IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

Case no: 15698/2015

In the matter between:

NEDBANK LIMITED	**PLAINTIFF/APPLICANT**

versus

ZEVOLI 208 (PTY) LTD	**FIRST DEFENDANT/RESPONDENT**
SHIELD HOMES EC (PTY) LTD	**SECOND DEFENDANT/RESPONDENT**
JACOB HENDRIK VAN RENSBURG	**THIRD DEFENDANT/RESPONDENT**
IAN KENNETH CHRISTIE	**FOURTH DEFENDANT/ RESPONDENT**

JUDGMENT

MADONDO DJP:

[1] This is an application for summary judgment in terms of which the plaintiff claims from the defendants the payment of the sum of R15 864 574.25 plus interest at the rate of 12.5% per annum. For convenience sake, I propose to refer to the parties as plaintiff and defendants as cited in the particulars of claim. The first defendant is the principal debtor and the second, third and fourth defendants the

sureties for the first defendant's indebtedness to the applicant. However, against the second defendant the plaintiff's claim is limited to R2 million. Further, the plaintiff seeks an order declaring the immovable property, the remainder of Portion 40 of Lot 81 No 1572, Tongaat, especially executable and costs on an attorney and client scale. On 8 March 2017 the first defendant in terms of section 129 of the Companies Act 71 of 2008 (the Companies Act 2008) resolved to commence business rescue proceedings. As a result, the plaintiff in terms of s 133(1) of the Companies Act 2008 is now barred from proceeding against the first defendant and hence the application against the first defendant is adjourned *sine die*, costs reserved. The plaintiff now only proceeds against the second, third and fourth defendants in their capacity as sureties.

Parties

[2] The plaintiff is Nedbank Limited, a company duly registered and incorporated with limited liability in accordance with company laws of the Republic of South Africa, also registered as a bank in terms of the Banks Act, 94 of 1990 and as a credit provider in terms of the National Credit Act, 34 of 2005 and having its principal place of business at 135 Rivonia Road, Sandton.

[3] The first defendant is Zevoli 208 (Propriety) Limited, a company with limited liability duly registered and incorporated in accordance with the company laws of the Republic of South Africa and having chosen *'domicilium citandi et exetandi'* at 64 Old Main Road, Botha's Hill.

[4] The second defendant is Shield Homes EC (Pty) Ltd, a company with limited liability duly registered and incorporated in accordance with the company laws of the Republic of South Africa and having chosen *'domicilium citandi et executandi'* at 1st Floor, Walusfield House, 79 Crampton Street, Pinetown.

[5] The third defendant is Jacob Hendrik van Rensburg, an adult male of 25 Lacus Steyn Street, Heuwelsig, Bloemfontein.

[6] The fourth defendant is Ian Kenneth Christie, an adult male of 1st Floor, Walusfield House, 79 Crampton Street, Pinetown.

[7] The plaintiff's claim against the first defendant arises from the loan agreement the plaintiff and the first defendant concluded on 30 July 2014 and in terms of which the plaintiff lent and advanced an amount of R28 309 472.00 to the first defendant. This agreement was termed by the parties as restated loan agreement as it was the reinstatement and replacement of the initial loan agreement the parties had concluded on 14 October 2012.

[8] Against the second, third and fourth defendants the plaintiff's claim is grounded on the surety agreements the defendants entered into with the plaintiff on 16 March 2009, 3 September 2014 and 5 September 2014 respectively. In terms of the agreements the defendants bound themselves jointly and severally to the plaintiff as sureties *in solidum* and co-principal debtors for the due performance of all obligations of whatsoever nature and from whatever cause arising which might then exist or which might arise in the future for which the plaintiff might become liable to the plaintiff subject to the terms specifically recorded in the suretyships.

[9] It was one of the essential terms of the agreement between the plaintiff and the first defendant that in the event of a default the loan balance plus any amounts not paid on the respective due dates for payment would immediately and without further notice become due and payable by the first defendant to the plaintiff and the plaintiff would have right to claim repayment of all amounts owing to it in terms of the restated loan agreement together with interest thereon and would have the right to exercise its rights under the surety.

[10] It was further an essential term of the agreement that the restated loan agreement would constitute the whole agreement between the parties as to the subject matter thereof and no agreement, representation and or warrants other than those set therein would be binding on the parties. Furthermore, no addition to or variation, consensual cancellation or novation of the restated loan agreement and no waiver of any right arising from the restated loan agreement or its breach or termination should be of any force or effect unless reduced to writing and signed by the parties or their duly authorised representatives.

[11] It was also a material and essential term of the contract between the parties that the then existing mortgage bond registered in favour of the plaintiff over the property, the remainder of Portion 40 of Lot 81 No. 1572, Tongaat, would continue to be utilised as security for all and any sum or sums of money which might then or in future be owing to or claimable by plaintiff from the first defendant and remain of full force and effect until cancelled in the deeds registry. The mortgage bond provided that the first defendant would be liable for the costs on the scale as between attorney and own client in the event of the plaintiff instituting legal proceedings against the first defendant.

[12] Under the suretyships the second, third and fourth defendants were not only bound for the due performance of all obligations of the first defendant to the plaintiff but also for the proper and timeous performance by the first defendant of its obligations under any contract or agreement entered into between plaintiff and the first defendant. The liability of the second defendant was limited to R2 million and that of the third and fourth defendants to R28 million. Further, the plaintiff would be entitled and without reference or notification to the first defendant and without affecting its rights in terms of the suretyships to release any other sureties and securities which it might have in respect of the indebtness of the first defendant to the plaintiff or grant the first defendant extensions of time for payment or to make any other arrangements with the first defendant and any other surety for the discharge of any obligations owing by the first defendant to the plaintiff as the plaintiff might deem fit.

[13] Also the parties agreed that a certificate of indebtedness for the purposes of any action against them signed by any manager or director of the plaintiff as to the amount owing by the first defendant to the plaintiff would constitute *prima facie* proof of the facts therein stated and the fact that the debts were due and owing and had not been paid or otherwise discharged.

[14] The first defendant breached the terms of the restated loan agreement in that it failed timeously to pay its monthly instalments and in particular the payment made by the first defendant on the 6th of October 2015 was returned “unpaid” and since that date remained in arrears. The arrears as at 5 November 2015 was the sum of

R44 919.38. In terms of the restated loan agreement the failure by the first defendant to make punctual payment to the plaintiff of any repayment or other amount payable in terms of the restated loan agreement was one of the events of default identified in the restated loan agreement. On the occurrence of an event of default the loan balance, plus any amounts not paid on the respective due dates for payment, immediately and without any further notice became due and payable by the first defendant to the plaintiff and the plaintiff had the right to claim repayment of all amounts owing to or claimable by the plaintiff in terms of the restated loan agreement.

[15] As the first defendant breached the terms of the restated loan agreement in that it failed timeously to pay its monthly instalments, in particular the October 2015 payment, the full amount of the loan balance immediately and without further notice became due and payable. In the circumstances, the plaintiff claims from the first defendant payment in the amount of R14 805 527.12, being the outstanding balance due, owing and payable by the first defendant to the plaintiff in terms of the restated loan agreement, entered into between the plaintiff and the first defendant on 28 July 2014, read with two written addenda thereto. From the third and fourth defendants, as sureties for the indebtedness of the first defendant to the plaintiff, the plaintiff claims payment of the amount of R14 805 527.12 the first defendant owes to the plaintiff and from the second defendant, also as a surety, the amount of R2 million.

[16] Two affidavits opposing summary judgment have been filed in the present case. One affidavit has been filed on behalf of the first, second and fourth defendants and the other on behalf of the third defendant. The defendants have raised various defences to the plaintiff's application for summary judgment.

Defences

[17] The defendants have raised ten defences to the applicant's application for summary judgment as set out below:

(a) the first defendant, being the principal debtor, resolved on 17 March 2017 to voluntarily commence business rescue proceedings in terms of Section 129 of the Companies Act 2008, and according to the defendants this has the

effect that the present action may not be pursued against the first defendant in future (the business rescue defence).

(b) after the issue of summons on 26 November 2015 the arrears on the accounts were paid and according to the defendants this had the effect that the plaintiff waived its right to rely on the first defendants' breach of the restated loan agreement (the waiver of breach defence).

(c) the plaintiff did not address a letter of demand to the first defendant, calling upon it to remedy its breach of the restated loan agreement before the issue of summons. As a consequence the defendants contend that this would offend the requirements of good faith if the plaintiff were to assert that such notice was not a contractually agreed prerequisite to enforcing its rights under the restated loan agreement (the defective notice defence).

(d) after the issue of summons, the plaintiff afforded the first defendant an opportunity to endeavour to sell the mortgaged property in order to settle its indebtedness to the plaintiff to the prejudice of the second, third and fourth defendants as sureties. The defendants allege that this indulgence by the plaintiff had the effect of releasing them as the sureties (the conduct prejudicial to sureties defence).

(e) the plaintiff was in terms of the deeds of suretyship obliged to call on the sureties to remedy the first defendant's default and the failure of the plaintiff to do so had, according to the defendants, the effect of releasing them as sureties (failure to make demand on sureties defence).

(f) the affidavit in support of the application for summary judgment contains evidence beyond what is allowed in terms of Rule 32, and this renders the application for summary judgment fatally defective (the additional evidence defence).

(g) the certificate of balance is defective in that the amount in respect of which summary judgment is claimed differs to the amount claimed in the particulars of claim and this, in defendants' submission, also renders the application for summary judgment defective (the certificate of balance defence).

(h) aligned to the certificate of balance defence is that the defendants deny the rectification of the restated loan agreement (the rectification defence).

(i) lack of jurisdiction in respect of the third defendant: the third defendant argues that this court has no jurisdiction over him since he does not reside in the area within its area of jurisdiction.

(j) the plaintiff was aware of the need for additional funding for further proposed development to be undertaken by the first defendant on the mortgaged

> property and the defendants contend that in instituting the plaintiff is acting over hastily and not in compliance with the underlying value of good faith which 'permeated' the restated loan agreement (the good faith defence).

[18] Before determining whether or not the allegations the defendants have made constitute a valid defence to the plaintiff's claims, I propose first to deal with the nature of the defence required in opposition to the summary judgment. Rule 32(3)(b) reads:

> "(3) Upon the hearing of an application for summary judgement the defendant may –
>
> (a) ….
>
> (b) satisfy the court by affidavit … or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.'

[19] The court has first to examine whether there has been sufficient disclosure by the defendants of the nature and grounds of their defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must both be *bona fide* and good in law. If the court is satisfied that this threshold has been crossed, it is bound to refuse summary judgment. See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G – 426E; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 32 at 11G – 12D.

[20] In *Venter v Kruger* 1971 (3) SA 848 (N) at 852 the court held that it is not intended in summary judgment proceedings, that a court should investigate the defence and decide whether the probabilities of success are with the defendant or not. What the plaintiff has to do is to verify his claim and what the defendant has to do is to disclose in his affidavit fully the nature and the grounds of his defence. See also *Roscoe v Stewart,* 1937 CPD 138 at 141.

[21] *'Bona fide'* relates to the defendant's subjective state of mind – that it believes its factual statement to be true. Actually, *'bona fide'* means to allege facts which, if proved at a trial, would constitute a good defence to the claim made against him. All this, shows that *'bona fide'* has to do with the belief on the part of the defendant as to

the truth or falsity of his factual statements. However, it does not end there, the defence in question must also be good in law.

[22] Now I turn to determine whether the allegations the defendants make in the present case constitute *bona fide* defences and which are good in law. In deciding that question I propose to deal with each and every defence raised, *seriatim*.

(a) Business rescue proceedings

[23] On 17 March 2017 the first defendant voluntarily resolved to commence business rescue proceedings. As a consequence the plaintiff is in terms of s 133(1) of the Companies Act 2008 precluded from proceeding against the first defendant. The question for decision is whether the second, third and fourth defendants are also entitled to benefit from such privilege or exemption. In *Desert Star Trading 145 (Pty) Ltd and another* 2011 (2) SA 266 (SCA) para 11 Ponnan JA said the following:

> 'It is well settled that the general rule is that a surety may avail himself or herself of any defences that the principal debtor has, save for those defences that are purely personal to the principal debtor.'

[24] In *New Port Finance Company (Pty) Ltd and another v Nedbank Ltd* [2014] ZASCA 201; [2015] 2 All SA 1 (SCA) paras 9, 10 and 12 the Supreme Court of Appeal considered the effect of business rescue on obligations of sureties and pronounced as follows:

> 'But we were referred to no authority and I have discovered none, in which it has been held that a compromise of the principal debtor's liability under the judgment, whether as a result of business rescue or otherwise, would accrue to the advantage of the surety after judgment had been taken against them. There can be no question of the surety's rights or interests being prejudiced thereby, [*Bock and others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) paras 18 – 21] because the extent of the surety's liability for the debt in question has been fixed and determined. How the creditor thereafter sets about executing the judgment against the principal debtor does not affect either the nature or the extent of the surety's liability …. Any default on the part of the principal debtor entitled the bank to sue the sureties. The benefit of excussion was waived …. the fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties.'

[25] In *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) paras 15 – 17 at 434F – 435C the court considered the statutory moratorium on proceedings against the

company undergoing business rescue and held that the statutory moratorium against legal proceedings for the enforcement of debts in terms of s 133(1) of the Companies Act 2008 in favour of a company that is undergoing business rescue proceedings is a defence *in personam*. The section does not protect a surety in respect of the debt of a company which is subject to business rescue proceedings in terms of the Act.

[26] Unlike a defence *in rem* a statutory moratorium in terms of s 133(1) of the Companies Act 2008 is a personal privilege or benefit in favour of the Company. The essence of a defence *in rem* is that the defence attaches to the claim itself in the sense that the defence (if upheld) shows that the claim against the principal debtor is invalid or has been extinguished or discharged. A defence *in personam*, by contrast, arises from a personal immunity of the debtor in respect of an otherwise valid claim existing. Clearly the moratorium afforded by s 133(1) falls into the latter class.

[27] In the present case the plaintiff is in terms of the statutory moratorium imposed by s 133(1) of the Companies Act 2008 barred from proceeding against the first defendant. The second to the fourth defendants also claim that benefit on the grounds that a possibility exists that after business rescue proceedings the plaintiff may not pursue its claim against the first defendant. In this regard the Court in *Investec Bank Ltd v Bruyns* (*supra*) para 22 at 436 – 437 said:

> ‘But even if the defendant had alleged facts from which one could infer that it was at least a reasonable possibility that the companies would be placed under business rescue proceedings and that a plan involving a reduction of the plaintiff's claims against them would be approved and implemented, this would still not disclose a defence. At this stage the plaintiff's claims against GDI and WC are unimpaired. Whenever a creditor sues a surety there is a possibility that at some stage in the future that creditor may compromise with the principal debtor or for that matter that the principal debtor may even discharge the debt by payment. These possibilities, whether likely or unlikely, do not permit the surety to ward off enforcement if at the time he is sued the principal debt is in existence. If the creditor takes judgment against the surety and the principal debt is later reduced or discharged before execution is levied against the surety, the latter could claim the benefit of the discharge or reduction. If the creditor were to recover from the surety in full, the right to consider a compromise against the principal debtor would pass to the surety because the creditor would fall out of the picture and the surety would take the creditor's place by virtue of his right of recourse against the principal debtor.’

[28] Implicit in the decided authorities is that the statutory moratorium in terms of s 133(1) of the Companies Act 2008, is only intended to benefit the company which has been placed under business rescue proceedings. The immunity in question is therefore a personal privilege or benefit of the company in question. The sureties cannot claim such benefit since they are sued on the basis of their suretyships with the plaintiff. In the *Investec* case para 23 the court held that if the law maker had intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue proceedings it would have said so. It accordingly follows that the second to fourth defendants, as being sued as sureties in the present matter, cannot claim such immunity in terms of the provisions of s 133(1) of the Companies Act 2008.

[29] The defence to a claim arising from the breach of a contract between the parties, must in my judgment arise from the terms agreed to between the parties in the contract allegedly breached or from the settled legal principles governing such a contract. In *Absa Bank Limited and another* v *Davidson* [2000] 1 All SA 355 (SCA) Para 19, the Supreme Court of Appeal held, in this regard, that ' the prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship.' In the present case the second to fourth defendants bound themselves as sureties *in solidum* and co-principal debtors jointly and severally with the first defendant for all its indebtedness to the plaintiff and renounced the benefits of excussion. In the absence of a specific provision in the business rescue plan for the situation of the defendants, as sureties, their liability will remain unaffected by the contemplated business rescue. Nor do the defendants allege that the indebtedness of the first defendant as principal debtor to the plaintiff has been extinguished or discharged. In the premises, the defendants' liability to the plaintiff in terms of suretyships is not in any way impaired.

(b) <u>The waiver of breach</u>

[30] The defendants contend that the third defendant entered into an agreement with the plaintiff in terms of which the arrears of the first defendant's account were paid together with the next loan instalment, and that in concluding such agreement and accepting the payment the plaintiff thereby waived its right to rely on the first defendants' breach of the loan agreement. In terms of the suretyships the plaintiff is

entitled without affecting its rights under the surety agreement to 'make any other arrangements with the debtor and any other surety for the discharge of any obligations owing under the facilities as it may deem fit.' In the circumstances, it cannot be said that any waiver as the defendants contend occurred.

(c) Defective Notice

[31] Whether or not the notice was given before issuing summons was in the plaintiff's submission irrelevant since on the occurrence of an event of default all amounts they owed immediately became due and payable without further notice. The second to fourth defendants bound themselves as sureties and co-principal debtors for the due and punctual fulfilment of all obligations of the first defendant to plaintiff. Should the first defendant fail to make payment of an amount due to the plaintiff or to discharge its obligations in favour of the plaintiff properly and timeously, the plaintiff would in terms of the agreement be entitled to demand immediate payment of all amounts and all performances of obligation then owed by the first defendant to the plaintiff. There is nothing to suggest that the defendants were not aware of the first defendants' failure to honour such obligations to the plaintiff.

[32] It has been argued in favour of the defendants that the plaintiff's failure to give the defendants notice to bring their arrears up to date in terms of the loan agreement offended the requirement of good faith built into our law of contract. In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC & others* 2011 (3) SA 511 (SCA) Para 28 the Supreme Court of Appeal held that the Constitution and its value system do not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on grounds of imprecise notions of good faith. Coercive interference by a court may only be allowed in circumstances where a party to a contract can show either extortion of oppression or something akin to fraud. In the absence of the allegation of extortion, oppression or fraud this court may not simply interfere with the contract deliberately entered into between the parties dealing at arm's length with each other on the mere allegation that the plaintiff was in breach of good faith built into our law of contract. In the circumstances of this case, I do not find any merit in this defence.

(d) Conduct prejudicial to sureties

[33] The defendants aver that various agreements were entered into between the plaintiff and the first defendant in terms of which the plaintiff provided time to the first defendant to sell the immovable property in order to extinguish its indebtness to the plaintiff. In the defendants' submission such a conduct by the plaintiff was prejudicial to them and amounted to a material alteration of the loan agreement, and that as such has an effect of releasing the defendants as sureties. It was contractually agreed between the plaintiff and the defendants that the plaintiff would be entitled to grant the first defendant extensions of times for payment or to make any other arrangements with the first defendant. I therefore find no substance in the argument that the conduct by the plaintiff had the effect of relieving the defendants as sureties from their obligation to the plaintiff since the plaintiffs conduct did not result in the breach of the duty or delegation in terms of the contract. In *Absa Bank Limited v Davidson* case para 19 the court held that 'as a general proportion prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation'.

(e) Failure to make demand on sureties

[34] There is nothing in the serutyships which obliges the plaintiff to call on the defendants to remedy the first defendants default. The defendants have not provided any support for the allegation that the plaintiff was in terms of the contract obliged to make a demand on them as sureties. More so, the fourth defendant is the director of both the first and second defendants. Therefore, they must have known that the first defendant was in default of payment.

(f) Additional evidence

[35] The defendants contend that the plaintiff's verifying affidavit has gone beyond what Rule 32 allows. Rule 32(4) limits a plaintiff's evidence in summary judgment hearing of the affidavit supporting the notice of application. In terms of rule 32(4) no evidence may be adduced by the plaintiff or otherwise than the affidavit referred to in sub rule (2). Rule 32(2) reads:

> '(2) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts

> verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay….'

[36] The explanation proffered by the plaintiff for the additional affidavit is that subsequent to the service of summons certain payments were made to the plaintiff which impacted on the amount of the outstanding balance. Such payments are properly referred to and brought to account in the supporting evidence. This situation according to the plaintiff is analogous to handing up a certificate of balance at the hearing of an application for summary judgement which brings to account payments received by the plaintiff after the issue of summons. In the plaintiff's submission the handing up of a certificate of balance is permissible and does not amount to new evidence. In support to such submission the plaintiff has referred me to the case of *Rossouw and another v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) at para 48 in which the Supreme Court of Appeal said:

> 'The certificate of balance, also handed up to the court a quo, stands, however, on a different footing. … The certificate did not, as the court a quo considered, amount to new evidence which would be inadmissible under rule 32(4). To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court that the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution. And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taken into account when summons was issued, this constitutes an admission against interest by the bank, and the bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function and are not hit by the provisions of rule 32(4).'

[37] In perusing the affidavit filed by the plaintiff in support of its application for summary judgment, I have established that it is partly analogous to the certificate of balance and partly evidential, and longer than the affidavit required for this purpose. The question for decision is whether the nature of the affidavit supporting the application for summary judgment can result in its rejection and ultimately the dismissal of the application. In *Venter v Kruger* (*supra*) at 851 Leon J stated that only the portions of the plaintiff's affidavit which do not comply with the rule should be disregarded. It follows that only those portions of the affidavit which comply with the provisions of the rule will be taken into account as well as the certificate of balance.

(g) Certificate of balance

[38] The defendants claim that the amount stated in the certificate of balance differ from the amount claimed in the particulars of claim and that for that reason the application for summary judgment is defective. The second to fourth defendants bound themselves as sureties and co-principal debtors for the due and punctual fulfilment of all obligations of the first defendant to the plaintiff and renounced 'the benefits of the legal exceptions no value received, no cause of debt, revision of accounts, errors in calculation; excussion; division and cession of action: They are accordingly precluded by the terms of suretyships from raising defects in the certificate of balance. Nor to challenge the discrepancy between the certificate of balance. However, the plaintiff has proffered an adequate explanation for such a discrepancy. I do not find any merit in this argument.

(h) Rectification of the restated loan agreement

[39] The plaintiff has correctly submitted that whether or not the restated agreement is rectified has no bearing on the amount of the first defendant's indebtedness to the plaintiff and as a consequence rectification is not relevant for the determination of an application for summary judgment.

(i) Lack of jurisdiction in respect of the third defendant

[40] The third defendant contends that this court does not have jurisdiction in respect of him since he does not reside within the jurisdiction of this court. The third defendant is claimed herein on the basis of suretyship and in terms of the principle of *continentia causae* (the cohesion of a cause of action). In the surety agreement the third defendant in terms of s 45 of the Magistrate's Court Act 32 of 1944 consented to the jurisdiction of the Magistrate's Court having jurisdiction in terms of s 28. I therefore agree with Mr Rood for the plaintiff that there is no merit at all in this defence.

(j) Good faith

[41] It has been argued on behalf of the defendants that in instituting an action against defendants, the plaintiff is acting over hastily and not in compliance with the underlying value of good faith which permeated the restated loan agreement. The

defendants are sued for the contractual breach of the loan agreement and the suretyships. The principle of good faith does not find any application in this matter as I have outlined above.

Conclusion

[42] I now proposed to consider whether the defendant's affidavits, in opposition to the application for summary judgment have disclosed *bona fide* defence to the plaintiff's claims and whether they have indicated that appearance had not been entered solely for the purpose of delaying the action. The approach to affidavits of this kind is that such affidavits should not be looked at with the same strictness as a pleading in an action. All that is necessary for a defendant to do in order to avoid summary judgment being granted against him is to set out facts, which if pleaded, would constitute a good defence. See *Varachia v Alliance Ball Co Ltd.* 7 P.H.L10*.* In *Venter v Cassimjee,* 1956 (2) SA 242 (N) at 245 the Full Bench of this Division held that it was sufficient if the defendant discloses fully the nature and grounds of a *bona fide* defence to the action. In *Roscoe v Stewart,* (*supra*) at 141 the court held that it is not intended, in summary judgment proceedings, that a court should investigate the defence and decide whether the probabilities of success are with the defendant or not. What the plaintiff has to do is to verify his claim and what the defendant has to do is to disclose in his affidavit fully the nature and grounds of his defence and to allege that it is *bona fide* defence. See also *Venter v Kruger* case at 852.

[43] The *bona fides* of the defence depends entirely on the state of mind of the defendant and such defence must also be good in law, which, in my view, means that it must be a valid and acceptable defence in law. The terms of the restated loan agreement and suretyships have been common cause between the parties and the defendants could not reasonably have believed the truthfulness of the defences raised in the present case since none is sanctioned by the terms of the agreements. Nor are they accepted as valid good defences in law, regard being had to the material facts upon which the defendants rely for such defences. The facts upon which the defendants rely for such defence are void of truth and the defendants are fully aware of that position. I do not think that the mere stating of possible defences resting on untruthful and incorrect facts satisfies the requirement of rule 32(b). In the premises, I am not satisfied that the defendants have provided any *bona fide*

defence to the plaintiff ‘s claim which is good in law and that such defence has not been delivered solely for the purpose of delay.

ORDER

[44] In the result I make an order in the following terms:

1. The application for summary judgment against the first respondent is adjourned *sine die* with costs reserved;
2. Summary Judgment is granted against the second, third and fourth respondent, jointly and severally, the one paying the other to be absolved, on the following terms;

2.1 Payment of the sum of R15 864 574.25 (but limited in respect of the second respondent to the sum of R2 000 000.00 (two million rand) and in respect of each of the third and fourth respondents to the amount of R28 000 000.00 (twenty eight million rand);

2.2 Interest on the sum of R15 846 574.25 calculated at the rate of 12.5% per annum (being the applicant’s prime rate of interest plus 2%) from 17 January 2017 to date of payment, calculated daily on the capital balance outstanding from time to time, compounded monthly in arrears;

2.3 Costs of suit on the scale as between attorney and client.

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MADONDO DJP

Appearances:

Date reserved:	25 May 2017
Date delivered:	4 July 2017
For Applicant:	Mr R T Rood
Instructed by:	Lowndes Dlamini
	Locally represented by:
	Venns Attorneys
	Ref: C Schoon/bmg/23156428
For Respondent:	Adv W J Pietersen
Instructed by:	Peter Skein Attorneys
	Locally represented by:
	Southey Attorneys Inc
	Ref: Mr J Temlett