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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 17249/2022

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

..... **3 November 2023**

SIGNATURE **DATE**

In the matter between:-

ASSETLINE SOUTH AFRICA (PTY) LTD Applicant
(Registration Number: 2009/021933/07)

and

KM ARCHITECTS (PTY) LTD 1st Respondent
(Registration Number: 2014/086668/07)

BELINDA BERNICE MOLEKO 2nd Respondent
(Identity number: [redacted])

THE EXECUTOR OF THE ESTATE 3rd Respondent
OF THE LATE KHOTSO LORD MOLEKO
(Identity number: [redacted])

BELINDA BERNICE MOLEKO N.O. 4th Respondent

THE BEST TRUST COMPANY (JHB) (PTY) LTD N.O. 5th Respondent
(Registration Number: 2001/021425/07)

4th and 5th Respondents cited as trustees of the
KBM SHARE 2 TRUST (IT3155/2005)

JUDGMENT

STRYDOM AJ

1. This application was set down for argument on the opposed motion roll, in the week of 24 to 28 July 2023.

2. It was allocated for argument on 25 July 2023 at 11h30.

3. The applicant seeks performance in terms of a loan agreement entered into by the applicant and the first respondent, and relief against the other respondents as sureties.

4. On or about 7 March 2019 the applicant and 1st respondent entered into a loan agreement.

5. On or about the same date, the 2nd, 3rd, 4th and 5th respondents bound themselves as sureties and co-principal debtors in respect of

the fulfilment of the 1st respondent's obligations in terms of the loan agreement.

6. In terms of the loan agreement, the 1st respondent loaned an amount of R800'000.00 from the applicant and the 1st respondent furnished a property over which a covering mortgage bond would be registered in favour of the applicant for the fulfilment of the loan agreement.

7. The loan agreement made provision for an establishment fee of R18'400.00 inclusive of VAT, an administrative fee of R6'900.00 inclusive of VAT, R23'175.00 inclusive of VAT for the registration fee of the mortgage bond and an introducer fee of R9'200.00 inclusive of VAT.

8. The parties agreed that the 1st respondent shall pay 3.5% interest per month on the amount advanced and, in addition, make payment of R575.00 inclusive of VAT administrative fee per month. An additional payment of 0.1% per month shall be payable in respect of the loan management fee until the amount is settled.

9. The intention of the parties, it appears to be, was always that the 1st respondent would pay the applicant in 180 calendar days, after

which the 1st respondent could make application to extend the period for another 6 (six) months with certain terms in place.

10. The terms included that the 1st respondent will be liable for a further administrative fee equal to 1% of the loan amount and a further establishment fee of R18’400.00 inclusive of VAT.

11. In the event of a breach, the amount due shall bear interest at the rate of 5% per month, compounded monthly and the applicant will be entitled to a default loan management fee in the amount of R575.00, inclusive of VAT per day, from the date of default until date of final payment.

12. The parties further agreed to additional administrative costs for telephone calls and hourly work on the matter.

13. The applicant performed in terms of the agreement by advancing the loan amount to the 1st respondent and the 1st respondent failed to adhere to the terms of the agreement specifically by paying the amounts referred above back to the applicant.

14. The above is common cause between the parties.

15. It appears that the 1st respondent was always represented by the late Khotso Lord Moleko, the deceased spouse of the 2nd respondent.

16. In response to the applicant's cause of action, the respondents raised a number of legal arguments, including that:

16.1. the *National Credit Act,* 34 of 2005 (hereinafter referred to as the ("*National Credit Act*") is applicable and in terms of which the respondents enjoy protection, particularly in respect of the *in duplum* principal;

16.2. if the *National Credit Act* is not applicable, and should not be extended in terms of a Constitutional point, then the common law *in duplum* rule applies and the liability should be limited to double the loan amount;

16.3. the Conventional Penalties Act finds applicability as the amounts charged by the applicant are excessive, unreasonable and therefore unlawful.

17. There were then also points taken in terms of Rule 46A, of the Uniform Rules of Court, regarding the executability of an immovable property, bonded by the Applicant.

18. The respondents further, supported by a Notice terms of Rule 16A of the Uniform Rules of Court, made an argument that the *National Credit Act* should be extended to remedy the unconstitutionalities of the said Act.

19. When the matter was argued before me, counsel for the respondents abandoned the argument in terms of the *Conventional Penalties Act*, 15 of 1962, and he further started to advance an argument that the Trust Deed precludes the 4th and 5th respondents from entering into a surety.

20. The applicant made objection to the point as it was not pleaded in any way before the argument was advanced.

21. The parties then agreed, to avoid a postponement of the motion, and punitive cost, during argument, that for purposes of the 4th and the 5th respondents, as well as the issue of executability of the property, this court is not to determine same.

22. What remained then for the court to determine, is whether the respondents raised a defence in terms of the *National Credit Act*, alternatively in terms of common law *in duplum*, what the status of

the certificate of balance is, what the liability of the remaining sureties would be, if any.

23. The court also took note of the Constitutional point that was raised in the answering affidavit read with the Rule 16A notice delivered by the respondents.

The interest charged by the applicant:

24. Having regard to the above, it is hard to imagine that any entity, or person, would enter into a credit agreement like this, especially having regard to the fact that the daily and monthly fees will just keep on running if there is no protection in terms of law.

25. After the first respondent's breach of contract, the amount advanced by the applicant to the first respondent accrued interest of 5% per month. Just on the capital amount of R800'000.00, excluding the cost of initiation, it would be R40'000.00 per month, or R480'000.00 per year, excluding the compounding effect.

26. Over and above this interest, the first respondent would be liable for R575.00 per day, which amount to another R17'250.00 in a 30 calendar day month, which amount to another 2.156% per month or R207'000.00 per year.

27. Be that as it may, the applicant and first respondent agreed to this terms.

The Certificate of Balance:

28. The quantum of the applicant's claim was placed in dispute.

29. The applicant is contractually entitled to issue a certificate that is regarded as *prima facie* proof of the amount due by the 1st respondent.

30. The applicant attached, as annexure *AJK8* to the founding papers, a certificate of balance indicating that the amount of R2,240,288.22 is due by the 1st respondent on 4 August 2022.

31. It is trite law that a certificate of balance, where parties agree to a certificate of balance contractually, is *prima facie* proof that the amount claimed was correctly calculated.

32. At this point in time, we are not dealing with the merits of the respondents' legal defences against the indebtedness, but rather the calculation of the amount.

33. In this regard see *ABSA Bank Ltd v Le Roux*, 2014 (1) SA 475 (WCC) and *Pretoria Portland Cement Company Ltd v Mielie Maize Holdings (Pty) Ltd*, (2007) JOL 19230 (T).

34. The respondents in this matter also did not make an attempt to challenge the amount from a calculation point of view.

The surety:

35. As stated above, the parties agreed that regarding the indebtedness of the 4th and 5th respondents, that issue should be postponed *sine die* and therefore was not before me.

36. It is clear that 2nd and 3rd respondents signed as sureties and as co-principal debtors of the 1st respondent. In this regard see annexure *AJK9.1* and *AJK9.2* to the founding affidavit.

37. A surety and co-principal debtor, it is trite law, shall be in the same position as the principal debtor and therefore they have the same defences as the 1st respondent but also the same obligation if a court awards in favour of the applicant.

The National Credit Act:

38. The *National Credit Act* finds limited applicability in the South African Law.

39. In terms of Section 140, the *National Credit Act* does not apply to "large agreements" concluded by juristic persons. The threshold at the time for determining what is a large agreement was set out by the Minister as R250'000.00.

40. *In casu*, the amount for the credit agreement between two entities was R800'000.00, which exceeded the threshold.

41. It is trite law that if the National Credit Act does not apply to the principal agreement, then it does not apply to the sureties, and *vice versa*.

42. In this regard, see *Firstrand Bank t/a RMB Private Bank v Nagel*, (2012/33690) (2013) ZAGPJHC 200, *Firstrand Bank Ltd v Colbec Estates (Pty) Ltd*, 2009 (3) SA 384 (T) and *Nedbank Ltd v Wizard Holdings (Pty) Ltd*, 2010 (5) SA 523 (GSJ).

Common law *in duplum*:

43. In terms of common law *in duplum* the interest charged may not exceed the capital advanced, there may be other fees which are not included in the calculation of the double capital amount.

44. The statutory *in duplum* Rule, on the other hand, includes administrative and management fees in the calculation of the amount that is not to exceed the amount advanced.

45. It is the case of the applicant in this matter that the amount referred to in the certificate of balance does not make provision for charging more than double interest. The reason the applicant got to such a large amount is due to daily management fees being charged on the amount.

46. The parties, in clause 13 of the loan agreement, excluded the applicability of the common law *in duplum* rule.

Constitutionality:

47. It is unthinkable how the respondents would have agreed to the interest set out above.

48. The respondents took a Constitutional point that the *National Credit Act* should be extended to include for natural persons who are surety and co-principal debtors to credit agreements.

49. A surety, who is a co-principal debtor, is in the same position as the principal debtor. There is no basis, or case made out to state why the legal position of the *National Credit Act* should be excluded in respect of the sureties.

50. The extension of the common law was not raised in terms of a Rule 16A notice, and therefore I will not comment on same.

The contract between the parties:

51. It is common cause that the Applicant and First Respondent willingly contracted in terms of the loan agreement.

52. I already made comment to the high amount of interest and cost charged in terms of the agreement.

53. Courts, in my view should not interfere in contracts between parties, unless requested to declare an agreement invalid, on application or action, and if it is *contra bonos mores*.

54. In *Sonae Arauco SA (Pty) Ltd v Trustees for the Time Being of the Oregon Trust and others* 2020 (9) BCLR 1098 (CC), the Constitutional Court recognized and confirmed the *pacta sunt servanda* in our law by saying:

> In paragraph 83 thereof:
>
> *"The first is the principle that public 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 that contracting parties honour obligations that have 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 contracts through the instrument of public policy, as it gives expression to central constitutional values."*
>
> In paragraph 84 thereof:
>
> *"Moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, 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."

In paragraph 85 thereof:

"The fulfilment of many rights promises made by our Constitution depends on sound and economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of 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 of pacta sunt servanda."

Analysis:

55. The parties before court contractually agreed that the 1st respondent would obtain finance from the applicant, it appears to have been the intention of the parties that the finance would be of short duration.

56. The 2nd and 3rd respondents bound themselves as sureties and co-principal debtors.

57. In the reported judgment by De Vos J in this Division in a matter of *Business Partners Ltd v De Vasconcelos & 3 Others*, (Case no. 71133/2014), obtained from SAFLII without neutral citation, De Vos J held that:

> "*There is no evidence that the defendants were induced by fraud or misrepresentation by the plaintiff to sign the deed of suretyship. It is my finding that all 4 defendants were fully aware of the nature of the documents they signed and intended to be bound by it. No blame can be attached to the plaintiff's behaviour, motivation and/or explanation towards the defendant. The plaintiffs played open cards with the defendants from the start and in negotiations until finalisation of the agreements.*"

> And

> "if the common law is to be developed, it must entail a proper understanding of the present economic and financial milieu we are living in. In my view, the legislator, having regard to our present economic and financial environment, deliberately exclude loans that are considered to be large from provisions of the *National Credit Act*, thereby confirming that the legislator respects and recognises the existence of free

enterprise. Accordingly, there is no room for *in duplum* rule in the present instance.

58. The defences raised *in casu* where similar to that before De Vos J, and the matter referred to was taken on appeal in the matter of *De Vasconcelos & Others v Business Partners Ltd* (637/2018) (2019) ZASCA 80 (31 May 2019).

59. In the Appellate Division, the court confirmed the view of De Vos J.

60. The *National Credit Act* cannot be applicable for the reasons stated above.

61. The accrued administrative fees cannot be regarded as interest for the sake of determination from the common law *in duplum* rule, which was in any event, contractually excluded.

62. The certificate of balance is *prima facie* proof, and contractually agreed, of the indebtedness as at 4 August 2022.

63. The 2nd and 3rd respondents duly bound themselves as sureties.

64. This court was never approached with a counter application to declare the agreement between the parties invalid, the legal issue above was merely raised as a defence.

65. For the reasons stated above, an expressed by the Constitutional Court, a court should not interfere with the contract between parties.

Costs:

66. The parties agreed to costs on a scale as between attorney and client and the court will not interfere with that.

WHEREFORE the following is made an order of court:

1) The 1st, 2nd and 3rd respondents are jointly and severely, with the one to pay the other to be absolved, to pay the applicant the amount of R2'240'288.22;

2) The 1st, 2nd and 3rd respondents are jointly and severely, with the one to pay the other to be absolved, to pay the applicant the amount of R575.00 per day from 5 August 2022 until date of final payment; and

3) The 1st, 2nd and 3rd respondents shall pay the costs of this application on a scale as between attorney and client;

4) Part A of the application is postponed *sine die* in respect of the 4th and 5th respondents; and

5) Part B of the application is postponed *sine die*.

CPJ STRYDOM

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

3 November 2023

Appearances:

For the applicant:	Adv. C Van der Linde
	Instructed by BDP INC
	c/o Macrobert INC
For the respondents:	Adv. T Qhali
	Nyapotse INC