



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 5034/2020P

In the matter between:

**ABSA BANK LIMITED**

**APPLICANT**

and

**HEMANTH RAJKUMAR SINGH N.O.**

**FIRST RESPONDENT**

**BALAN NAIDOO N.O.**

**SECOND RESPONDENT**

**PRAVESH RAJKUMAR SINGH N.O.**

**THIRD RESPONDENT**

**HEMNATH RAJKUMAR SINGH**

**FOURTH RESPONDENT**

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Coram: Mossop J

Heard: 14 March 2023

Delivered: 12 April 2023

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**ORDER**

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The following order is granted:

1. The respondents' application to deliver a further answering affidavit is refused, with costs on the attorney and client scale.

2. Judgment is entered against the respondents jointly and severally, the one paying the other to be absolved, for:

- (a) Payment of the sum of R18 039 598.59;
- (b) Interest thereon at the rate of 8,25% (prime plus 1.00%) per annum capitalised monthly from 2 June 2020 to date of payment, both days included;
- (c) Costs of suit on the scale as between attorney and client.

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## JUDGMENT

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### MOSSOP J:

[1] The applicant is a major South African financial institution. In this application, which is opposed by the respondents, it seeks a monetary judgment against them, jointly and severally, for payment of the sum of R18 039 598.59 (the judgment amount), interest thereon at the prime interest rate charged by it plus one percent, and costs on the attorney and client scale. The first three respondents are cited in their representative capacities as trustees of the H. R. Singh Family Trust (the Trust) and the first respondent is also cited in his personal capacity as the fourth respondent.

[2] When the matter was argued, the applicant was represented by Mr van Rooyen and the respondents were represented by Mr Alberts. Both counsel are thanked for the assistance that they have provided to the court.

[3] The applicant's case is simply framed and pleaded. It is brought on application, on the basis that there is no major dispute of fact between it and the respondents.<sup>1</sup> It alleges that on 26 October 2018, it concluded a written term loan agreement (the loan agreement) with an entity known as Proud Heritage 217 (Pty) Ltd (the company). In terms of the loan agreement, the applicant agreed to lend the company an amount of approximately R19 million (the loan amount). The purpose behind the loan is set out on the first page of the agreement and was:

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<sup>1</sup> *Lutchman v Perumal* 1950 (2) SA 178 (N).

'To restructure the outstanding obligations of Divine Inspiration Trading 350 (Proprietary) Limited, together with all existing obligations of Proud Heritage 217 (Proprietary) Limited into a new term loan on the basis as set out herein.'

While the loan agreement was a consolidation of the then existing indebtedness of both entities mentioned in the extract above, the obligation to repay the loan amount was accepted by the company.<sup>2</sup> The loan amount would attract interest at the interest rate mentioned earlier, which was to be a variable rate, and it was to be repaid, not in monthly instalments, but in weekly payments by the company, commencing with the first payment on 2 November 2018 and concluding with the last payment on 2 November 2028, ten years later. The applicant and the company agreed that the company would be in breach of the loan agreement if it neglected to pay any instalment on the due date or if it was liquidated. If either of those events, inter alia, occurred, the applicant would be entitled to require the company to immediately discharge the whole of its indebtedness to the applicant. The loan agreement also provided that any default under the loan agreement that required the applicant to enforce its rights would require the company to pay the applicant's costs on the attorney and own client scale.<sup>3</sup>

[4] The loan agreement, whilst between the applicant and the company, also had other signatories. It was also signed by the fourth respondent in his personal capacity, the Trust, an entity called Exclusive Access Trading (Pty) Ltd (EAT), and an entity called National Pride Trading (Pty) Limited (National Pride). The Trust, EAT and National Pride were represented by the fourth respondent, who asserted that he was duly authorised to sign on their behalf. These latter signatories were presumably included because of the security they were required to put up on behalf of the company, to which further reference will be made shortly.

[5] On 3 January 2020, the company was, indeed, subject to winding up proceedings at the instance of another of its creditors, not at the instance of the applicant, which order was made final on 16 July 2020. The entire balance then owing by the company to the applicant, being the judgment amount, thus became

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<sup>2</sup> Divine Inspiration Trading 350 (Proprietary) Limited has played no part in this application whatsoever.

<sup>3</sup> The two deeds of suretyships sued upon each contained similar provisions concerning legal costs.

payable in terms of the loan agreement. The judgment amount has been calculated and expressed in a certificate of balance issued by the applicant, as it was entitled to do in terms of the loan agreement and in terms of the two deeds of suretyship dealt with below.

[6] Approximately five years before the conclusion of the loan agreement, the Trust had agreed to stand as surety for the obligations of the company to the applicant. Thus, on 26 November 2013 it had executed a written deed of suretyship that recorded that fact. That deed of suretyship was in an unlimited amount. On that same day, 26 November 2013, the fourth respondent also bound himself in his personal capacity as a surety to the applicant for the obligations of the company. This latter deed of suretyship was limited to the amount of R32 million. These are the deeds of suretyship that the applicant relies upon for the judgment that it seeks against the respondents in this application.

[7] Upon the liquidation of the company, the applicant called upon the respondents to make payment in terms of their respective deeds of suretyship. When such payments were not forthcoming, this application was the inevitable consequence.

[8] At the commencement of the matter, Mr Alberts moved an application on behalf of the respondents to admit a second, supplementary answering affidavit (the further affidavit) on behalf of the respondents. The application was a substantive one supported by an affidavit and was opposed by Mr van Rooyen on behalf of the applicant. Far from seeking leave to hand up the further affidavit, it had already been delivered and was in the court file, without the leave of the court first having been obtained. Chronologically, the delivery of the further affidavit occurred 11 months after the initial answering affidavit was delivered. This application drew its first breath in August 2020 and is long outstanding. As Mr Van Rooyen pointed out, the matter would be delayed further if the application was granted as the applicant would be compelled to reply thereto.

[9] Uniform rule 6(5)(e) provides that the filing of further affidavits is only permitted with the indulgence of the court. An application to deliver a further affidavit, if properly brought, should in my view, only be granted if good reasons are provided for the granting of this indulgence by the party seeking it.<sup>4</sup> The question is not whether the handing up of a further affidavit will be prejudicial to the other side. Rather the issue is whether the party seeking to deliver the further affidavit has established exceptional circumstances which render it fair to permit its acceptance.<sup>5</sup>

[10] In seeking such leave, some explanation must also be provided dealing with why the new material contained in the further affidavit did not appear in the initial affidavit. The only real reason advanced in the affidavit that underpinned the respondents' application is that the respondents, having appointed one attorney then terminated the first attorney's mandate and then appointed a second attorney. The second attorney then decided to brief counsel, who determined that a further affidavit should be delivered. That is not a sufficiently compelling reason to permit the delivery of a further answering affidavit and is certainly not an exceptional circumstance.<sup>6</sup> No explanation was provided as to why what is now stated in the supplementary affidavit was not stated in the initial answering affidavit. The attempted delivery of a further affidavit appeared simply to be a stratagem to further delay this matter. In the exercise of my discretion I accordingly refused the respondents' application, with costs. Those costs must be on the scale as between attorney and client in accordance with the provisions of the loan agreement and the deeds of suretyship.

[11] Before considering the defences raised by the respondents, it is necessary to discuss certain other aspects of the loan agreement which have come to assume some significance in the light of the specific defences raised by the respondents.

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<sup>4</sup> *Amedee v Fidele and others* [2021] ZAGPJHC 837 para 79.

<sup>5</sup> *Impala Platinum Ltd v Monageng Mothiba N.O. and Others* [2016] ZALCJHB 475.

<sup>6</sup> *Impala Platinum Ltd v Monageng Mothiba N.O. and Others* [2016] ZALCJHB 475.

[12] The loan agreement recorded that the applicant already held certain security for the obligations of the company. In schedule 1 to the agreement (schedule 1), all the security that it already held in respect of the company was identified and included:

- (a) A second deed of suretyship limited to the amount of R20 million, executed by the Trust on 28 April 2016;
- (b) A second deed of suretyship limited to the amount of R20 million, executed by the fourth respondent on 28 April 2016;
- (c) A general cession of all trade receivables due to the company, executed by the company on 28 April 2016;
- (d) A guarantee limited to the amount of R9 million, executed by National Pride on 23 January 2017; and
- (e) A deed of suretyship limited to R5 million, executed by EAT on 26 November 2013.

In addition to this security, there were also the two deeds of suretyship relied upon by the applicant for the judgment that it seeks in this application, although in schedule 1 the deed of suretyship binding the fourth respondent is incorrectly described as having been concluded on 6 November 2013 and not on 26 November 2013.

[13] Notwithstanding the existence of this security, the loan agreement recorded that the parties agreed that additional security was to be put up. This security was identified in schedule 2 to the loan agreement and comprised of:

- (a) A general notarial bond (the notarial bond) to the value of R8 million that the company was required to pass over its moveable assets; and
- (b) The cession of an insurance policy held by EAT in respect of property that is described as being 'the encumbered property'. What the connection of EAT to this matter is, and to what property reference is being made, was never explained. It is, however, safe to assume that there is some link between EAT, the company and the Trust, as EAT was apparently persuaded to agree to cede its insurance policy and had previously also put up a deed of suretyship. Indeed, EAT, as previously mentioned, was a party to the loan agreement and the fourth respondent signed that document on its behalf.

[14] It is common cause that the new security was never put up: The notarial bond was never registered and the cession of the insurance policy did not occur. I did not understand what security the insurance policy provided given its vague description in the loan agreement. I asked Mr Alberts about this during argument, but he was as informed about it as I presently am. He ultimately submitted that the failure by EAT to cede the policy to the applicant was not an issue upon which the respondents relied if I understood him correctly.

[15] Given that the bringing into existence of the two deeds of suretyship relied upon by the applicant in this application predated the conclusion of the loan agreement by approximately five years, there can be no suggestion that the requirement of the new security was a material factor in the respondents becoming sureties or that the failure to secure the new security in itself prejudiced the respondents in agreeing to their respective deeds of suretyship.

[16] In seeking the judgment that it does, the applicant is obviously seeking final relief. As such, I must apply the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.<sup>7</sup> To create a valid dispute of fact, the respondents must, however, seriously and unambiguously address any disputed facts. This is particularly so where those facts are peculiarly within the knowledge of the respondents.

[17] I turn now to consider the respondents' defences. I, however, immediately qualify my intent by stating that I do not propose dealing with issues that were raised in the papers but which were then not persisted with by the respondents' counsel when the matter was argued. I shall focus on those issues that are set out in Mr Alberts's heads of argument and which formed the basis of the argument addressed to me by Mr Alberts.

[18] The principal, but not the only, defence raised by the respondents is a multi-layered defence that commences with the proposition that the granting of the loan amount to the company by the applicant, coupled with a failure to secure the new

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<sup>7</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

security, prejudiced the position of the respondents as sureties. It was argued further that the furnishing and registration of the new security was a condition precedent to the advancing of the loan to the company. It was not disputed that the loan amount was advanced by the applicant. It is, however, contended by the respondents that in advancing the loan amount without the new security being in place, the applicant was reckless or negligent, or both. The argument proceeds that had the loan not been advanced in such circumstances, the respondents would not be in the position that they are now in and accordingly, so they contend, they should be discharged from their obligations as sureties and the application should be dismissed with costs.

[19] I shall consider the prejudice aspect of the principal defence first. In the often-quoted matter of *Absa Bank Ltd v Davidson*,<sup>8</sup> the Supreme Court of Appeal considered the proposition that there is a general principle in our law that dictates that if a creditor does anything in its dealings with a principal debtor that has the effect of prejudicing a surety, the surety is entitled to claim his full release from his obligations. Olivier JA stated in this regard that:

‘As a general proposition 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. The prime sources of a creditor’s rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer.’<sup>9</sup>

[20] The starting point when assessing a defence where prejudice is claimed by a surety must logically be the provisions of the deed of suretyship concluded. As was stated by Harms JA in *Bock and others v Duburoro Investments (Pty) Ltd*, citing Voet:

‘agreements make the law for contracts, and therefore for suretyships also . . .’<sup>10</sup>

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<sup>8</sup> *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA).

<sup>9</sup> *Ibid* para 19.

<sup>10</sup> *Bock and others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA); [2003] 4 All SA 103 (SCA) para 29.



[21] The two deeds of suretyship are very similar in their content but are not identical. They do, however, have certain clauses that are identical. Both deeds of suretyship contain the following clause:

'The validity and enforceability of this suretyship shall in no respect be subject to the obtaining of a suretyship from another person or be subject to the validity of the suretyship of any other surety.'

In other words, the deeds of suretyship stand alone and do not require the applicant to obtain any additional deed of suretyship for them to be valid and binding on the Trust and the fourth respondent.

[22] Both deeds of suretyship also contain an acknowledgement by the surety that the applicant may:

'release in whole or in part present or future security, including this suretyship or the suretyship of co-sureties, in respect of the debtor's obligations to the bank;'

Thus, future security, such as the new security, may be released by the applicant as it determines. In my view, 'release' may in this context have two meanings: it may mean that a person who undertook to put up security is released from the obligation of doing so and thus never puts it up, or it can mean that security that has already been put up is no longer required and is consequently released. I can see no difference between not acquiring such security and acquiring it but then releasing it: the effect is the same.

[23] The respondents submit that the failure to obtain the new security has prejudiced them. I confess, however, that I am not entirely sure what the basis of this dissatisfaction is or what the prejudice complained of comprises.

[24] Looked at practically, the new security did not introduce a new security provider to the raft of security already held by the applicant. Excluding the cession of the insurance policy, the principal provider of the new security was the company itself. Regard being had to the clause in the loan agreement that required the provision of the new security, it is to be noted that the agreement did not impose any obligation on the applicant. The obligation was placed on the entities providing the new security, namely the company and EAT. The applicant could not simply of its own volition acquire the new security: it

had to be placed in possession thereof by the parties providing it. The passing of the notarial bond<sup>11</sup> and the cession of the insurance policy thus did not lie within the power of the applicant.

[25] The fourth respondent was a director of the company. I do not know if he was the sole director. He may well have been, but I do not know that to be the case. At the very least, the fourth respondent would have been aware that prior to the loan amount being advanced by the applicant, the company had not passed the required notarial bond. Why the notarial bond had not been passed was within the knowledge of at least the fourth respondent, who acted in both his personal and representative capacities. As director of the company and trustee of the Trust, the fourth respondent's knowledge binds himself and the Trust. Rather than protest that the new security was not in place, the company accessed the loan account, drew down on the loan amount and utilised it. There is no evidence that the fourth respondent, or the Trust for that matter, raised any objection to the fact that the new security was not in place when the company became entitled to draw down on the loan amount. In other words, it seems to me that the respondents acquiesced in the loan proceeding without the new security being in place.

[26] Acquiescence may be found to exist where a:

'person by unequivocal conduct, knowing of his or her rights, inconsistently acts with the intention to the contrary and shows that he acquiesced to a set of facts'.<sup>12</sup>

If the person concerned has clearly and unconditionally acquiesced in, and abided by, a situation, that person cannot thereafter challenge that situation.<sup>13</sup> What is required is conduct leading to a conclusion of an intention not to assail a factual position. Both as a director of the company and as a trustee of the Trust, the fourth respondent would have known whether the company had passed the notarial bond.

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<sup>11</sup> A notarial bond is a bond attested to by a notary public, hypothecating all the movable assets or a specific asset of the debtor, and is registered in the Deeds Office by the registrar of deeds in a manner similar to mortgage bonds.

<sup>12</sup> *AL v The Central Authority for the Republic of South Africa and another* [2018] ZAGPJHC 12 para 12.

<sup>13</sup> *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A); *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268.

He knew that it had not but reconciled himself with that fact. While the respondents have all complained that that the notarial bond was not in place at the time that the loan amount was accessed, no explanation has been provided by at least the fourth respondent why this had not occurred. It appears to me to be inescapable that the respondents acquiesced in the advancing of the loan amount without the new security being in place. They may thus not challenge the advancing of the loan without such new security being in place.

[27] Considering the next layer of the principal defence, being that the acquisition of the new security was a condition precedent to the conclusion of the loan agreement, the respondents are correct in asserting that there is a schedule to the loan agreement that deals exclusively with conditions precedent (schedule 4). The final condition mentioned in schedule 4 is the following:

'Receipt by the Bank of the New Security Required duly executed by the parties thereto together with such.'

[28] The fact that the parties to a contract may describe a provision as a condition precedent does not, of course, make it one. Whether it is a true condition precedent must be determined by the language employed by the parties in writing their contract. In *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others*<sup>14</sup> the court stated that:

'[50]. . . the meaning of a contested term of a contract . . . is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its

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<sup>14</sup> *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA); [2021] 3 All SA 647 (SCA) paras 50-51.

structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.’

[29] A true condition precedent, or suspensive condition, suspends the operation of all or some of the obligations flowing from a contract until the occurrence of a future uncertain event. Whether a condition precedent is a true condition precedent or is merely a term of an agreement may often be difficult to determine. It may require an interpretation of the contractual provision. Why this should be the case was explained in *R v Katz*:

‘The word “condition” in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase “conditions of sale”. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price, etc - in other words the so called *accidental*ia of the contract. In the sense of a true suspensive or resolute condition, however, the word has a much more limited meaning, viz. of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event . . . Where the qualification defers the operation of the contract, the condition is suspensive, and where it provides for dissolution of the contract after interim operation, the condition is resolute . . . In the case of true conditions the parties by specific agreement introduce contingency as to the existence or otherwise of the contract, whereas provisions which are not true conditions bind the parties as to their fulfilment and on breach give rise to ordinary contractual remedies of a compensatory nature, i.e. (depending on the circumstances) specific performance, damages, cancellation or certain combinations of these.’<sup>15</sup>

[30] A consideration of schedule 4 reveals it, in essence, to simply be a list of documents that the company required to be given by either the company or the other signatories to the loan agreement. The list does not appear to be entirely specific to this particular transaction. For example, it requires any party to the loan agreement that is incorporated outside South Africa to provide a legal opinion on the entitlement of the party to conclude what is described as ‘the Finance Documents.’ None of the

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<sup>15</sup> *R v Katz* 1959 (3) SA 408 (C) at 417D-H.

parties to the agreement were so incorporated. Some of the stipulations are vaguely worded. For example:

'Receipt by the Bank of such documentation and evidence as is required by the Bank in order for it to carry out and be satisfied it has complied with all necessary 'know your customer' or similar identification procedures under applicable laws rules and regulations...'

[31] The loan agreement records that the loan facility would be available for draw down by the company in a single amount and that any part of the facility not taken up on the draw down date would lapse and would not thereafter be capable of being accessed by the company. It was further anticipated, following the wording of the loan agreement, that the first instalment date would be:

'The 1<sup>st</sup> Friday of the 1<sup>st</sup> calendar month post the date of draw down which shall not be earlier than 02 November 2018.'

[32] The first instalment date could, therefore, notionally, have been 2 November 2018, which was a Friday. Given that the agreement was only signed on 26 October 2018, exactly a week before 2 November 2018, it seems highly improbable that the new security, in particular the notarial bond, would be in place on 2 November 2018. This might tend to indicate that the provision of the new security was not a true condition precedent and was merely a term of the agreement in the sense that the loan agreement would be given effect to notwithstanding that the new security may not have been in place. That this is probable is reinforced by the standard terms of the loan agreement which includes the following clause:

'Each Condition Precedent is for our sole benefit and we may by written notice to you waive or defer fulfilment of any Condition Precedent, in whole or in part, subject to any other condition we may decide.'

[33] For a contractual provision to be construed as a true condition precedent, the operation and consequences of the whole contract must be dependent upon an uncertain future event. The passing of a notarial bond does not strike me as an uncertain future event where one of the entities concluding the loan agreement that requires the passing of the notarial bond is the very party that is obligated to pass that notarial bond. Far from being an uncertain future event, it seems to me to be a definite

future event that was entirely within the ability of the company to execute. I must therefore conclude that despite the wording of schedules 2 and 4, the provision requiring the new security was not a condition precedent but was merely a term of the loan agreement. Notice of waiver from the applicant was therefore not required.

[34] There is, furthermore, no evidence on the papers that the applicant was reckless or negligent in advancing the loan amount to the company. On the contrary, it appears to have been punctilious in ensuring that it was properly protected in the event of the company defaulting. That a third party creditor succeeded in liquidating the company by no means establishes any of the conduct complained of by the respondents.

[35] After a consideration of the principal defence, I am unable to conclude that the applicant has breached any legal duty or obligation that it owed the respondents. As was indicated above, the applicant and respondents agreed in their respective deeds of suretyship that the applicant had the power to release any existing, or future, security. Even assuming for the purposes of argument that the failure to acquire the new security was prejudicial to the respondents, without accepting that it was and having found that it was not, it appears to me that this was a form of prejudice that the respondents undertook to suffer in agreeing to the terms of their respective deeds of suretyship. The fact that the respondents had put up such extensive and substantial security for the obligations of the company is the reason why they find themselves in their current position and not any conduct on the part of the applicant.

[36] The principal defence consequently must fail.

[37] That was not the only defence raised by the respondents. They have also raised certain ancillary defences, ostensibly in the alternative to their principal defence. They contend that reasons exist in the following allegations to dismiss the application:

(a) The applicant failed to ensure that the company was sold for fair value;

- (b) The certificate of balance put up by the applicant is allegedly unreliable;
  - (c) The applicant did not disclose dealings that it allegedly had with the liquidator of the company and also did not explain certain proceedings against EAT and a payment apparently received from an entity called National Pride (Proprietary) Ltd;
  - (d) The applicant has failed to provide a full and proper computation of the amount that it claims from the respondents; and
  - (e) The applicant has allegedly failed to establish its claim.
- These further defences must be considered.

[38] As regards the first point, I am not sure if the sale being referred to is alleged to have occurred prior to, or during, the liquidation of the company. If it is intended to refer to events prior to liquidation it is not clear how the applicant could have effected such a sale when it was not the owner of the company nor did it then have a judgment against it. If it is intended to refer to a sale that occurred during the winding up of the company, it hardly seems necessary to state that upon the event of liquidation the assets of the entity in liquidation fall under the control of the liquidator. It is the duty of the liquidator and not that of the creditors to liquidate the company. There is no obligation on a creditor to ensure that the assets of the liquidated company achieve a certain value. In its vagueness, the point is bereft of any merit.

[39] Dealing with the second point, in terms of both deeds of suretyship it was agreed that the applicant could establish the indebtedness of the company to it by way of a certificate signed by a manager of the applicant whose appointment it would not have to prove and that such certificate would be 'sufficient (prima facie) proof of this amount'.

As was stated by Stratford JA in *Ex parte the Minister of Justice: In re Rex v Jacobson and Levy*:<sup>16</sup>

"*Prima facie*" evidence in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence.'

Such a certificate has been put up. In such circumstances, the respondents bear an evidential onus to establish that the certificate is incorrect that goes beyond merely

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<sup>16</sup> *Ex parte the Minister of Justice: In re Rex v Jacobson and Levy* 1931 AD 466 at 478.

alleging that it is unreliable.<sup>17</sup> Where nothing is proved to disturb the prima facie proof of the content of a certificate of balance, it becomes conclusive proof of the facts stated therein. The respondents have made no reference to any facts that could cast doubt on the correctness of the certificate of balance put up. The suggestion that the certificate of balance is unreliable appears only in the respondents' counsel's heads of argument. There is accordingly no basis for doubting the accuracy of what is stated in the certificate of balance.

[40] Turning to the third point, I should have been very surprised if there had been no interaction between the applicant and the duly appointed liquidator of the company. The applicant is obviously a substantial creditor of the company and it is to be expected that it would have dealings with the liquidator. The suggestion by the respondents is that there is something unsatisfactory about this. I am not able to share this sentiment in the absence of any facts advanced to prop up this aspersion. What proceedings against EAT are being referred to and what payment apparently was received from National Pride is not clear from the answering affidavit. The point must be dismissed.

[41] The fourth point taken by the respondents is an allegation that the applicant has not provided a full computation of the amount owed to it by the company. This, with respect, misses the purpose of a certificate of balance. The certificate of balance obviates the need for such a calculation unless it has properly been challenged. I have already found that it has not been properly challenged. This point has no merit.

[42] The final point taken, namely that the applicant has not made out its case, is not a defence at all but is a conclusion. It, too, is without merit. The applicant has established that the respondents undertook to stand surety for the debts of the company to the applicant and have now been called upon to act in accordance with that undertaking. They must honour it.

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<sup>17</sup> *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 382H–2383A.



[43] The principal and ancillary defences raised by the respondents have all failed. There is accordingly no reason why the judgment claimed by the applicant should not be granted.

[44] In the circumstances, I grant the following order:

1. The respondents' application to deliver a further answering affidavit is refused, with costs on the attorney and client scale.
2. Judgment is entered against the respondents jointly and severally, the one paying the other to be absolved, for:
  - (a) Payment of the sum of R18 039 598.59;
  - (b) Interest thereon at the rate of 8,25% (prime plus 1.00%) per annum capitalised monthly from 2 June 2020 to date of payment, both days included;
  - (c) Costs of suit on the scale as between attorney and client.



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**MOSSOP J**

**APPEARANCES**

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Date of Hearing : 14 March 2023

Date of Judgment : 12 April 2023