintiff’s security. Why they would do this if they hadn’t agreed to flies in the face of all logic. The fact that 1st defendant did not give evidence to refute plaintiff’s evidence and to confirm that it was not 2nd defendant’s signature on the documents is very telling under the circumstances and, in this case, the negative inference that results must apply²⁵ as the 1st and 2nd defendants denial of the validity of their suretyships was a central issue to the case on the pleadings and called for a rebuttal.

[27] The defendants closing argument focused solely on the fact that that the TLA was void *ab initio*. This, they argue, is because the AoD and

²⁴ No argument on this issue was presented in closing argument

²⁵ Pexmart CC and Others v Home Construction (Pty) Ltd and Another 2019 (3) SA 117 (SCA)

Consolidation Agreement is void as 2 crucial suspensive conditions were not complied with:

- a) that Wolwepan Feedlot²⁶ had not bound itself as surety and co-principal debtor in favour of plaintiff by 29 October 2012 – or at all; and
- b) the insolvent also failed to undersign the TLA by 29 October 2012, it being common cause that he signed only the application form on 29 October 2012 and the quotation on 10 December 2012.

[28] Thus, argue defendants, although the plaintiff paid the R26,5 million consolidated debt, the only valid liability for which the defendants stood surety was the remaining production credit debt in the amount of R4 483 666-71. This they say was extinguished through, *inter alia*, insurance payments exceeding R6,5 million and thus the defendants have no liability towards the plaintiff at all.

[29] The defendants' argument is developed on two main threads:

Re Wolwepan

29.1 on this issue the argument is that the plaintiff's main witness, Ms Douglas, never gave any evidence to the effect either generally or specifically, that the Wolwepan suretyship had been signed by 29 October 2022;

29.2 the argument was that her confirmation as regards the fulfilment of the conditions was specifically limited to the fulfilment of the conditions set out in paragraphs 12.2.2 (a) to (g) supra.

²⁶ See paragraph 12.2.2 at page 8 supra

Re the TLA

29.3 even so, say defendants, Ms Douglas' evidence was that the insolvent had to sign the agreement by 29 October 2012. But this did not happen – instead the evidence was that the insolvent only signed an application for credit on 29 October 2012 in regards of which the plaintiff only gave a quotation on 10 December 2012 which was signed by the insolvent on that date. It was thus only on 10 December 2012 that an agreement came into existence²⁷;

29.4 this being so, the condition set out in paragraph 27(b) supra was not fulfilled by 29 October 2012 and the TLA was void *ab initio*.

THE WOLWEPAN ARGUMENT

[30] The defendants' argument is that the text of the 2nd agreement is explicit to the extent that the only reasonable conclusion is that the provision of a suretyship by Wolwepan is a suspensive condition. This they say is clear from the heading of clause 2 and the wording of paragraph 2.1 which reads:

“2. VOORWAARDES VAN AFBETALINGS – OOREENKOMS

2.1 *Die partye kom ooreen dat Statusfin aan die skuldenaar uitsel verlen vir betaling v/d Statusfin Skuld onderhewig aan die voorwaardes soos hieronder uiteengesit...*”

²⁷ The agreement consisting of the application of 29 October 2012 and the quotation of 10 December 2012

[31] **Sentinel Mining Industry Retirement Fund and Another v Waz Props (Pty) Ltd and Another**²⁸ sets out the principles upon which headings in a contract can be utilised in interpreting the contract:

“[10] ... In the absence of express provision to the contrary, headings in contracts can be taken into account in interpreting the contract. It seems to me more common sense that where a heading conflicts with the body of the contract, it must be the body of the contract which prevails because the parties’ intention is more likely to appear from the provisions they have spelt out than from an abbreviation they have chosen to identify the effect of those provisions; but that where the heading and the detailed provisions can be read together, that should be done...”

[32] According to the defendants, the conclusion of the documents set out in paragraph 2.1.2 supra constitute *conditiones causalis* and are “*patent suspensive, conditions*”.

[33] In my view what the above argument loses sight of is the following: as regards Wolwepan, Ms Douglas was asked whether the conditions set out in the 2nd Agreement had been fulfilled – her response was “yes”. It is my view that that pertained not to just 12.2.2 (a) – (g) supra, but to all the conditions listed. If there was any uncertainty as to whether that included Wolwepan, it was Mr van Nieuwenhuizen’s obligation to specifically raise and clarify this in cross-examination - he did not.

²⁸ 2013 (3) SA 132 (SCA) at paragraph 10

[34] In **Caroll v Carroll**²⁹ it was stated that the nature and purpose of cross-examination is to elicit facts favourable to the cross-examiner's case and to challenge the truth or accuracy of the witness's version of the disputed events.

[35] In **President of the Republic of South Africa v South African Rugby and Football Union**³⁰ it was explained thus:

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.

[62] The rule in Browne v Dunn is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly

²⁹ 1947 (4) SA 37 (D)

³⁰ 2000 (1) SA 1 (CC) at paragraph 61 - 65.

where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

[64] *The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where "a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box."*

[65] *These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike..."*

[36] In my view, the defendants failed to follow this rule. What is left is that Ms Douglas' evidence that the conditions (such as they were) had been fulfilled stands and there is no evidence before me that the 2nd agreement is void for want of compliance.

[37] The plaintiff argues that, in any event, the conditions set out are simply terms of the 2nd agreement – they are neither resolute nor suspensive. Furthermore, the parties' conduct subsequent to the conclusion of the agreement is a clear indication that they regarded the

2nd agreement as binding and enforceable³¹ - I agree.

THE VOID AB INITIO ARGUMENT

[38] As regards the fact that “the agreement”³² had to be signed by the insolvent by 29 October 2012, the defendants argument is that Ms Douglas’ evidence was that a credit agreement between plaintiff and the insolvent only came into being once the latter signed the quotation. According to the documentation, that did not occur.

[39] Plaintiff referred me to the fact that in the sequestration proceedings brought by plaintiff against the insolvent under case number 26088/2014, Wepener J stated:

“[7] It was common cause and the respondent so accepted that save for the defence that the applicant had granted credit to the respondent recklessly, the applicant complied with all other requirements for an order for the respondent’s sequestration. The indebtedness and the fact that the respondent is insolvent if the applicant has an enforceable claim are common cause. The former denials of those issues have been abandoned.”

[40] Whilst this is important, even more so is the preceding paragraph of that judgment which states:

“[6] I need not further dwell upon all the facts leading up to the credit being granted to the respondent or his particular breaches of

³¹ Unica Iron and Steel (Pty) Ltd and Another v Mirchandani 2016 (2) SA 307 (SCA) at paragraphs 21-26

³² See paragraph 29.3 supra

the agreement as the respondent's counsel advised that the respondent relies only on the 'technical' defence, namely that the applicant acted recklessly when it granted the respondent the credit with the result that the agreement is enforceable pursuant to the provisions of the NCA. (sic) This, in turn, would result in the applicant not having locus standi as a creditor as it has no enforceable debt against the respondent." (my emphasis)

[41] Mr van Nieuwenhuizen argued that this court is not bound by the decisions of Bam J and Wepener J when granting the provisional and final sequestration of the insolvent per the rule espoused in **Hollington v F Hewthorn & Co Ltd**³³ where it was stated that a criminal conviction may not be used as evidence in a subsequent civil trial of the fact that the accused had indeed committed the crime of which he was convicted. He referred to the case of **Graham v Park Mews Body Corp & Another**³⁴ where Henley J stated:

"[58] In these proceedings, the applicant, after having been successful in the arbitration proceedings, relied on the findings of the arbitrator and the evidence used in those proceedings, without presenting the evidence independently as a foundation upon which to build his case. The opinions of the experts who testified in the arbitration proceedings, especially that of Mr Mitchell, as reflected in his report, that "In the opinion of the building Consultant this building does not appear to be well maintained nor frequently maintained", is inadmissible as evidence.

³³ [1943] 2 All ER 35

³⁴ 2012 (1) SA 355 (WCC) at paragraph 59 – 65

[59] *The rule laid down in Hollington v F Hewthorn (Pty) Ltd ([1943], 2 All ER 35) provides that the conviction of an accused in a criminal court cannot be used as evidence in a subsequent civil trial of the fact that the accused had indeed committed the crime of which he was convicted. Schmidt at 21-3 Law of Evidence states that 'Hollington is therefore authority for the view that a finding in a criminal case cannot in a subsequent civil case serve as evidence of a fact that the criminal had considered to be proved.'*

[60] *I am of the view that such rule is applicable in the present matter, even though the previous proceedings were not a criminal trial, but arbitration proceedings. There seems to be a general rule that findings of another tribunal cannot be used to prove a fact in a subsequent tribunal. I also see no logical reason why the application of this rule cannot be extended to the findings, orders and awards of other tribunals, so as to exclude the opinion of triers of fact in these proceedings in civil or criminal matters."*

[42] But whilst this may be so, we are not dealing only with the findings of the court, there are also the affidavits of the insolvent that have been put up – and nowhere in these has the underlying causa for the sequestration proceedings (ie the various agreements) been disputed. The only dispute was whether the credit advanced constituted reckless lending for purposes of the NCA.

[43] This being so, argues Mr van der Merwe, it ill-behoves the defendants to challenge an agreement to which they were not a party³⁵ and has relied on **Land Agricultural Development Bank of South Africa v**

³⁵ Nedcor Investment Bank Ltd v Visser No and Others 2002 (4) SA 588 (TPD) at 594 D-E

Du Plessis NO and Others³⁶ where Daffue J stated:

“[42] The general rule is that if two parties entered into a contract and if there is or was non-compliance with its terms, it is only the contracting parties who can challenge the validity of the agreement. In Hillock and Another v Hilshage Investments (Pty) Ltd the following was held: “In my judgment this argument has no merit... A third party, such as National Exposition in the present case, cannot seek to rely on the provisions in question, unless it has become a party to the agreement, for example by assignment.”

[43] In the last decade of the previous century four well-known banks and building societies merged into Absa Bank Ltd and in order to achieve a proper merger, agreements were entered into to transfer rights, title and interest in and to the claims against their debtors and their assets to Absa which transfers were subject to consent by the authorities. Absa became embroiled in litigation and one of its debtors disputed its locus standi. It appeared from the evidence tendered at the trial that there were indeed non-compliance with certain terms and conditions, but the court had no hesitation to reject the argument of the close corporation debtor that it was entitled to tell the parties to the contracts who the actual owner of the underlying assets were. Lombard J held as follows: “Dit is myns insiens ‘n onbegonne taak vir verweerders as derdes om nou te poog om die ooreenkoms waaraan die partye daartoe ten volle uiting gegee en oor en weer presteer het te laat ongeldig verklaar.”³⁷”

[44] Whilst it is without question so that every suretyship is conditional upon

³⁶ (5559/2019) [2020] ZAFSHC 136 (10/8/2020)

³⁷ ABSA Bank Ltd v CL Von Abo Farm (CC) 1999 (3) SA 262 O at 274D as well as Nedcor Investment Bank Ltd v Visser N.O. & Others 2002 (4) SA 588 T.

the existence of a valid principal obligation³⁸ and a surety is entitled to raise any defence which the principal debtor can raise³⁹, in my view a surety is bound by a debtor's admissions of liability⁴⁰ which, in this instance, appear from an extract of his answering affidavit in his sequestration proceedings:

"16.1 Regarding the contents of these paragraphs, I admit the following:

16.1.1 That it was agreed that the Applicant would assist me further in order to discharge debts owed by me to ABSA Bank Limited and to Fincrop;

16.1.2 That the Applicant and I signed the "SKULDERKENNING EN KONSOLIDASIE OOREENKOMS" ON 25 October 2012 and that a copy thereof is annexed to the Applicant's founding affidavit as annexure "B";

16.1.3 That the Applicant provided me with necessary funding in order to settle my indebtedness to ABSA Bank Limited and to Fincrop;

16.1.4 That the Applicant correctly sets out certain terms and conditions of annexure "B" to its founding affidavit in paragraph 18 (together with sub-paragraphs of its founding affidavit."

[45] In any event, paragraph 7 of the defendants' suretyships contain the

³⁸ African Life Property Holdings v Score Food Holding 1995 (2) SA 230 (A) at 238F

³⁹ Ideal Finance Corporation v Coetzer 1970 (3) SA 1 (A); Linden Duplex (Pty) Ltd v Harrowsmith 1978 (1) SA 371 (W) at 373 A.

⁴⁰ Standard Bank of SA Ltd v Wilkinson 1993 (3) SA 822 (C)

following clause:

“7 The Surety/ies admit and agree that all admissions of liability made by Principal Debtor shall be binding on the Surety/ies as if the Surety/ies expressly consented thereto”

[46] In **Two Sixty Four Investments (Pty) Ltd v Trust Bank**⁴¹ Leveson J stated:

“Lastly, on this aspect, clause 9 of the deed of suretyship provides that the surety is bound by all admissions of liability made by the principal debtor. It seems to me that the acceptance of the respondents claim, not merely by the liquidators but by creditors in the second creditor’s meeting of the insolvent company acting as the organ of the company in a like sense to that used by Gower in his well-known text on Modern Company Law of the board of directors of the members in general meeting as the organ of the company is such an admission. The applicant would be bound thereby.”

[47] Whilst in the present case the insolvent is a person and not a company, the same principle applies – the undisputed evidence of Ms Douglas was that the plaintiff submitted a claim in the insolvent estate at the creditors meeting and was paid out 2 separate amounts – the first was R20 109 451-91 and the second was R5 583 625-59.

[48] Bearing in mind that a sequestration of a debtor’s estate results in a *concursum creditorum*, that the insolvent is divested of his estate which is then vested in the trustee⁴² and that any creditors rights to enforce a

⁴¹ 1993 (3) SA 384 (W) at 387 H-I

⁴² Section 20 and 45 of the Insolvency Act 24 of 1936

20 (1) The effect of the sequestration of the estate of an insolvent shall be-

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;

(b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the

claim against the debtor is now solely by way of proving one against the insolvent estate, the principle set out in **Two Sixty Four Investments** still applies.

[49] This being so, the defendants are bound by these actions and this defence is not available to them.

[50] Mr van der Merwe has submitted that the defence is, in any event, not available to the defendants based on the principle set out in **Nedcor** (supra)⁴³ and **Unica Iron and Steel (Pty) Ltd and Another v Mirchandani**⁴⁴ on the basis that, irrespective of the actual words used in the 2nd agreement, the plaintiff and the insolvent proceeded to implement its terms and all their conduct demonstrated unequivocally that they regarded the agreement as binding upon them. Given all that has been said *supra*, it is not necessary for me to consider this in any

insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate;

(c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs;

(d) to empower the insolvent, if in prison for debt, to apply to the court for his release, after notice to the creditor at whose suit he is so imprisoned, and to empower the court to order his release, on such conditions as it may think fit to impose.

45(1) After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.

(2) The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed.

(3) If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five.

⁴³ At footnote 34

⁴⁴ 2016 (2) SA 307 (SCA)

further depth other than to state that it is clear from the conduct of plaintiff and the insolvent that it is indeed so that their intention was to be so bound and that they considered themselves so bound.

[51] This being so, the defence that the AoD and Consolidation Agreement is void *ab initio* is dismissed.

THE CERTIFICATE OF BALANCE

[52] Given the dismissal of this defence, there was no defence mounted against the Certificate of Balance⁴⁵ produced by the plaintiff. This took into account the amounts owing by the insolvent in regard of all the agreements, deducted amounts recovered from the insolvent estate and amended the compound interest to simple interest. The result is that the initial capital claim of R27 776 142-76 was reduced to R22 556 651-19 which is to defendants' benefit.

THE OTHER DEFENCES

[53] The submission by defendants was that, whilst they were not abandoning any of the defences raised in the pleadings, they were not arguing them. But this is, quite frankly, a *non sequitur* - by not arguing these issues it is clear that defendants are not relying on any of these defences. This is simply underscored by the fact that they closed their cases without tendering any evidence.

ORDER

⁴⁵ Rossouw v FirstRand Bank 2010 (6) SA 439 (SCA)

[54] In my view, the plaintiff has succeeded in proving its claim and judgment is therefore granted as follows:

As against the First and Second Defendants jointly and severally the one paying the other to be absolved for:

1. Payment of the capital amount of **R22 556 651.19**.
2. Payment of simple interest on the aforesaid amount, at the rate of prime plus 6% calculated from 20 May 2017 to date of final payment.

As against the First Defendant:

3. That the immovable property of the First Defendant, namely:
 - 3.1 Remaining Extent of Portion [...] of the Farm S[...];
Registration Division I.P., North West Province;
In extent 489,0026 hectares;
and held by deed of transfer [...]

be declared specially executable.
4. Costs of suit and an attorney and client scale, as agreed in terms of clause 5 of the deeds of suretyship, to be taxed.

As against the Second Defendant:

5. That the immovable properties of the Second Defendant, namely:
 - 5.1 Remaining Extent of the Farm K[...];
Registration Division I.P., North West Province;
In extent 736,5247 hectares; and
 - 5.2 Portion [...] of the Farm V[...];

Registration Division I.P., North West Province;

In extent 3,0776 hectares;

Both properties held by deed of transfer [...]

And subject to the conditions therein contained.

be declared specially executable.

6. Costs of suit and an attorney and client scale, as agreed in terms of clause 5 of the deeds of suretyship, to be taxed.



B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 October 2022.

Appearances:

For the Plaintiff	: Adv MP van der Merwe SC
Instructed by	: AP Grové – Tim du Toit & Co
For the Defendants	: Adv H van Nieuwenhuizen
Instructed by	: Bosman & Bosman Attorneys
Heard on	: 6 to 9 September 2022