

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 NO:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: **25 March 2024** Signature: _____

In the matter between:

DCYSIVE FINANCE (PTY) LTD
(REGISTRATION NUMBER: 2012/186932/07)

Applicant

And

LED CAPITAL INVESTMENTS (PTY) LTD
(REGISTRATION NUMBER: 2012/186932/07)

1st Respondent

MUNTINGH HAMMAN

2nd Respondent

(IDENTITY NUMBER: [...])

ELIZABETH WINTER

3rd Respondent

(IDENTITY NUMBER: [...])

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an opposed application for a monetary judgment against the respondents based on a loan agreement between the applicant and the first respondent wherein the second and third respondents stood surety.

B. THE PARTIES

[2] The applicant is Dcysive Finance (Pty) Ltd, a company with limited liability, duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa, is a financier that provides finance solutions to multiple entities.

[3] The first respondent is LED Capital Investments (Pty) Ltd, a company with limited liability, duly registered and incorporated in accordance with the laws of the Republic of South Africa,

[4] The second respondent is Muntingh Hamman, an adult male businessman with his chosen *domicillium citandi et executandi* and residential address at [...] P[...] P[...] R[...], W[...], H[...], Gauteng, [...].

[5] The third respondent is Elizabeth Winter, an adult female businesswoman with her chosen *domicillium citandi et executandi* and residential address at [...] P[...] P[...] R[...], W[...], H[...], Pretoria, Gauteng, [...].

C. THE FACTS

[6] On 12 August 2019, the first respondent entered into a written loan agreement with the applicant, for an amount of R250 000. In terms of the written loan agreement the applicant was to pay the first respondent in two instalments, the first instalment of R30 000 was payable by 8 August 2019 and the second instalment of R220 000 was payable by 13 August 2019. The applicant as per the agreement paid these instalments, which were a sum of R250 000, to the first respondent. In terms of the loan agreement the loan was repayable with 5% interest per month to be calculated on a daily basis or part thereof with a minimum interest charge of R12 500, this was to be payable to the applicant by 13 September 2019. The applicant in terms of the loan agreement was entitled to claim the full balance of the loan together with interest should the first respondent fail to pay any instalment on due date.

[7] The first respondent failed to make the repayment by 13 September 2019 but made a payment of R100 000 on 4 November 2019 and another payment of

R150 000 on 31 March 2020, which amounts to a total of R250 000. Demands were sent to the respondents in respect of what is owed and payable to the applicant but with no response. The amount claimed by the applicant is R350 382.87 together with interest thereon at a rate of 5% per month or part thereof until date of payment. However, this amount was later reduced, by the applicant, to R197 203.70 as a result of the application of the *in duplum* rule.

[8] It is common cause that the second and third respondents signed deeds of suretyship on 29 April 2019, respectively, binding themselves in writing, jointly, severally, irrevocably and in an unlimited amount as co-principal debtors *in solidum* with the first respondent.

[9] It is noteworthy that the parties have conceded that the National Credit Act 34 of 2005 is not applicable in this matter. It is also noteworthy that the late filing of the replying affidavit has been allowed by the respondents.

D. APPLICANT'S SUBMISSIONS

[10] The applicant submits that this Honourable Court has the necessary jurisdiction to adjudicate on the matter as the respondents either have their *domicillium citandi et executandi* or they are residing within this Honourable Court's area of jurisdiction and the entire cause of action arose within this Honourable Court's area of jurisdiction in that the conclusion, the partial performance of and the breach of the loan agreement and conclusion of the Deeds of Suretyship Agreements took place within this Honourable Court's area of jurisdiction.

Regarding the monetary jurisdiction of this Honourable Court, the applicant submits that in as much as the Magistrate's Court has jurisdiction on the matter based on the amount claimed, the High Court must entertain matters within its territorial jurisdiction even if the amount claimed falls within the jurisdiction of a Magistrate's Court and as such this Honourable Court has concurrent jurisdiction with the Magistrate's Court and has the necessary jurisdiction to hear the matter.

[11] The applicant submits that there are no fundamental factual disputes. As the factual disputes raised by the respondents regarding the breach of the loan agreement, the validity of the deeds of suretyship agreements, the calculation of the interest and the outstanding amount payable to the applicant, can easily be resolved with reference to the relevant documents, applicable legislation, and rules of common law. The applicant contends that by admitting that the first repayment of the loan was only paid during November 2019, the respondent admits that the loan agreement was breached as the repayments were not made timeously as per the loan agreement, as such, the breach of the loan agreement cannot be said to be a bona fide dispute. Secondly, the applicant submits that that the respondents do not deny signing sureties and only raise the dispute in relation to the validity of the suretyship agreements, and this can be resolved easily by reference to the relevant documents and the relevant law. The same applies to the calculation of the interest and the outstanding amount payable to the applicant. As such, the applicant submits that there is no need

for the matter to be launched by means of an action proceeding. Therefore, there was no wrong choice of process which constitute an abuse of process.

[12] The applicant submits that the first respondent breached the loan agreement when it failed to pay the outstanding amounts as they became due and payable. The applicant submits that it made numerous demands for repayment from the respondents who undertook both verbally and in writing to pay but failed to do so. Additionally, the applicant's attorneys addressed email correspondence to the first respondent demanding the said payments but there was no response from the respondents, and they still failed to pay the outstanding amount to the applicant or even attempt a portion of the outstanding amount. Moreover, the applicant submits that because the second and third respondents bound themselves in writing, jointly, severally, irrevocably and in an unlimited amount as surety for and co-principal debtors in solidum with the first respondent, they are indebted to the applicant for the outstanding amount which is due and payable to the applicant. The applicant submits that these deeds of suretyship signed by the second and third respondents are valid and have complied with the formalities prescribed by the legislation and the common law. As the deeds of suretyship are linked to the loan agreement by the reference in clause 1 of the loan agreement which clearly refers to the second and third respondents as personal sureties.

[13] The applicant submits that the deeds of suretyship make provision for a certificate of indebtedness, and this can serve as *prima facie* evidence of the

amount owed by the respondents to the applicant, this certificate of indebtedness has been attached in the founding affidavit and is annexure 'DGM6'. The amount owed and shown on the certificate of indebtedness is supported by a clear calculation shown on the amortisation schedule annexed as 'DGM5', submits the applicant. Regarding the admissibility of annexures 'DGM5' and/or 'DGM6', the applicant submits that they are not hearsay evidence as the probative value of the contents of these annexures do not depend on the credibility of any person other than the applicant as they are simply calculations of the amount claimed by the applicant. Further, the applicant submits that the admissibility of the certificate of indebtedness has no effect on the question of whether or not there had been a breach of the loan agreement by the first respondent, especially considering that this is not the only document that the applicant relied on to support the amount claimed from the respondents.

[14] The applicant submits that the way the in duplum rule works is that the interest stops running when the unpaid interest equals the outstanding capital and not the original capital, and in terms of the common law, payments made by debtors are first appropriated to interest and then to capital. As a result, the applicant submits that, the repayments by the first respondent were appropriated to the interest that would have accrued before reducing the outstanding capital and considering that the due dates for the repayments were missed, further interest accrued. The money claimed is the outstanding capital

plus the interest accrued thereon which is limited by the in duplum rule to the outstanding capital amount.

[15] Finally, the applicant submits that there is an obligation on the first respondent to pay the applicant and this is evidenced by the WhatsApp messages between the applicant and the second respondent who essentially admits that there is money owed to the applicant and undertakes to settle the money. The applicant further submits that these messages were not disputed by the respondents, nor were they explained by the respondents, this is indicative of the fact that the respondents know that there is money due and payable to the applicant, but they try to hide behind bare denials and false claims of factual disputes in an effort to delay the payment of the amount due.

[16] The applicant submits that a proper case has been made out for the relief sought.

[17] It is also noteworthy that the applicant has since, in its heads of argument, gone back on its submission on the validity of the deeds of suretyship attached to the founding affidavit. In that the deeds of suretyship do not contain all the terms essential for the creation of the sureties' liability and as such, the applicant cannot proceed with its claim based on these two deeds of suretyship. It is also noteworthy that the applicant submitted in its replying affidavit that it had attached the incorrect deed of suretyship in respect of the third respondent and has attached the correct one in Annexure 'RA3', which

the applicant claims does not suffer the alleged defects mentioned by the second respondent regarding non-compliance with section 6 of the General Law Amendment Act. The admissibility of this deed of suretyship will be analysed further below.

E. RESPONDENTS' SUBMISSIONS

[18] The respondents submit that this Honourable Court has jurisdiction to adjudicate on the matter as the respondents are situated and/or permanently reside within the area of jurisdiction of this Honourable Court. However, this Honourable Court does not have the necessary jurisdiction to hear the matter as the amount claimed falls squarely within the jurisdiction of the Magistrate's Court and bringing this matter to this Honourable Court constitutes an abuse of process and the application ought to be dismissed.

[19] The respondents stated that there are deep and fundamental factual disputes, regarding the alleged breach of the loan agreement, the validity of the deeds of suretyship agreements, the interest calculation, and the calculation of the outstanding amount payable to the applicant, that cannot be determined on affidavit. These fundamental factual disputes, submit the respondents, should have been foreseen by the applicant who should have instituted action proceedings instead. As such the applicant wrongly brought this matter to this Honourable Court by means of a motion proceeding instead of action proceeding and this constitutes an abused of process and the application ought

to be dismissed for the wrong choice of process. As this wrong choice of process infringes the respondents' right to have their disputes determined in a fair process as guaranteed by section 34 of the Constitution.

[20] The respondents submit that the deeds of suretyship attached to the founding affidavit are not valid due to the non-compliance with section 6 of the General Law Amendment Act 50 of 1956. In that upon proper interpretation of the deeds of suretyship, the second and third respondents are referred to as the principal debtors and the law does not permit one to sign and stand as a surety on their own behalf. Moreover, the respondents submit that regarding the allegation that the second and third respondents signed as sureties and co-principal debtors in solidum with the first respondent does not appear from the alleged deeds of suretyship and the first respondent is not identified as the principal debtor.

[21] The respondents contend that payments were made to the applicant in the sums of R100 000 and R150 000 on 4 November 2019 and 31 March 2020, respectively. The respondent further contends that the remainder of the amortisation schedule in annexure 'DGM5' is hearsay, inadmissible and it cannot be determined from the founding affidavit or proper reading of annexure 'DGM5' or 'DGM6' as to how the interest has been calculated. The respondents contend that the applicant did not state which computer was used and how to calculate the interest and the like. As such this evidence is hearsay and inadmissible.

[22] The respondents submit that the loan agreement does not make a provision for a so-called 'certificate clause' and as such the applicant cannot and is not entitled to prove the alleged indebtedness prima facie by way of a certificate that is not provided for in the loan agreement. The respondents submit that the applicant is misleading this Honourable Court by alleging that it is entitled to rely on a certificate of indebtedness when it is not as such is not provided for in the loan agreement.

[23] The respondents submit that, R350 381.87, the amount claimed by the applicant exceeds the principal debt of R250 000 notwithstanding the payment of the R250 000. This, submit the respondents, goes against the in duplum rule which dictates that the interest claimed cannot be more than the original capital amount of the loan and as such, the interest calculation is incorrect and annexures 'DGM5' and 'DGM6' are to be disregarded and are inadmissible.

[24] The respondents submit that there is no obligation on the first respondent and/or the other respondents to make payment to the applicant and the application stands to be dismissed.

F. ISSUES FOR DETERMINATION

[25] There are various issues before this Court:

- 25.1 firstly, there is the issue of the jurisdiction of this Court.
- 25.2 secondly, there is the issue of whether there are fundamental disputes of facts.
- 25.3 Thirdly, there is the issue of admissibility of the deed of suretyship 'RA3'.
- 25.4 Fourthly, there is the issue of whether annexures 'DGM5' and 'DGM6 constitute hearsay evidence and their admissibility thereof.
- 25.5 Fifthly, there is the issue of whether the applicant is entitled to rely on the certificate of balance to make out its case.

G. LEGAL ANALYSIS

Jurisdiction

[26] There is consensus among the parties that to the extent that the respondents reside within the area of this Court's jurisdiction, this Court has territorial jurisdiction. However, there is a dispute about the monetary jurisdiction of this Court, in that the amount claimed falls within the jurisdiction of the Magistrates Court.

[27] The jurisdiction of High Court is governed by section 169(1) of the Constitution, subsection 169(1)(b) specifically finds application in this matter and it provides that:

“(1) The High Court of South Africa may decide—

...

any other matter not assigned to another court by an Act of Parliament.”

[28] This provision can be understood to mean that the High Court may decide *inter alia* only matters that are not assigned to another Court, and if the matter brought before it is assigned to another Court the matter should be heard and decided by the assigned Court. That is to say that if a matter falls within the jurisdiction of the Magistrates Court, the High Court may not entertain such a matter. However, there is the issue of concurrency that can come to play and, in such situations, like in the present matter, “a plaintiff (applicant) as *dominus litis* has a right to choose in which of concurrent fora he wishes to institute legal proceedings.”¹ Of which in this case, the applicant has chosen this High Court which has concurrent jurisdiction with the Magistrates’ Court.

[29] Moreover, the High Court cannot refuse to hear the matter that it has a concurrent jurisdiction with another Court. This was held in the Supreme Court of Appeal in the matter of *Agri Wire (Pty) Ltd v Commissioner, Competition Commission and Others*² which held the following in paragraph 19:

¹ Marth NO v Collier and Another [1997] JOL 340 (C) page 508.

² [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA).

“[s]ave in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.”

[30] Furthermore, the Supreme Court of Appeal in *Standard Bank of South Africa Ltd and Others v Thobejane and Others; Standard Bank of South Africa Ltd v Gqirana NO and Another*³ held that a High Court must entertain matters that fall within its territorial jurisdiction that fall within the jurisdiction of a Magistrates’ Court, brought to it, due to its concurrent jurisdiction with the Magistrates’ Court, in fact the High Court is obliged to entertain such matters. This was appealed in the Constitutional Court which found this holding to be good law.⁴

Disputes of fact

[31] In situations where a matter is brought to Court by means of a motion proceeding the issue or dispute must be one that is grounded on the law. This is because the “purpose of the courts in motion proceedings is to resolve legal disputes on common cause facts.”⁵ without the need to hear oral evidence. So, in instances where there is an alleged dispute of fact the Court must examine if the alleged dispute of fact is real and if the alleged dispute of fact is one that cannot satisfactorily be determined without the aid of oral evidence or without

³ [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA).

⁴ South African Human Rights Commission v Standard Bank of South Africa and Others [2022] ZACC 43; 2023 (3) BCLR 296 (CC); 2023 (3) SA 36 (CC).

⁵ Roselli v Derek’s Boerewors and Pie Mecca CC and Others [2016] ZAGPPHC 1160 para 8.

the need to have the matter referred to trial or without the need to dismiss the application in its totality.

[32] In this matter, the respondents call for the dismissal of the application based on the wrong choice of process by the applicant due to there being a dispute of fact. The Court in *Roselli v Derek's Boerewors and Pie Mecca CC and Others*⁶ held that “the application is disposable on one question, whether there arise disputes of fact of the sort that is material, *bona fide*, foreseeable and incapable of resolution on the pleadings.” This is to say that the Court ought to scrutinise the alleged dispute of facts in order to determine if they incapable of resolution on the pleadings. The test for this, i.e., the *Plascon-Evans* rule was set out in *Plascon-Evans Ltd v van Riebeeck Paints (Pty) Ltd*⁷ which essentially says that a final order or relief may only be granted “if the facts as stated by the respondent together with the admitted facts in the applicant’s affidavits justify such an order.”⁸ Especially where the respondent has not made any request for oral evidence or rather cross-examination as stipulated under Rule 6(5)(g) of the Uniform Rules of Court which says that “where an application cannot properly be decided on the papers, the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious

⁶ *Supra* footnote 5.

⁷ 1984 (3) SA 623 (A).

⁸ 1984 (3) SA 623 (A) at 634H-635C.

decision. In particular, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact.”⁹

Closer scrutiny of the alleged disputes of fact calls for assessing the adequacy of the respondent’s denial for the purposes of determining whether a real, genuine, or *bona fide* dispute of fact has been raised. The court in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*¹⁰ set out the methodology for determining whether there is a real, genuine, or *bona fide* dispute of fact as follows:

“[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents’ answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant’s application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine, or bona fide. For the reasons which follow I respectfully agree with the learned judge. (own emphasis)

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . .

[13] A real, genuine, and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and

⁹ Rule 6(5)(g) of the Uniform Rules of Court.

¹⁰ 2008 (3) SA 372 (SCA) paras 11-13.

unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.” (own emphasis)

[33] That is to say that the Court can decide the matter without having to dismiss the application or calling for oral evidence, if upon closer scrutiny of the apparent disputes the Court is satisfied that the respondents’ version is far-fetched and falls to be rejected outright. Based on the above methodology it can be argued that some of the alleged disputes of fact constitute material

disputes of fact. However, these as will be shown below, can be easily resolved on papers and as such the alleged disputes of fact do not justify an order for oral evidence or the dismissal of the application as rule 6(5)(g) would require.

[34] In this matter, considering there being material disputes of fact, this Court can consider the common-sense approach set out in *Soffiantini v Mould* [1956] 4 All SA 171 (E) on page 175 as shown below:

“It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

[35] The dispute of facts are as follows:

- 35.1 The breach of the loan agreement;
- 35.2 The validity of the deeds of suretyship attached in the founding affidavit;
- 35.3 The attached amortisation schedule which is the calculation of the interest accrued, with the applicant saying that this need not be explained as the calculations could have easily been scrutinised and the respondents saying that the applicant did not explain its reliance on this attachment in their founding affidavit and the explanation is only given in the heads of argument and this is not the correct way to present evidence in court;
- 35.4 The certificate of indebtedness attached in the founding affidavit, with the applicant saying that the deed of suretyship agreements provide for such a certificate and the respondents saying the loan agreement does not provide for such and the deeds are invalid so the reliance on it is unfounded.

[36] It is common cause that the loan agreement states that the debt of R250 000 will incur interest at a rate of 5% per month calculated on a daily basis. It is also common cause that the first respondent made a payment of R250 000 in total. The amount paid cannot, without needing to do any calculations, be sufficient to pay off the amount the first respondent owes to the applicant which is the

R250 000 plus interest. Moreover, it is common cause that the loan agreement stated that the loan was repayable by 13 September 2019 or earlier, however the first payment was made on 4 November 2019 and the second payment was made much later on 31 March 2020. As such, it cannot be said that there is a real, genuine, and *bona fide* dispute of fact regarding the breach of the loan agreement.

[37] It cannot be said that there is a dispute on the deeds of suretyship attached in the founding affidavit due to their non-compliance with the formalities, as there is concession amongst the parties that these are invalid and are no longer relied on. The only dispute surrounding suretyship is the issue of the other deed of suretyship attached to the replying affidavit which will be analysed below together with its admissibility.

[38] The dispute around the amortisation schedule being hearsay evidence and it being inadmissible thereof can also easily be resolved in the papers as will be done below. In the same way that the dispute on the reliance of the certificate of balance can also be easily resolved on the papers.

Validity of Suretyship Agreements and the Admissibility of the Deed of Suretyship 'RA3'

[39] Inasmuch as there is concession amongst all the parties involved, that the deeds of suretyship attached to the founding affidavit do not comply with all the necessary formalities, it is necessary to set out what the law says regarding the

validity of the deeds of suretyship. Especially considering that reliance is now placed on yet another deed of suretyship.

[40] The legislation governing deeds of suretyship is the General Law Amendment Act 50 of 1956 (“GLAA”). That is to say that for a deed of suretyship to be valid, it must adhere to the strict formal requirements set out in the GLAA, specifically section 6 of the GLAA, which stipulates that:

“No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.”

[41] One of the requirements that emerges from the reading of section 6 of the GLLA is that the ‘terms’ of the suretyship agreement must be embodied in the written document. The Court in *Fourelmel (Pty) Ltd v Maddison*¹¹ held that the word ‘term’ in section 6 of the GLLA includes the identity of the creditor, the identity of the surety, the identity of the principal debtor and also the amount of the principal debt. Page 344H-345C of *Fourelmel supra* provides the following:

“The word ‘terms’, in the context with which we are now concerned, ordinarily means ‘conditions or stipulations limiting what is proposed to be granted or done’...Confining myself to the word when used in relation to a contract of suretyship, it is manifest that, for example, identification of the principal debt and debtor is not only a term of the

¹¹ 1977 (1) SA 333 (A).

contract but is essential to the creation of the surety's liability, suretyship being an accessory obligation."

[42] That is to say that for a deed of suretyship to be valid, the agreement must have all the abovementioned terms otherwise the deed of suretyship cannot be enforceable. In this case, it is quite clear that the deed of suretyship attached to the replying affidavit, which the applicant now relies on to find liability is indeed free of the defects of the other deeds of suretyship conceded to be invalid, this is to say that the deed of suretyship in respect of the third respondent attached to the replying affidavit is valid. However, it is trite that this kind of evidence which the applicant seeks to rely on should have been attached to the founding affidavit. As such, its admissibility comes into question.

[43] It is important to note that the case that the applicant is making is that the respondents are jointly and severally liable to it as a result of the loan agreement in respect of the first respondent and the deed of suretyship agreement in respect of the second and third respondents. The deed of suretyship attached to the replying affidavit still seeks to make the same case which is of the respondents' liability to the applicant. The attachment of this deed of suretyship in respect of the third respondent is not a new case, if anything, it is a response to the argument advanced by the respondent that the attached deeds of suretyship agreements are invalid, and as a result the applicant attached a valid deed of suretyship agreement, with the same text as

the other ones with the exception of the identity of the principal debtor. This speaks entirely to its admissibility.

[44] The evidentiary basis on which the application is brought must be set out in the founding affidavit, because of the principle that “an applicant must stand or fall by his petition and the facts alleged therein...”.¹² However, it is important to note what the Supreme Court of Appeal in *Mostert and Others v FirstRand Bank t/a RMB Private Bank and Another*¹³ said in paragraph 13:

“It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This is not, however, an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. See the oft-quoted dictum in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (W) at 177G – 178A and the judgment of this court in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para 26. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant

¹² *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68.

¹³ 2018 (4) SA 443 (SCA).

when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs.”

[45] In light of the above, the question then becomes whether the deed of suretyship relied on that is attached to the replying affidavit should be admitted and taken into account when adjudicating on this matter.

[46] Moreover, considering that the respondents only filed and uploaded their heads of argument about two months after the replying affidavit was filed and uploaded, if they took issue with this deed of suretyship or its attachment in the replying affidavit, or if they opined that they suffered prejudice thereof, they could have either sought leave to file further affidavit and deal with it there or they could have brought an application to have this deed of suretyship struck out. Both of these options were available to the respondents as a remedy to the prejudice they may have suffered, but these options were not explored.

[47] Therefore, it is safe to argue that this constitutes one of the exceptional cases permitting the admission of a new attachment in a replying affidavit, i.e., the deed of suretyship. Especially considering that it is common cause that the second and third respondents signed deeds of suretyship. However, the valid deed of suretyship is only in respect of the third respondent and as such only the third respondent can be found to be liable.

Hearsay Evidence of Annexures 'DGM5' and 'DGM6' and Their Admissibility

[48] The law governing hearsay evidence is the Law of Evidence Amendment Act 45 of 1988, which defines hearsay evidence as “evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence”.¹⁴ The general rule of the Law of Evidence of South Africa is that hearsay evidence is inadmissible, however this rule is not absolute and there are exceptions to it. When dealing with a hearsay evidence allegation, it is important to first determine if the evidence in question amounts to hearsay evidence before delving into whether or not it is admissible, provided that the evidence is found to be hearsay.

[49] The evidence alleged to be hearsay is the amortisation schedule and the certificate of balance, both attached to the founding affidavit as annexures 'DGM5' and 'DGM6', which essentially are the same thing with the inclusion of the interest accrued for May 2022 in annexure 'DGM6'. These annexures reflect the amount owing by the respondents together with the interest accrued from 08 August 2019 till 31 May 2022. The basis of the allegation of these annexures being hearsay evidence is that the applicant failed to show how the calculations for interest accrued or how they were done, and this cannot be determined from the founding affidavit or upon a proper reading of annexures 'DGM5' and/or 'DGM6'.

¹⁴ Section 3(4) of the Law of Evidence Amendment Act 45 of 1988.

[50] For evidence to be considered hearsay, as aforementioned, the probative value of such contents must depend on the credibility of another person other than the person giving such evidence, in this case, the applicant. The calculations reflected in annexures 'DGM5' and 'DGM6' are based on the 'Interest' clause found in the loan agreement which is also indicated in the founding affidavit. It is safe to argue that all the applicant did was to do the calculation in terms of the agreed formula, i.e., 5% per month calculated on a daily basis, and there is no evidence suggesting that the applicant sought for instances the expertise or aid of another person to whom the probative value of the calculations depends on their credibility. As such the calculations were made by the applicant based on the information available to both parties. Therefore, the allegation that these annexures are hearsay evidence is unfounded.

[51] Regarding the applicant's failure to explain the formula used for the calculations in the founding affidavit and to only do so in their heads of argument, it is important to note that when parties attach annexures to their affidavit, "...what is incumbent is the identification of portions thereof on which reliance is placed as an indication of the case which is sought to be made out on the strength of the document concerned."¹⁵ Otherwise "a party would not know what case must be met."¹⁶ However the Court in *Swissborough Diamond*

¹⁵ *Elegant Line Trading 257 CC v Member of the Executive Council for Transport – Eastern Cape* [2022] ZAECBHC 45 para 7.

¹⁶ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) page 324G-H.

*Mines (Pty) Ltd and Others v Government of The Republic of South Africa and Others*¹⁷ further held the following in page 324H-I:

“In *Heckroodt NO v Gamiet* 1959 (4) SA 244 (T) at 246A—C and *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509E—510B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged.”

[52] That is to say that where an argument is made in support of the relief sought but this argument is not specifically mentioned in the papers, such argument may be allowed provided that it stems from the facts alleged and the opposition will not be prejudiced in that they will not know what case must be met. The High Court in *Road Accident Fund v Britz obo Britz*¹⁸ held the following paragraph 11:

“The rules are meant for the Court and not the Court for the rules. The common law jurisdiction of the high court further allows a high court to govern its own procedures and with Rule 27, to condone non-compliance with any of the rules...in interpreting the Rules of Court, Schreiner JA in *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) said:

‘No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the

¹⁷ 1999 (2) SA 279 (T).

¹⁸ [2017] ZAGPPHC 762.

machinery for the administration of justice. But on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

[53] In light of the above, there is no unfairness or prejudice towards the respondents, owing to the applicant’s failure to explain the calculations in their founding papers. Especially considering that the method for calculation of the amount claimed is provided in the loan agreement, the terms of which are common cause. The respondents could have easily made the calculations reflected in the amortisation schedule themselves using the provided method for calculation if they take issue with the ones reflected in the amortisation schedule. Therefore annexures ‘DGM5’ and ‘DGM6’ ought to be admissible for the purposes of this Court’s adjudication of the matter.

Reliance on the Certificate of Balance

[54] The applicant relies on the certificate of indebtedness attached to the founding affidavit as annexure ‘DGM6’ to claim the amount due and payable to it, but it makes reference to the loan agreement that the certificate of indebtedness is issued in terms of the loan agreement. The respondents correctly submitted that the loan agreement does not have a certificate clause. However, the applicant contended that the deeds of suretyship agreements do have a certificate clause on paragraph 6. It is common cause that the deeds of suretyship attached to the founding affidavit are invalid, but the deed of

suretyship attached to the replying of affidavit has been found to be valid and admissible and it does contain a certificate clause on paragraph 6. This as a result resolves the alleged dispute on the reliance on the certificate of balance.

[55] Regarding the allegation of the wrong choice of process, the facts that are common cause, like the amount borrowed, the loan agreement's terms, the amount paid, the existence of the deeds of suretyship agreements, render the respondents' version or submission implausible as the relief sought by the applicant can be determined on these common cause facts.

H. CONCLUSION

[56] This Court has jurisdiction to hear this matter as shown already, and there are no fundamental disputes of fact warranting the dismissal of this application. The applicant has not succeeded in making out a case against the second respondent. Only the first and third respondents remain liable in terms of the loan agreement and in terms of the deed of suretyship in respect of the third respondent.

[57] The application is opposed by the second respondent.

The in duplum rule

[58] It has been conceded amongst the parties that the *in duplum* rule applies to the agreement at issue here, hence the reduction of the initial amount claimed from the R350 382,27 to R197 203,70 plus interest and costs.

[59] The *in duplum* rule has been defined as "...a common law norm that regulates the accrual of interest on a debt that is due and payable. The rule is that arrear interest stops accruing when the sum of the unpaid interest equals the extent of the outstanding capital. The plain policy consideration underlying the rule is to prevent a broken debtor from being pounded by the ever-growing interest burden. The purpose of the rule is dual. It permits a creditor to recover double the capital advanced to the debtor whilst it seeks to alleviate the plight of debtors in financial distress." – *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paragraph 107.

[60] When the first respondent made the second payment for the amount of R150 000 on 31 March 2020, the outstanding balance became R98 568,85 and it was at this outstanding amount that when matched by the arrear interest, it (arrear interest) would stop accruing. The arrear interest as a result continued to run for 14 more months until 31 May 2021 when it matched the outstanding balance of R98 568,85, as a result the amount due and payable to the applicant became R195 108,43 following the application of the *in duplum* rule.

[61] The amount reflected on the applicant's papers is computed as R197 203,70 following the application of the in duplum rule and has not been disputed as such.

[62] In conclusion, the application against the second respondent is dismissed, as against the first respondent and the third respondent, the application succeeds. The following order is made against the first and third respondents, jointly and severally, the one paying the other to be absolved, for:

- (i) Payment of the sum of R197 203.70.
- (ii) Interest thereon at the governing rate of interest per month from due date until date of final payment.
- (iii) Applicant's costs on the scale as applicable in the Magistrate's Court.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 03 October 2023

Date of Judgment: 25 March 2024

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