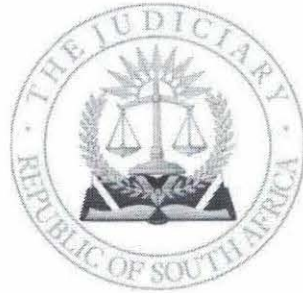


Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: 1481/2022

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA
LIMITED**

Plaintiff

and

SAMUEL HERMAN

First Defendant

**EMERALD PANTHER INVESTMENT
122 (PTY) LTD**

Second Defendant

JUDGEMENT

DIBETSO-BODIBE AJ

INTRODUCTION

- [1] This is an application for summary judgement by Standard Bank against the 1st Defendant, Samuel Herman (“Herman”) and the 2nd Defendant, Emerald Panther Investments 122 (Pty) Ltd (“Emerald”) in their capacities as co-principal debtors and sureties/guarantors for and on behalf of Hanhuis CC (“the Principal Debtor”). Herman is the sole member of Hanhuis CC and he is also the sole director of Emerald.
- [2] During 2021, the Principal Debtor was placed under final liquidation at the instance of Standard Bank as per the order of this Court dated 23 September 2021. Standard Bank then turned against Herman and Emerald for the outstanding balance of the debt owing by the Principal Debtor.

THE PLEADINGS

- [3] According to the Plaintiff’s Particulars of Claim, Standard Bank and the Principal Debtor entered into a Commercial Property Finance Loan Facility Agreement (“Facility Letter”) on 24 February 2017. Post liquidation of the Principal Debtor, its immovable property (as security), is still pending auction. As part of the Facility Letter, Herman Provided an unlimited suretyship and Emerald provided two guarantees, which guarantees were limited to R4 025 000.00 and R1 845 000.00 respectively (plus interest and costs thereon). On 19 July 2011 Herman executed a written Deed of Suretyship in terms whereof he bound himself jointly and severally as surety and co-principal debtor in solidum unto and in favour of Standard Bank in respect of any amounts then or thereafter due and payable by the Principal Debtor to Standard Bank. The balance outstanding as at 28 February 2022 and in terms of the Certificate of Balance (“COB”) which the Defendants must pay is R4 990 141.45 together with interest thereon at the rate of 11.25% (Prime plus 3.5%) per annum. Standard Bank further avers that the

amount owing by the Principal Debtor has “slightly reduced” after liquidation due to certain payments made by the Defendants.

- [4] The Defendants deny that the deed of suretyship and/or guarantees extend to the Principal Debtor’s indebtedness under the current Loan Facility. In fact their Plea turned into a bare denial as a result of their purport to distinguish between so-called “Previous Facility Letter” and the “Current Facility Letter” (signed on 24 February 2017) as stated in their affidavit as follows:-

“The Deed of Suretyship was not meant to act as covering and continuing security for all debts owing by the Principal Debtor to the Plaintiff from any source whatever... It certainly was not my intention for the Deed of Suretyship to act as a continuing and covering surety for all debts owing by the Principal Debtor... It is not what I understood when signing the agreement. To the extent that the Plaintiff intended the document to be a covering suretyship, this is not borne out by the wording of the document, at best for the Plaintiff, the document is ambiguous, and in accordance with the contra proferentem rule, the Deed of Suretyship must be interpreted against the Plaintiff... If regard is had to the Commercial Property Finance Loan Facility, the Previous Facility was “superseded and replaced in its entirety” by the Commercial Property Finance Loan Facility. As a result of the Commercial Property Finance Loan Facility, the Deed of Suretyship (being accessory to the Previous Facility) was discharged. Accordingly I am no longer indebted to the Plaintiff under and in terms of the Deed of Suretyship.”

- [5] The Defendants further disputed the computation of the interest rate stating that if the wrong interest rate was applied, the wrong interest was capitalized and the wrong capital amount has been calculated and to this end, urging Standard Bank to provide a full account of the manner in which it calculated the sum of R4 990 141.45, including the interest it applied over the entire period. The Defendants attached a spread sheet

of the applicable interest rates over the years to disprove the interest rates applied by Standard Bank.

- [6] Another essential issue averred by the Defendants, which issue is not disputed by Standard Bank, is that post the liquidation of the Principal Debtor, the Defendants have since made payments in order to reduce the Principal Debtor's indebtedness under the Current Loan Facility. In fact, the Defendants averred that they have paid no less than R1 599 833.06 and attached proof of payments as part of their affidavit. To this end, they contend that it is not clear on how these payments made a difference in reducing the Principal Debtor's indebtedness especially taking into consideration the incorrect computation of the applicable interest rates at a given time.

APPLICABLE LAW

- [7] Summary judgement is governed by Rule 32 of the Uniform Rules of Court. Post its amendment in 2019, a plethora of legal authorities lament its ambiguity and absurdity as more efforts are being fostered towards its interpretation with resultant conflicting decisions. Although Rule 32 in its amended form had good intentions to ameliorate the potential harshness towards the defendant by allowing him to first plead his case and to guard against a sham defence, its lack of clarity left an onerous burden of interpretation on the courts. This, perhaps in my view, is an indication that the time is ripe for the Rules Board to revisit the rule for review. I do not intend to venture into any further interpretation of Rule 32 safe to say that lucid principles of the rule, and in particular sub-rules 32(2)(b) and (3)(b) can be garnered as follows:-

- [7.1] The rule is a double-edged sword useful when it precludes the interposition of defences solely for delay, but also harsh if the defendant is deprived of the opportunity to have a trial of seriously contested questions of fact.

- [7.2] It is the duty of the court so to hold when it is clear that what has been set up as a cause of action or as a defence presents no genuine or substantial triable issue, is a sham and feigned, and asserted solely to harass and annoy or for the purpose of delay. Summary judgement therefore serves to discourage the bringing of applications that have no basis but at the same time fosters early finalisation of settlement of debts where no triable issue exist.
- [7.3] The rule is not intended to shift the burden of proof. The rule specifically requires the affidavit of the plaintiff or any other person having knowledge of the facts to verify the cause of action. It is only when such prima facie proof is made that judgement may summarily be ordered upon the defendant's failure affirmatively to show the existence of a triable issue.
- [7.4] The test is what is contained in the affidavits and other proof submitted. It will not assist the defendant's affidavit to merely repeat the various denials contained in the plea. Facts must be presented. The defendant who opposes a summary judgement application is called upon to assemble and reveal his bona fide defence in order to show that the issues averred in his opposing affidavit were real and capable of being established upon trial. Mere averments will not suffice.
- [7.5] Misinterpretation of a legal instrument such as a deed of suretyship, guarantee or loan facility agreement, as is the case in the present matter, will not assist the defendant to avoid summary judgment.
- [7.6] The extent of perjury, apparent on the legal instruments such as affidavits, deeds documents or certificate of balance, as is the case in the present matter, should be analysed and decided accordingly.

MISINTERPRETATION OF THE LEGAL INSTRUMENTS

- [8] Herman signed two commercial financial loan agreements, termed the Previous Facility Letter and the other the Current Facility Letter. The agreements were signed with Standard Bank on 21 June 2016 and 24 February 2017 respectively. The conditions of the Current Facility Letter provides that “the Bank and the Borrower have agreed to amend certain terms of the Previous Facility Letter in terms of which the Bank made the loan facility available to the Borrower, by amending certain of the paragraphs, inserting various new paragraphs and restating the remainder of the paragraphs. The Bank and the Borrower agree that the Loan Facility shall from the date of fulfilment (or waiver or postponement, as the case may be) of the Draw Down Conditions to this Facility Letter be governed by the terms and conditions contained herein, and accordingly the Previous Facility Letter shall be superseded and replaced in its entirety by this Facility Letter.”
- [9] It is clear from the reading of the preceeding paragraph that, upon the signing of the Current Facility Letter, certain of the conditions of the Previous Facility Letter were amended accordingly and thereafter incorporated with and/or consolidated with the terms and conditions under the Current Facility Letter with the end result that the Previous Facility Letter ceased to exist and is superseded by the Current Facility Letter upon signature thereof by both Parties. In the premises, the Defendants’ contention that the Previous Facility Letter was “superseded and replaced in its entirety” is misplaced and accord a new interpretation with the insertion of the words “replaced in its entirety” to mean that the Previous Facility Letter was upon the signing of the Current Facility Letter discarded or simply done away with.
- [10] This misinterpretation is then perpetuated to disregard the legal instruments which formed part of the Previous Facility Letter, in this regard, the Defendants contending that as a result of the Current Facility Letter “the Deed of Suretyship (being accessory to the Previous Facility)

was discharged. I am no longer indebted to the Plaintiff under and in terms of the Deed of Suretyship". As alluded to above, the Current Facility Letter incorporated the amended terms and conditions of the Previous Facility Letter and the Defendants cannot decide to read between the lines for a favourable interpretation as no interpretation is required under the circumstances.

- [11] Herman's averment that "It certainly was not my intention for the Deed of Suretyship to act as a continuing and covering surety for all debts owing by the Principal Debtor... It is not what I understood when signing the agreement" is unfortunate and does not advance this matter any further as Herman signed a Deed of Suretyship on 19 July 2011 wherein he bound himself "as surety and co-principal debtor for the payment when due of all the present and future debts of any kind ("the debts") of Hanhuis CC (the debtor) to Standard Bank. The total amount of the debts which the Bank may recover from us under this suretyship is unlimited and includes all unpaid interest". As stated by Koen J:-

"In construing the deed of suretyship it is as well to remember that broadly speaking a suretyship receives as a rule a somewhat strict interpretation, so that it may not be extended beyond what was expressed or was at least covered by the intention and sense of the words of the suretyship... The surety is a favoured debtor and the creditor is bound to express clearly the extent of the surety's liability... the extent of a surety's liability must be expressed by him, or necessarily comprised in the terms of his contract. This contract is to be construed strictly – that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in the contract..."¹

¹ Christopher Lionel Astill v Lot 54 Falcon Park CC (Case No. AR447/2011) ZAKZPHC (February 2012) – An extract from SA General Electric Co (Pty) Ltd v Sharfman and Others NNO 1981 SA 592 (W) at 597A-B

- [12] I am satisfied that prima facie the provisions of the Current Facility Letter and the Deed of Suretyship, Herman bound himself to an unlimited suretyship covering unconditionally, both past and future debts of the Principal Debtor.

LIMITED SURETYSHIP AND OR GUARANTEES BY EMERALD

- [13] Emerald signed two guarantees limited to a maximum aggregate amount of R1 845 000.00 and R4 025 000.00. The guarantees, just as the unlimited deed of suretyship also formed part of the Current Facility Letter. The only guarantee which is questionable, in my view, is the one for R4 025 000.00 (“the 1st Guarantee”) where the Company’s special resolution is dated 12 December 2016 and the guarantee is dated 10 December 2016, meaning that the guarantee was signed before the resolution by Emerald as to whether it was financially feasible to issue a guarantee to the said amount as requested by Standard Bank. Not only that, it was also unethical for Standard Bank to alter the date of signature of the guarantee from 10 December 2016 to 12 December 2016 so as to align the signature on the guarantee to that of Emerald’s special resolution. This alteration was effected by Standard Bank in its affidavit as follows:-

“4.1 The Plaintiff’s claim against the second defendant as Guarantor, is based on two written Guarantees given and signed by the second defendant (represented by the first defendant) on 12 December 2016 and 28 February 2017 respectively...”

- [14] Similarly, the same alteration was effected on the Certificate of Balance in respect of the 1st Guarantee as follows:-

“... the amount due, owing and payable by the guarantor in terms of the guarantee obligation limited to R4 025 000.00 dated 12 December 2016...”

- [15] The alteration is, in my view tailor-made to suit Standard Bank and to the detriment of the Defendants and as stated by Koen J in paragraph 11 above, this contract is to be construed strictly – that is, the obligation is not to be extended to any other subject, to any other person or to any other period of time than is expressed or necessarily included in the contract. The Defendants signed the guarantee on 10 December 2016 and not 12 December 2016 and this, in my view, constitutes a triable issue in favour of the Defendants.

WHETHER PAYMENTS MADE BY THE DEFENDANTS POST LIQUIDATION OF THE PRINCIPAL DEBTOR WERE TAKEN INTO CONSIDERATION AND WHETHER INTEREST APPLIED FROM TIME TO TIME WAS CORRECT

- [16] Standard Bank in its Particulars of Claim averred that “the amount owing by the Principal Debtor (and 1st and 2nd Defendants) has slightly reduced subsequent to the liquidation of the Principal Debtor. The reduction is due to first and/or second Defendants having made certain payments to the Plaintiff.” On the other hand the Defendants stated in their affidavit that they have paid no less than R1 599 833.06 in order to reduce the Principal Debtor’s indebtedness under the Current Facility Letter. To this end, the Defendants attached documentary proof of how the said amount was paid to Standard Bank.
- [17] The prime rate is also disputed by the Defendants stating that this further places into doubt the manner in which Standard Bank calculated the capital amount of R4 990 141.45 and contending that if the wrong interest rate was applied, the wrong interest was capitalized and the wrong capital amount has been calculated. The Defendants attached a spread sheet of the interest rate applied over a period of time and challenged Standard Bank to provide a full account of the manner in which it calculated the total sum owing, including the interest rate applied over the entire period.

[18] I do not undermine the concerns of the Defendants especially in the light of what Standard Bank stated that the Principal Debtor's debt has slightly reduced as a result of payments made by the Defendants. The issues raised by the Defendants and in particular the issue of computation of interest rate applied, raise genuine and bona fide defences entitling the Defendants to ventilate the issues at trial.

CONCLUSION

[19] The issue regarding the alteration of the date upon which the First Guarantee was signed and evidentiary proof of the issue of quantum, i.e reduction of the debt owing through payments made post liquidation of the Principal Debtor, on the face of the alleged incorrect applied interest rates, raises genuine dispute of facts and an opportunity for the Defendants to defend the matter.

[20] In the premises, I am unable to grant summary judgement, and it should consequently be refused.

ORDER

[21] in the premises, the following order is made:

- (i) Summary judgement is refused.
- (ii) The Defendants are granted leave to defend the main action.
- (iii) Cost shall be costs in the cause.



**O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING: 01 September 2023

DATE OF JUDGEMENT: 25 April 2024

APPEARANCES

FOR THE PLAINTIFF: Adv Y. Coertzen

INSTRUCTED BY: Newtons Inc
c/o Smit Neetling Inc

FOR THE DEFENDANTS: Adv J.M Hoffmann

INSTRUCTED BY: Rothbart Inc
c/o Nienaber & Wissing
Attorneys