IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 2021/35904

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

31 October 2024

…….
DATE SIGNATURE

In the matter between:

HABIB OVERSEAS BANK LIMITED
(IN LIQUIDATION) Applicant

and

CRESTAR PRINTERS AND PUBLISHERS
(PTY) LIMITED (IN LIQUIDATION) First Respondent

IKRAAM JAFFER Second Respondent

SALAHHUDDEEN JAFFER Third Respondent

HAWA JAFFER Fourth Respondent

DR TANWIR JAFFER Fifth Respondent

IKRAAM JAFFER N.O. (TRUSTEE FOR THE TIME
BEING OF THE AHMED JAFFER FAMILY TRUST)
(IT 13346/07) Sixth Respondent

RASHIDA OMAR N.O. (THE EXECUTRIX IN THE ESTATE LATE SHEIK HASSAN OMAR) Seventh Respondent

GHOUSBIBI ARIFULLAH CC Eighth Respondent

THE EXECUTOR IN THE ESTATE OF THE LATE AHMED HASSAN JAFFER Ninth Respondent

HAWA JAFFER N.O. Tenth Respondent

SALAHHUDDEEN JAFFER N.O. Eleventh Respondent

DR TANWIR JAFFER N.O. Twelfth Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand down is deemed to be 10h00 on 31 October 2024

JUDGMENT

S VAN NIEUWENHUIZEN AJ

INTRODUCTION

[1] This matter started off with the names of nine respondents and, by the time it came to the hearing thereof, there were twelve respondents before the Court (they represent eight of the parties properly cited). No relief is sought against the ninth respondent in terms of the applicant's draft order. It is alleged in argument that no executor has been appointed for the ninth respondent who passed away prior to the commencement of the proceedings. The first respondent was placed in liquidation by special resolution registered

on 5 May 2022 and the liquidators, Adriaan Willem van Rooyen N.O. and Safiyah Ebrahim Cook N.O. appointed on 18 November 2022. The liquidators were substituted for the first respondent on 2 March 2023. The Notice of substitution refers to them as joint provisional liquidators but the Certificate issued by the Master on 18 November 2022 makes it clear that they are joint liquidators.

[2] Due to the fact that the sixth respondent is not the only trustee for the time being of the Ahmed Jaffer Family Trust (IT 13346/07), the tenth, eleventh and twelfth respondents also had to be joined to the proceedings. This took place on 21 April 2022.

[3] Prior to the matter being heard, the seventh respondent passed away and it became necessary to substitute the seventh respondent with his executrix, i.e. Rashida Omar N.O.

[4] The aforesaid events, coupled with the fact that the papers, as originally served, were defective in that certain pages was missing, caused several delays. The applicant ultimately went into provisional liquidation and became represented by one Kajee Zeenath as provisional liquidator with extended powers including the power to litigate. On 10 May 2024 an application for leave to file a supplementary affidavit was brought by Naadira Sheik Omar, being the daughter of the late Sheik Hassan Omar (the seventh respondent), and also a member of the eighth respondent, Ghousbibi Arifullah CC. The application was also brought by on behalf of Rashida Omar in her capacity as executrix in the estate of Sheik Hassan Omar. She also filed a confirmatory affidavit.

[5] The main matter with the application to supplement came to me in the opposed motion court on 16 May 2024 and all defences to the plaintiff's claims against the respondents were argued.

[6] For the sake of convenience, the applicant will be referred to as "the bank" and the various respondents either by their surnames or number as

respondent, as may be convenient and the executrix of the seventh respondent as "the executrix"

BACKGROUND

[7] The bank issued proceedings in this matter on 26 July 2021, claiming the following relief:

> *"1.1 Payment of the sum of R5 133 581,05 (Five Million One Hundred and Thirty Three Thousand Five Hundred and Eighty One Rand and Five Cents) plus accrued interest thereon on R14 797,43 (Fourteen Thousand Seven Hundred and Ninety-Seven Rand and Forty-Three Cents) on the total capital plus interest calculated at the rate of prime plus one per cent from the 9th of June 2021 to date of final payment, both days inclusive, being the amount due and owing by the first respondent to the applicant in respect of the overdraft facilities accorded by applicant to first respondent.*
>
> *1.2 Payment of the sum of R4 195 255.00 (Four Million One Hundred and Ninety-Five Thousand Two Hundred and Fifty-Five Rand) plus accrued interest of R11 953.60 (Eleven Thousand Nine Hundred and Fifty-Three Rand and Sixty Cents) plus interest on the 9th of June 2021 calculated at the rate of prime plus one per cent compounded monthly and subject to change as and when the bank's prime rate changes, due and owing by the first respondent to the applicant in respect of a loan advanced by the applicant to first respondent.*
>
> *2. Interest on the aforesaid judgment amounts (clause 1.1 to clause 1.2 inclusive) from 9th of June 2021 until date of payment, both days inclusive at the prime rate of the applicant from time to time, plus one per cent until date of payment, both days inclusive.*
>
> *3. The immovable properties registered in the name of the first respondent, namely:-*
>
> *3.1 **ERF 4[…] ELDORAIGNE EXTENSION 40 TOWNSHIP HELD BY TITLE DEED NUMBER T33541/2001 MEASURING 1123 (ONE THOUSAND ONE HUNDRED AND TWENTY-THREE) SQUARE METRES** be declared executable in terms of the provisions*

of Rule 46(1)(a)(ii) of the Uniform Rules of Court read together with Rule 46A ('The Rules');

3.2 ***ERF 2[…] SUNDERLAND RIDGE EXTENSION 1 TOWNSHIP HELD BY TITLE DEED NUMBER T172192/2005 MEASURING 1500 (ONE THOUSAND FIVE HUNDRED) SQUARE METRES*** *be declared executable in terms of the provisions of Rule 46(1)(a)(ii) of the Uniform Rules of Court read together with Rule 46A ('The Rules').*

The Registrar of the above Honourable Court be authorised and instructed to issue a writ of execution against the immovable property in respect of the property referred to in the preceding paragraph.

4. The first, second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents pay the costs of this application, jointly and severally, on the scale as between attorney and client, the one paying the other to be absolved.

5. Further and/or alternative relief."

The Facts

[8] Crestar held a current account with the bank under account number 1155-5011310-001 ("the current account").

[9] The current account was established subject to the following terms and conditions set out in the Account Opening Application ("the account mandate") and the terms and conditions signed on behalf of Crestar on 6 August 2018.

[10] In terms of the facility letter annexure "FA3 "(couched in the form of an offer dated 11 November 2019) and the annexures thereto signed on behalf of Crestar on 12 November 2019 ("the facility letter"), the bank lent and advanced to Crestar, by way of credit to the current account, of:

10.1 R5 million on 24 February 2020, in respect of an overdraft facility; and

10.2 R5 034 935,94 on 3 July 2020, in respect of a term loan.

[11] The bank was represented by Chaudary Mohamed Qadeer Khan, the erstwhile branch manager of the Laudium branch of the bank, and the deponent to the founding affidavit of the bank is Mr Qamar Farooq Ali. Crestar was represented by second, third and fourth respondents, all of them being members of Crestar. It is alleged that their authority stems from a special resolution passed by the members of Crestar held at Johannesburg on 20 November 2019 annexed marked “FA4” I should point out that annexure “FA4” does not deal with Crestar but is a special resolution passed by the members of Ghousbibi authorising it to stand surety for the obligations for Crestar and authorising Mr Omar to sign the relevant suretyship. The correct annexure ultimately surfaces in the banks’s replying affidavit.

[12] The loan facility already referred to was to be repaid in 60 monthly instalments of R83 000.00 plus interest at the bank’s prime rate of interest plus one per cent from time to time. The rate of interest in respect of both the overdraft facility and the loan would be charged at the prime rate of interest plus one per cent in respect of the facility amounts afforded to Crestar. The rate of interest charged on any or all unauthorised access over the limits afforded in the banking accounts of Crestar, respectively, would be subject to the prime rate of interest from time to time plus five per cent. In addition, the bank reserved the right to review the interest rates at its own discretion from time to time.

[13] Further terms and conditions on the aforesaid transaction were as follows:

13.1 Crestar would ensure that the credit turnover in the affiliate current accounts conducted by Crestar and the fourth respondent, respectively, would be commensurate with the credit facility in each account, failing which the bank would reconsider the continuation of the facility;

13.2 the bank would charge its normal banking charges from time to time, together with its legal costs and service fees, together with cash deposit fees, which were subject to review.

[14] The following securities were also required:

14.1 a first covering mortgage bond of R4 million registered over Erf 4[…] (No 1[…]) T[…] Street, E[…] Township, E[…] Extension 40 (copies of the mortgage bond and title deed were annexed to the founding affidavit as “FA5” and “FA6”, respectively). (“FA5” is in fact a surety bond and contrary to Annexure “FA3” the owners are Ahmed Hassan Jaffer and Hawa Jaffer, the fourth and ninth respondents, respectively – See however clause 12 of the bond terms and further);

14.2 a first covering mortgage bond of R6 million registered over Erf 2[…] (No. 1[…]) R[…] Street, S[…] Ridge Extension 1 Township, City of Tshwane, Pretoria (copies of the mortgage bond and title deed were also annexed to the founding papers, as “FA7” and “FA8”, respectively) (“FA7” is a surety bond – See however clause 12 of the bond terms and further)

14.3 corporate surety of Ghousbibi Arifullah CC (registration number 2004/026300/23) for an amount of R6 million) (this document was also annexed as annexure “FA 9.7”, dated 20/11/2019) (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached);

14.4 personal surety of Mr Omar, for an amount of R6 million (this document is also annexed as annexure “FA 9.6”, dated 15/11/2019 (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached);

14.5 unlimited personal surety of Mr Ikraam Jaffer annexed marked “FA 9.1”, dated 12/11/2019 (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached);

14.6 unlimited personal surety of Mr Salahhuddeen Jaffer annexed marked “FA 9.2”, dated 12/11/2019 (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached);

14.7 unlimited personal surety of Mrs Hawa Jaffer, identity number 601201 0136 082 annexed marked “FA 9.3”, dated 12/11/2019 (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached);

14.8 unlimited personal surety of Tanwir Jaffer, identity number 890929 0085 087 annexed marked “FA 9.4”, dated 12/11/2019 (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached); and

14.9 unlimited corporate surety of the Ahmed Jaffer Family Trust (IT13346/07) annexed marked “FA 9.5”, dated 12/11/2019 (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached);

14.10 unlimited personal surety of Ahmed Hassan Jaffer annexed marked “FA 9.8”, dated 12/11/2019 (the signed document refers to the debtor as Crestar represented by Ikraam Jaffer, Salahhuddeen Jaffer and Mrs Hawa Jaffer duly authorised by a resolution annexed thereto as “R1” – no such resolution is attached)

[15] It is alleged that annexure “A” to annexure “FA3” specifically informed Crestar as follows:

15.1 the facilities outstanding at any one time are subject to variation by the applicant by way of increase of decrease at the applicant's sole discretion, without any notice to Crestar;

15.2 Crestar must maintain, if the bank requires it at any time to do so, such margin as the bank may from time to time require over the overdrawn amounts of the facility limit referred to by way of:

15.2.1 either the deposit of cash or such other property as the bank may consider acceptable, such deposits to be secured in the bank's favour and such documents as the Bank may require from time to time; or

15.2.2 the creation in favour of the bank of such security interest that the bank may require over such property it considers as acceptable;

15.3 Crestar must execute, or procure the execution of, such documents as the bank may require to create such security interest;

15.4 Crestar authorises the bank at any time to set off any credit balance to which they are entitled on any account held with the bank against all or part of the overdrawn amount or interest accrued thereon;

15.5 repayment of all/or part of the overdrawn amount and payment of interest will be due and payable by Crestar on demand;

15.6 the facility may be terminated by the bank at any time if Crestar fails to make payments to the bank of any sum outstanding from it on demand, or otherwise commit a breach of the agreement arising out of the acceptance of the offer contained in the facility letter of any documents mentioned in 15.3 above;

15.7 in the event interest has not been paid within 14 days of the date at which it becomes due for payment, the whole of the outstanding balance of the account plus interest and charges

will immediately become repayable without the bank having to make a demand for same;

15.8 all legal charges incurred by the bank in connection with the facility;

15.9 joint and several liability: in the event that the addressee(s) of the letter dated 11 November 2019 (annexure "FA3") comprises more than one person, the obligations imposed on the addressee(s) by the acceptance of the offer of this letter shall be joint and several obligations of each such person and references to "you" and "your" shall be treated as references to any and all of such persons and the addresses;

15.10 exercise of rights:

15.10.1 no failure or delay on the bank's part in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise thereof of any other right, power or privilege. The rights and remedies herein expressly specified are accumulative and not exclusive of any rights or remedies which the bank would otherwise have;

15.10.2 Crestar is required to submit the latest financial statements of the company and the latest network statements of the surety/ies within a reasonable period from the end of the financial year, failing which the bank reserves the right to recall the facility (until) such time (as) the financials and network statements are submitted and are found to be satisfactory.

[16] The individual deeds of suretyship as called for in annexure "FA3" were executed by the second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents. The respective deeds of suretyship contain, *inter alia*, the following terms:

16.1 The second to sixth respondent and ninth bound themselves as surety *in solidum* for, and as co-principal debtors jointly with, Crestar in favour of the bank for the due and punctual payment by Crestar of all or any monies which Crestar owed to the bank from time to time, from whatsoever cause and howsoever arising as is evident from annexures "FA 9.1" – "FA 9.6"and "FA 9.8" in an unlimited amount.

16.2 Mr Omar and Ghousbibi bound themselves as surety *in solidum* for, and as co-principal debtor jointly with, Crestar in favour of the bank for the due and punctual payment by Crestar, but only up to a maximum amount of R6 000 000.00 (six million rand) each, which Crestar owed to the bank from time to time, from whatsoever cause and howsoever arising as is evident from "FA9.6" and "FA 9.7"

[17] The further material terms of the aforementioned deeds of suretyship include, *inter alia*, that:

17.1 Clause 5: Renunciation

Respondents renounce the legal benefits of the defences of excussion and division, cession of action, *non causa debiti*, *errore calculi* and non *numeratae pecuniae*;

17.2 Clause 10: Certificate of amount owing

A certificate purporting to be signed on behalf of the bank would be proof until the contrary is proved of the balance owing by the respondents and the fact that it is due and payable and that the authority of the signatory and the validity of the signature need not be proved.

17.3 The bank prays that the balance of the terms and conditions in the above suretyships be read as if incorporated in its founding affidavit.

[18] On or about 6 August 2018, Crestar granted an account mandate to the bank. A copy of the account mandate is annexed marked "FA10" (prior to annexure "FA3" and contains the following terms:

18.1 in terms of the account mandate, the bank was, *inter alia*, authorised to:

18.1.1 open an account in the name of Crestar;

18.1.2 debit to the account any cheques or other orders, bills of exchange, promissory notes made on behalf of Crestar, whether the account was in credit or overdrawn, or may have become overdrawn as a result of an instruction being carried out;

18.1.3 honour any order to withdraw any or all monies in the account;

18.1.4 act on any instructions with regard to the account, whether in credit or overdraft, subject thereto that the documents were signed in accordance with the signing instructions and by the authorised signatory of Crestar;

18.1.5 debit the account with bank charges consistent with banking practice.

[19] The material terms of the mandate also included that, in the event that the account of Crestar was in debit, the indebtedness of Crestar would be determined and proven by a written certificate signed by a manager of any branch of the bank, which certificate would, on production thereof, be binding and be conclusive proof of the contents thereof and of the fact that the amount so certified is due and payable.

[20] This account mandate relates to account number 1[…].

[21] The bank pleads that the further terms hereof be incorporated as if specifically stated.

[22] It is further alleged that Crestar and the other respondents breached the facility agreement as set out in paragraphs 25 – 31 of the founding affidavit. The details of the breaches are dealt with below.

[23] I should point out that the two continuing covering surety mortgage bonds secure the obligations of the fourth and ninth respondents and that of Ghousbibi in terms of their respective suretyships in favour of the bank. The mortgage bonds in relation to the obligations of:

23.1 the fourth and ninth respondents is registered for the sum of R4 million over a residential immovable property, which is alleged to be the primary residence of the fourth respondent (the Eldoraigne bond); and

23.2 Ghousbibi, is registered over a commercial immovable property for the sum of R6 million (Sunderland Ridge bond).

[24] The bank, although it did not comply with section 46A of the Uniform Rules of Court, seeks an order declaring the fourth respondent's undivided half share in the immovable property, covered by the Eldoraigne bond, and the immovable property of Ghousbibi, encumbered by the Sunderland Ridge bond, to be declared specially executable.

Applicant's case

[25] The bank contended in its heads of argument that the respondents have no cognisable case. All the respondents contentions are allegedly either unmeritorious technical defences or procedural defences which are bad in law and devoid of any substance or both.

[26] In terms of a counterapplication Crestar filed with its answering affidavit it sought a stay of the present proceedings pending a finalisation of business rescue proceedings which were instituted without any mention of Crestar's indebtedness to the bank and without service on the bank at a time before the bank even instituted the present application. In addition Crestar sought a stay of the present proceedings pending the finalisation of a debatement of account between the business rescue practitioner and the bank in respect of Crestar's overdraft and loan account with the bank.

[27] In the meantime the application for the appointment of a business rescue practitioner has been dismissed. The content of the answering affidavit

contains no content entitling Crestar to a debatement of account in respect of the overdraft or the loan.

[28] As far as the seventh respondent is concerned, as at the time the applicant filed its heads of argument there was no executrix appointed as yet. I deal later with the final stand of the seventh respondent. As pointed out before, the seventh and eighth respondents have filed a supplementary affidavit and request that same may be admitted. I will consider this affidavit and will deal with the reasons why same should be admitted below.

[29] The ninth respondent was cited as the executor of Ahmed Hassen Jaffer. At the time there was an attorney who filed a notice to ostensibly oppose, but at the date of filing of the banks heads of argument, this attorney had not yet responded to a rule 7(1) notice which was served upon him on 21 October 2021. The bank seeks no order against the ninth respondent. It would appear that the ninth respondent is not properly cited.

[30] Broadly, the applicant's submission is that the defences, as apparent from the answering affidavits filed on behalf of the respondents, are not cognisable issues for determination. The allegations on which the respondents purport to rely disclose no defence to the relief sought by the bank and amount to no more than technical defences or procedural defences, which are either bad in law or devoid of factual substance, or both.

[31] It is submitted that the institution of the counter application was no more than a stratagem to delay finalisation of the bank's claim. In any event, by the time that the matter came before me for hearing, Crestar was already in liquidation and the issue became moot.

[32] It is the bank's position that the answering affidavit deposed to by the second respondent on behalf of Crestar, the second to sixth respondent and ninth respondent[1] is replete with allegations that are irrelevant, scandalous or

[1] See paragraph 6 of Ikraam Jaffer answering affidavit purportedly only on behalf of the first to sixth respondents

vexatious. The bank did deliver notice of its intention to apply that that same be struck out but submitted that the matter can be heard without the necessity of formally being struck out.

[33] One of the defences raised is that the Court has no jurisdiction to entertain the application because none of the respondents reside within the area of jurisdiction and because the Master of the Pretoria Division is seized with the administration of the ninth respondents estate. The bank's counter hereto is that this court has concurrent jurisdiction with the Pretoria seat. Hence the aforesaid is of no consequence.

[34] In *Standard Bank of South Africa Ltd and Others v Mpongo and Others*[2] it was held that a litigant can choose its forum where there is a concurrency of divisions. If a litigant is dissatisfied with such a choice, he can in appropriate circumstances avail himself of the procedural mechanisms in the rules and in the absence of an abuse of process, a court is obliged to hear the matter before it. I can see no basis for an abuse of the right to have the matter heard in the Johannesburg division of Gauteng.

[35] In the said answering affidavit there is also a complaint raised to the effect that the bank should have approached a magistrate's court for the relief given the fact that the standard suretyship terms allows for same. The High Court is a Court with inherent jurisdiction and the bank is entitled to approach it as of right. Whether this will have adverse cost consequences given the most recent amendments in the Uniform Rules of Court as to counsels' fees will be dealt with at the end of this judgment.

[36] In the circumstances the jurisdictional challenge should be dismissed.

[37] As to the business rescue proceedings the bank made the following submissions. Unbeknown to the bank the second respondent on 26 February 2021 (before the bank issued proceedings in the present matter) approached the Pretoria Division of the above Honourable Court under case no

[2] 2021 (6) SA 403 (SCA)

10129/2021 for the appointment of a business rescue practitioner in respect of Crestar. In the Crestar affidavit it is alleged that a business rescue practitioner was appointed who was in the process of preparing of compiling a report for purposes of the business rescue application and he undertook to make it available to the court, if necessary.

[38] The bank was not cited as an interested party nor was it served on the bank. The bank was also not notified thereof as an affected person in the prescribed manner or at all.

[39] Mr Ikraam Jaffer in his opposing affidavit filed on behalf of the second to sixth and ninth respondents states that:

> "*Due to the proliferation of a plethora of litigation against the first respondent, it may have been an oversight not having served a copy of the application on the applicant herein who was not regarded as a creditor at the time.*"

[40] Mr Ikraam Jaffer also states that the bank already knew on 6 October 2021 of the business rescue proceedings. There is no disclosure as to who on half of the bank knew or how such knowledge was conveyed.

[41] How the bank could not be regarded as a creditor and in the same breath it is contended that it may have been an oversight not to serve a copy of the application for business rescue is beyond me. It appears to me that the second respondent's attempt to obtain an order for business rescue was an attempt to obtain the protection under the section 133 of the Companies' Act 71 of 2008 and the bank was deliberately not informed. I infer this from the peculiar wording in the extract quoted above and the fact that on 25 April 2022 the business rescue application was dismissed with a punitive costs order.

[42] Even if I am wrong in this view the fact remains that no application for business rescue was granted and although the issue of such application may have caused a temporary stay of these proceedings, or even temporarily stultified these proceedings, or even prevented the issuance of these

proceeding there is no bar to granting the relief sought. The notion that the present proceedings should be reissued afresh is nonsensical and overly formalistic. It will also prolong justice being done to all the interested parties.

[43] According to the bank during the engagements between the parties leading up the institution of these proceeding application no mention was made of the business rescue proceedings. The bank allegedly only became aware of the business rescue proceedings on 15 March 2022 when the first to sixth respondents filed their answering affidavits (the second respondents affidavit is dated 14 March 2022). It is alleged that subsequent thereto and on 21 April 2022, the second respondent surreptiously enrolled the business rescue application as an urgent application. The notice of amendment to the notice of motion in the business rescue application in which he sought that the matter be treated as one of urgency was not served on the bank and the bank was not notified by either the second respondent or by any of the other representatives of Crestar of the urgent proceedings.

[44] Some of the respondents has also suggested that the bank has not established its *locus standi* and its status as a registered bank and credit provider in terms of the National Credit Act 24 of 2005 has been called into question. It specifically pleaded in its founding affidavit that it has such status. When challenged it produced the relevant documentation in its replying affidavit.

[45] It was submitted that same is a frivolous allegation made by such respondents to distract one from the fact that they have no defence against the relief sought . The documentary evidence the bank provided in response to the allegations in the Crestar affidavit demonstrates that the bank was incorporated as a public company on 1 August 1990, was registered as a bank and held a valid licence to conduct business as a bank in terns of the Bank's Act 94 of 1990 and as a credit provider in terms of the National Credit Act 34 of 2005.

[46] A lot was made of the fact that Annexure "FA4" was the incorrect document to the extent that it is a special resolution adopted by the eighth

respondent. In answer to Crestar's and the other respondents counterapplication Mr Goolam Muhamed Hassan deposed to the bank's replying affidavit which also constitutes the answering affidavit to the first to seventh and ninth respondents (defined as the principal respondents) counterapplication and explained that annexure "RA3" to his answering affidavit is actually what should have been annexed as Annexure "FA4" Annexure "RA3" is in fact the special resolution adopted by Crestar represented by Mr Ikraam Jaffer, Mr Salahhuddeen Jaffer and Mr Hawa Jaffer.

[47] He denies that the bank was aware of the application for business rescue and points out that Crestar's representatives in the run up to the launch of the present application never made reference thereto, In any event this application was dismissed as is evident from annexure "RA1" to the aforesaid affidavit. I point out that the court dismissed same with attorney and client costs against Mr Ikraam Jaffer, the second respondent in the present matter.

[48] It is clear that to the extent that Mr Ikraam Jaffer in his answering affidavit relied on the appointment of a business rescue manager and that post-commencement finance was made available, same became moot. Notice was given that costs *de bonis propriis* will be sought against Crestar's attorney jointly and severally with the costs order that will be sought against the respondents. I do not believe that such an order is warranted.

[49] The fifth respondent had withdrawn her notice of opposition on the basis that the letters "POA" indicated the use of a power of attorney and until such time as same is produced by the bank she does not oppose the application. Mr Hassan has indicated that these letters have nothing to do with her liability and that it is indeed her signature that appears on annexure "FA3" and on her personal suretyship, annexure "FA9.4". He also explained that the absence of her signature on annexure "FA4" is not important given that she is not a member of Crestar.

[50] He has also indicated that to the extent that she is in wilful default an order will be taken against her.

[51] He confirmed that the trust represented by the sixth respondent executed the sixth respondent's suretyship annexed as "FA 9.5" to the founding affidavit on 12 November 2019. This suretyship was signed by Ikraam Jaffer duly authorized in terms of the trust respondents' resolution, annexure "RA2" to the bank's replying affidavit, the trust respondents being the sixth, tenth, eleventh and twelfth respondents who nominally represents the Ahmed Jaffer Family Trust. The second respondent did allege that there is no basis for the joinder of the tenth, eleventh and twelfth respondents but it is self – evident that the trust cannot be cited in any litigation without all the trustees being before the court in their capacities' as trustees. The latter respondents was eventually joined on 21 April 2022.

[52] The answering affidavit of Crestar also contained criticism to the effect that rule 41A was not complied with. This is of no assistance.[3]

[53] There was also a complaint by the fourth respondent who is owner of an undivided half share of the property jointly registered in her name and that of the late Mr Jaffer (the ninth respondent) and that the bank has not complied with Rule 46A of the Uniform Rules of Court. The bank's answer hereto is that the requisite information falls within her specific knowledge and that she proffered no alternatives to discharge her obligations under the suretyship, other than the execution against the property and she also did not provide the names of any other persons who will be affected by such an order of execution.

[54] She is alleged to be a businesswoman who actively participates in the day to day management of a large business operation. No facts have been put forward in Crestar's affidavit (or hers) that she would be rendered

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[3] See *Ghaheri and others v Firstrand Bank Limited* - 2023 JDR 3991 (GJ)

homeless in consequence of execution by the bank based on the mortgage bond registered over the property.

[55] Mr Hassan on behalf of the bank also annexed a valuation report of the property as annexure “RA5” dated 9 October 2019. This places the market value at R6 000 000.00 and the forced sale value at R3 600 000.00. Its saleability and lease-ability is classified as good according to DMK valuators as represented by Mr M.S. Pillay. There is no affidavit filed by Mr Pillay and the valuation is nearly 5 years old.

[56] I should mention that an affidavit was filed by the eighth respondent represented by its member Naadira Sheik Omar dated 5 July 2022 raising *inter alia* the defence of non-joinder of all the trustees of the sixth respondent and an oral release of the seventh and eight respondents from their suretyships. She also denied that the bank is the registered holder of the mortgage bond annexure “FA7” registered over the property of the eighth respondent. She further alleged that the suretyship involved is void for vagueness because it does not state whether it refers to the overdraft or the loan. I do not deal with this affidavit in any detail further given that she did not persist with these defences. This affidavit was in any event largely superseded by the supplementary affidavit dealt with below.

[57] Mr Hassan also deals with the eighth respondent’s property referred to which is a commercial property. He states that the bank is not subject to Rule 46A in respect of this property. He also annexes a valuation report in respect of this property also performed by Mr M.S. Pillay of DMK Valuators giving a valuation as at 9 October 2019 with a comparable market value of R 10 180 000.00 and a forced sale value of R7 126 000.00. This commercial property is situate at Sunderland Ridge Ext 1, Sunderland Industrial.

[58] Mr Hassan denies that there was ever an agreement to release the eighth respondent from its surety obligations. In any event clause 12 and 13 of the mortgage agreement and clause 15 of the suretyship agreement would render such an oral agreement of no force and effect.

[59] On 2 June 2023 the seventh respondent filed an answering affidavit in her capacity as executrix of the estate late Sheik Hassan Omar. In this affidavit she attacks the validity of the suretyship on numerous grounds. These defences were not argued before me but effectively abandoned by reliance on the suretyship of the seventh and eighth respondents coupled with an admission of the debt Crestar incurred with the bank. As will transpire below the emphasis was ultimately on the defence of set-off in respect of the seventh and eighth respondents' affidavits filed on 10 May 2024. I will thus not deal with the defences raised in the 2 June 2023 affidavit. The bank filed a replying affidavit deposed to by Mr Hassan dealing with the seventh respondent's allegations. Certain aspects of this relying affidavit bears mentioning.

[60] He points out that the deceased's former attorneys delivered a notice of intention to oppose the matter as far back as 20 August 2021 and that the answering affidavit was due by 10 September 2021. Despite the passage of time the deceased did not file any affidavit before his passing on 1 January 2022. The executrix was appointed as such in the deceased's estate on 8 April 2022 as is clear from annexure "RA1" annexed to the bank's replying affidavit.

[61] I will now deal with the application for leave to file a supplementary affidavit, launched by the seventh and eighth respondents on 10 May 2024, which affidavit was deposed to by the aforesaid Naadira Sheik Omar and confirmed by her mother Rashida Omar ("the executrix"). As stated in her earlier affidavit she is the daughter of the late Mr Omar, and also a member of Ghousbibi. Mr Omar and Ghousbibi were also represented by different attorneys than the other respondents by the time this matter came before me.

[62] In this supplementary affidavit the seventh and eighth respondents change tack and now no longer dispute the claim of the bank against Crestar and address the fact that:

62.1 the Mr Omar and Ghousbibi were depositors with the bank and at all material times had liquidated claims in respect of their deposits against the bank;

62.2 the terms on which the bank accounts were conducted expressly provide for set-off if the seventh and eighth respondents were indebted to the bank;

62.3 accordingly, prior to its liquidation, the bank, on the one hand, Mr Omar and Ghousbibi, on the other, were mutually indebted to each other and the debts were thus liquidated and fully due. Hence, it was argued that set-off operated automatically and, by operation of law, prior to the commencement of the liquidation, even if the bank did not give effect thereto through its accounting on the bank statements, such set-off should *pro tanto* take place for any claim that may exist between the bank, and Mr Omar and Ghousbibi, as sureties and co-principal debtors. Each claim will however have to be subjected to the R6 milllion limit applicable to each suretyship.

[63] This affidavit was only filed on 10 May 2024 shortly before the hearing of the matter. The reasons why I should admit the application for leave to supplement were given as follows:

63.1 that, in December 2023, the executrix and Ghousbibi were confronted with applications to compel delivery of their heads of argument;

63.2 that a provisional liquidation order in respect of the bank had been granted and the return day for the final order was only set for 22 January 2024;

63.3 that, in the circumstances, the deponent's mother, the executrix to the estate of the deponent's late father, deposed to an affidavit on 11 December 2023 and indicated that they were, at the time, considering raising two further defence i e the defence of set-off and the defence of rectification.

63.4 Based on the advice received up to that stage, she was of the view that set-off could only operate if the final liquidation order against the bank was refused. The new advice it obtained since was that this is incorrect.

63.5 It was, asserted that the aforesaid advice was based on the wrong assumption i.e that the executrix and Ghousbibi should

await the outcome of a hearing in respect of the liquidation of the bank to assess whether the defence of set-off may be viable or not.

63.6 Orders were thereafter obtained to compel the executrix and Ghousbibi to file their heads of argument.

63.7 Both the above orders contained a so-called “drop dead” date of 7 February 2024, by which time the heads of argument should be filed and, as it transpired, the final order of liquidation against the bank was only granted on 26 February 2024, as appears from the judgment annexed to the supplementary affidavit, “NSO1”.

63.8 Nevertheless, the excutrix and Ghousbibi delivered heads after a short extension on 9 February 2024.

63.9 Senior counsel was unavailable to settle the heads of argument and, although his name appears on the heads of argument, this was erroneous and he played no role in the preparation thereof.

63.10 Prior to the supplementary affidavit, and in order to try and ascertain whether the defence of set-off may be viable, the seventh and eighth respondents were advised that they needed more information as to the form of the contractual documents to ascertain what their terms and conditions were and also how much money was in each account at each stage.

63.11 For this purpose a notice were delivered under Rule 35(13) and (14) on 15 January 2024. This notice requested all the contractual documents between the seventh and the eighth respondents, on the one hand, and the bank, on the other, and all the statements of account reflecting all debits and credits and running balances for each of the banking accounts for the past 36 months. A copy of such notice is annexed to the supplementary affidavit as “NSO2”.

63.12 On 2 February 2024, the bank’s attorneys responded to the Rule 35 notice and no supplementary affidavit was delivered at the time as to the status of the winding up of the bank.

Based on earlier advice, after the final winding up order was granted on 26 February 2024 against the bank, the executrix and Ghousbibi respondents were of the view that the set-off defence was no longer viable.

63.13 After junior counsel was reappointed and drafted an affidavit for further consideration by 24 April 2024, accompanied with pessimistic advice, a consultation was arranged with senior counsel who had earlier been involved in the matter and it was only on 2 May 2024 that he was requested for his final advice as to whether the seventh and eighth respondents should continue to oppose the application. He required further instructions and information and that was only provided to him on Friday 3 May 2024.

63.14 Under the aforesaid circumstances, senior counsel undertook to consider all the papers in the matter and the legal position and thereafter advise whether any defence of set-off could still be raised. It is alleged that the task was extensive and, the papers in the matter being voluminous, further intermittent requests were made to obtain further instructions as to the relationship and background whilst senior counsel considered the legal position. He also had to undertake extensive legal research, which was interrupted due to the fact that, in the week of 6 May 2024, he was briefed for a two-week arbitration for the week commencing 30 May 2024, which he also had to prepare for. Although it was initially unlikely that he would be available to argue the matter, the same senior counsel was approached in order to save costs.

63.15 One of the reasons for caution was that the seventh and eighth respondents were reluctant to throw good money after bad if there were no prospects of success. It was submitted that the deponent's late father had agreed to sign surety for Crestar on the back of a relationship with his brother-in-law, who was the erstwhile chairman of KPMG. His nephews and the deponent's cousins were the ones running the business. In support hereof, annexure "NSO4" was annexed, being an

article which apparently appeared in a magazine styled CFO South Africa.

63.16 Paragraphs 4.25 and 4.26 of the supplementary affidavit demonstrate that the deponent's father were already seeking his release from the suretyships on 11 May 2021. The effect of Covid-19 on the family business must have been known to him and its reasonable to infer that his efforts to get himself and Ghousbibi released from their suretyships were predicated on the increased risk. It is clear that he knew that the family business was not flourishing after Covid -19.

63.17 He passed away on 1 January according to Ghousbibi's answering affidavit referred to above and by 5 July 2022 no executor in the seventh respondent's estate was as yet appointed.

63.18 It was further alleged that the deponent's late father had a longstanding relationship with various role players in the bank. He kept many millions of rands with the bank. In the end, he obviously agreed to sign as surety and commit the eighth respondent as surety based on trust: trust in the family, trust with the bank, that it would treat him fairly, especially in light of the fact that he had millions of rands deposited with the bank.

63.19 It is also alleged that, as Covid-19 appeared, the business of Crestar took a turn for the worse. It is alleged, by the deponent, that her late father was seeking to have Ghousbibi released from its obligations as a surety. It is suggested that he was also trying to have his own suretyship released. In the present affidavit she accepts that the statement in paragraph 20.2 of Ghousbibi's answering affidavit that an oral agreement was reached that he would be released cannot be supported. Nevertheless, it was stated that it was her father's intention. Be that as it may, the deponent's late father and Ghousbibi continued to bank with the bank and, at all times, held funds well in excess of the indebtedness of Crestar with the bank in respect of bank accounts.

63.20 Not only did Crestar's business go from bad to worse, but so did the business of the bank and, hence, on 26 March 2023 the Minister of Finance, on the recommendation from the Prudential Authority at the SA Reserve Bank, placed the bank under curatorship.

63.21 From that point onwards, no funds have been withdrawn from these accounts. As already stated, the bank has since gone into liquidation.

63.22 At present, all that has been repaid to depositors is R100 000.00 per depositor. It was submitted that if the bank was granted an order in the terms it seeks, without applying set-off, the estate of the deponent's late father and that of Ghousbibi will be severely prejudiced and that it could indeed lead to the demise of Ghousbibi's business and have a prejudicial effect on its creditors and the heirs of the seventh respondent.

63.23 It is for that reason that senior counsel was consulted and clarity sought as to whether the defence of set-off had any merit. On Thursday 9 May 2024, senior counsel had already concluded that they had good prospects of success in succeeding with the argument relying on set-off and, hence, the affidavit was filed on 10 May 2024. It was also submitted that the evidence introduced was relatively limited and should effectively be common cause because the information is in the knowledge of the bank (the bank being the source thereof) and that the evidence only relates to the balances of the accounts held with the bank by the deponent's late father and, thereafter, his estate and Ghousbibi, and the terms and conditions of their contracts. Hence, it is submitted that the primary argument is one of set-off and that it would follow from the common cause evidence.

63.24 It was further submitted that the balance of prejudice clearly favours permitting the evidence and allowing the legal arguments to be raised and which are indeed permitted.

63.25 It was also submitted that section 359 of the Companies Act 61 of 1973 (the Act) became applicable after the final liquidation of the bank and that no notice had been provided in terms of section 359 and given that Mr Zeenath Kajee had not yet been appointed as final liquidator the litigation could not proceed.

63.26 In addition it is alleged that it *appears* as if no notice was given to the final liquidators of Crestar in terms of the Act and hence the proceedings against Crestar are deemed to be abandoned unless the Court orders otherwise.

63.27 It was, therefore, submitted that the bank has suffered no prejudice since it already has the seventh and eighth respondents' money and the seventh and eighth respondents will suffer irreparable prejudice if they are not afforded the opportunity of raising a sound defence to the claim and allowing the substantial sums of money held by the bank to be set off against its claim against the seventh and eighth respondents.

63.28 It was also pointed out that, should judgment be granted against Ghousbibi, the consequence thereof would be that it will also lose its business premises and, in this context, it was pointed out to me that it employs 102 people. Hence, it was submitted that even should the matter be postponed as a consequence of the admission of the supplementary affidavit the "healing balm" of a costs order would cure any prejudice suffered by the bank.

63.29 It should be noted that the supplementary answering affidavit also serves as a founding affidavit in respect of a counterapplication to the extent necessary. No further affidavits answering this counterapplication were filed and no opportunity to do so was sought by the bank.

The set-off

[64] Ghousbibi opened a current account with the bank in May 2006 under account number 1[…]. An account opening form is attached in support hereof marked “NSO 5” The balances from time to time in this account are set out in the statements marked “NSO 6A” and “NSO 6B”, which statements were obtained from the bank.

[65] On the date of commencement of the application on 26 July 2021 the bank owed Ghousbibi R3 751 048.78 on account 2[…] and at the date of the commencement of the curatorship of the bank on 26 March 2023, the bank owed Ghousbibi R 7 305 955.49 on account 1[…]. After the curatorship Ghousbibi was unable to transact on this account. It has also after the curatorship been provided with an additional account statement in respect of account 11551213202 reflecting a balance of R 12,464,557,00 as at 15 March 2023 based on an internal transfer. As at 1 February 2024 the latter account reflected the amount of R12 868,851.88 as appears from “NSO 6C”

[66] No opening documentation in respect of the accounts held by the seventh respondent was disclosed under the Rule 35 reply by the bank and hence the deponent assumes same was lost.

[67] It is asserted that there is no dispute that the late Mr Omar held four accounts with the bank. No bank statements were provided by the bank although the balances on these accounts were provided as at 3 January 2022, 2 days after his death (see the death certificate annexed marked “NSO 7”). The credit balances in these 4 accounts are as follows:

Account number	**R**
1[…]	R627 781.31
1[…]	R590 754.22
1[…]	R2 347 374.49
1[…]	R6 000 000.00
Total	**R9 565 910.02**

[68] The aforesaid figures are based on an email sent by the bank to the deponent on 5 January 2022 marked “NSO 6”

[69] On 18 January 2019, the deponent's late father signed the account opening terms and conditions of the bank, which is annexed as "NSO 9". It appears, from clause 13.13 of the terms and conditions, that the Bank reserved its rights to amend the terms and conditions and recorded that such changes would be displayed on the notice board of the Bank and on its official website. Any amendments would be binding on the depositors with immediate effect. Accordingly, these terms and conditions would apply to all of the seventh and eighth respondents' accounts.

[70] Clause 12 of these terms and conditions deals with set-off and reads as follows:

> **"***12.1 You agree that the assets or funds in any of your Accounts and all rights you may have against the Bank will be subject to a first, perfected, and prior lien, security interest, and right of set-off and held as security by the bank for the discharge of any indebtedness or any other obligation you may have to the Bank, howsoever such obligation may have arisen.*
>
> *12.2 In all instances of indebtedness, the assets in your Account will be held by the Bank* as *security for payment of any liability you may have. You agree to satisfy any indebtedness to the Bank and pay any debit balances in your Account on demand.'*
>
> *12.3 The Bank will not be liable to you for any losses that arise out of or related any such transactions, including tax consequences you may face as a result of such actions. In the event that the bank applies a set-off of your assets to satisfy any debt due and owing to the Bank, the bank reserves the right to restrict or close your Account, and to seek payment of any residual indebtedness through any legal means possible, includlng but not limited to, reporting such debt to credit agencies/bureaus."*

[71] It was submitted to me that the bank intended that set-off should take place where amounts were held as credit against any indebtedness from any cause whatsoever. It was further pointed out to me that set-off operates

automatically by operation of law and not because of a plea of set-off (once it is invoked).

[72] Based on the notion that the relationship between the bank and the client is that of a debtor and a creditor, it was submitted that a credit balance can be set off against a debit balance on the basis of the debtor and creditor being the same.

[73] It was further submitted that the purported dispute by Crestar does not mean that the debt was not liquidated. The indebtedness of Crestar to the bank was demonstrated by a certificate of balance attached to the founding affidavit and it is accordingly ascertainable and capable of prompt ascertainment by simply having regard to the bank account statement, which was also attached to the founding affidavit.

[74] In the circumstances, it was further submitted that the indebtedness of Crestar is clearly liquidated and has been since the demands and certainly by no later than the date by which the application was launched. In terms of the seventh and eighth respondents suretyships “FA9.6” and “FA 9.7” to the founding affidavit the seventh and eighth respondents interpose and bound themselves as sureties in solidum, and as co-principal debtors, jointly with the first respondent, in favour of the applicant in the sum of R 6 million each. In terms of clause 5.1 of each of the suretyships the seventh and eighth respondents also renounced the benefit of excussion meaning the bank was entitled to sue for the full amount owing under the suretyship without proceeding against the first respondent.

[75] It was thus submitted there can be no dispute that as at the date of the demands, the date of the institution of the application and at worst the date of the curatorship, the bank was indebted to the seventh and eighth respondents in amounts exceeding the indebtedness of the first respondent. Each of the seventh and eighth respondents suretyships were limited to R6 million.

[76] On the basis that the indebtedness of the bank was due and payable and clearly liquidated and the indebtedness of Crestar was also due and payable and liquidated, it was argued that set-off had taken place by operation of law and the indebtedness of Crestar was thus extinguished. This much is said in paragraph 32 of the affidavit. In order to achieve this it would appear to me that both Mr Omar's and Ghousbibi's credit accounts might have to be utilised (the one or the other to the maximum limit of R6 million) to achieve this result.

[77] It was also submitted that that insofar as more detail is sought as to exactly what amounts were set off when, the full bank accounts have not been disclosed by the bank despite the rule 35 notice and the Rule 35 reply. The seventh and eighth respondents are simply not in a position to provide further particularity because they do not have all the accounts. However it is clear that more than R6 million was available in the accounts at all material times.

[78] It was further submitted that the bank should know what each account was for. The point was made that the account of R6 million under account number 1155-3802248-250 looks suspiciously like it was being held as security for the R6 million suretyship.

[79] it was further argued that even at the date of filing the supplementary affidavit there are more than sufficient funds in the accounts to extinguish the first respondent's indebtedness for which the seventh and eighth respondents have signed surety.

[80] The bank's claim as per its latest draft order against Crestar (and the other respondents), in terms of paragraph 1.1 is payment in the amount of R9,328,836.05 plus interest at the prime rate plus1 % and in terms of paragraph 2.1 against the seventh and eighth respondents the sum of R6 million. All the aforesaid is claimed jointly and severally the one paying the other to be excused. Although it is so claimed in the draft order (and somewhat differently in the prayer in the notice of motion) it appears to me that the effect of an automatic set-off will have to operate on at least both the 7th and 8th respondents' credit accounts.

[81] It was submitted that the sum of R6 million has been extinguished by set-off retrospectively to the moment the mutuality of indebtedness arose. This would have been prior to the provisional liquidation of the bank and at the latest at the date of the commencement of the curatorship of the bank. The reversion to an amount of only R6 million having been extinguished contradicts the notion that Crestar's debt is extinguished. On the basis that both the seventh and eighth respondents' accounts were in credit and each stood surety for R6 million the bank would in my view obliged to apply set-off on each account until the full extent of Crestar's debt is extinguished subject only to this limitation that it is not entitled to exceed the R6million limit in respect of each suretyship.

[82] With regard to the bank's curatorship it was submitted that it would be contrary to public policy to not permit set-off in circumstances such as the present where the South African Reserve Bank was assuring depositors that their funds were safe but where they were not allowing funds to be withdrawn. It was highlighted that the demise of the bank was due to mismanagement. Reference was made to Annexures NSO 10A and 10B, a South African Reserve Bank media statement as well as a list of questions and answers pertaining to the reasons why the bank was placed under curatorship. Suffice it to say that from the latter annexures it is clear to me that the word "mismanagement" is an understatement.

[83] It was further submitted that even if the bank could argue that set-off did not take place historically prior to the curatorship, and even if it could prevent set off by its election, which is denied, it is submitted that set off would have to take place with effect from the date of the curatorship. This it was argued is because in terms of clause 12 of the terms and conditions, even if set-off did not take place, the funds were being held as security.

[84] It was further pleaded that the seventh and eighth respondents cannot be prejudiced by the bank's conduct in failing to rely upon such security. The security is only bad as a result of the bank's demise and going into liquidation by reason of its own mismanagement and it is deemed to have appropriated

the security in terms of its own terms and conditions. I should mention that an automatic set-off and the realisation of a security are two different concepts. Realisation of an amount ceded or pledged as security is as a matter of law usually achieved by *parate executie*. The seventh and eighth respondents are primarily invoking set-off as of 26 July 2021 when the bank launched these proceedings and there is no indication of parate executie.

[85] It would also appear that the aforesaid is based on the principle of law that nobody can benefit from their own wrongdoing and to permit the bank in the circumstances of this case to claim the full indebtedness of the seventh and eighth respondents as a result of their suretyship obligations whilst only paying them back a few cents in the Rand for the deposits held with the bank, as is likely to eventuate as a result of the liquidation, is inherently unfair and contrary to public policy.

[86] The above submission was backed up by reliance on section 25 of the Constitution of the Republic of South Africa, 1996 **("the Constitution")** as it would allegedly amount to an arbitrary deprivation of property in terms of section 25 (1) of the Constitution in as much as *"no one may be deprived of property except in terms of law of general application, and no law* may *permit arbitrary deprivation of properly"* coupled with the submission that to not permit set-off in the circumstances of this case or to permit the bank to refuse to apply set-off, which would otherwise operate by operation of law, would amount to an arbitrary deprivation of property. Insofar as any law that would purport to limit the seventh and eighth respondents rights in this regard would not be reasonable and justifiable in an open and democratic society based on_human dignity, equality and freedom, taking into account all relevant factors as set out in section 36 (1) of the Constitution.

[87] The argument was further bolstered by the submission that in terms of clause 12 of Annexure “NSO 9”, styled “THE HABIB OVERSEAS BANK LTD ACCOUNT OPENING TERMS AND CONDITIONS” the credit balances would, at worst, constitute perfected liens in favour of the bank. It was argued that it must act on such perfected security and cannot wait for its own liquidation which occurred due to mismanagement as the Reserve Bank

documents and the liquidation,application reveals to the detriment of the seventh and eighth respondents. In my view by the time the bank fell into curatorship the automatic set-off of all credit balances held by the seventh and eighth against Crestar's debt respondents would already have taken place if set-off may be relied upon.

[88] The bank, as per annexures "FA12" to "FA15.6" to the founding affidavit began demanding payment from May 2021. It was only provisionally liquidated more than two years later in August 2023.

[89] It was also submitted that to the extent that the bank may allege that set-off was not automatic, then it is contended that it was negligent, if not grossly negligent and reckless, in failing to have relied upon clause 12 of its terms and conditions and in failing to have given effect to the set-off. It cannot benefit from such wrongdoing.

[90] In addition it was submitted that the seventh and eight respondent's prejudice is tangible in that the seventh and eighth respondents would have to, in effect, pay twice with the eighth respondent having to suffer the sale of its immovable property in order to settle such indebtedness potentially leading to its demise.

[91] In the result it is pleaded, the bank's application against the seventh and eighth respondent should be dismissed, and to the extent necessary, it should be declared that the claim has been extinguished by set off.

Requirements for set-off

[92] The requirements for set-off are trite. In *Schierhout v Union Government (Minister of Justice)*[4] it was held that :

> "*The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other,*

[4] 1926 AD 286 at 289-290

both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other pro tanto as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of compensatio by bringing the facts to the notice of the Court as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together."

[93] Where one is dealing with a bank the situation should be approached by understanding a few fundamentals first. A depositor in the bank does not own any deposit he may have made in the common law sense of the word. The money having been deposited becomes the property of the bank.[5]

[94] The essentials of set-off are discussed in Amler's, Precedents of Pleadings 9th edition as edition as follows:[6]

94.1 The defendant must allege and prove:

94.1.1 The indebtedness of the plaintiff to the defendant;

94.1.2 That the plaintiff's debt to the defendant is due and payable;

94.1.3 that both debts are liquidated;

94.1.4 that the parties are indebted to each other, in the same capacity.

94.2 In the present matter the bank owed the surety (Mr Omar) and reserved to itself the right to apply set-off. on its own terms. As already stated above it reads as follows:

"12.1 You agree that the assets or funds in any of your Accounts and all rights you may have against the Bank will be subject to a first, perfected, and prior lien, ***security interest, and right of set-off and***

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5 *Standard Bank of South Africa Ltd v Echo Petroleum CC* 2012 (5) SA 283 (SCA) p 28 - "*The general rule is that moneys deposited into a bank account fall into the ownership of the bank. The resulting credit belongs to the customer, the bank having a contractual obligation to pay the customer on demand and to honour cheques validly drawn on the account to the extent that it stands in credit.*"

6 See p 337

held as security by the bank for the discharge of any indebtedness or any other obligation you may have to the Bank, howsoever such obligation may have arisen.

12.2 ***In all instances of indebtedness, the assets in your Account will be held by the Bank as security for payment of any liability you may have. You agree to satisfy any indebtedness to the Bank*** *and pay any debit balances in your Account on demand.'* (my emphasis)

[95] By stipulating in such terms, the bank was in part repeating the common law of automatic set-off and upfront sought to beef it up as to a first, perfected, and prior lien, security interest, held as security. Both Mr Omar and Ghousbibi in addition, agreed to satisfy any indebtedness to the bank subject to the R6 million limitation in respect of each surety. It should be noted that this regulated the deposits made by Mr Omar since 2006. The deponent being the daughter of the executrix reconfirmed this position when she opened the estate account on behalf of the estate having been so empowered by the executrix on 11 April 2022. The latter may be irrelevant in as much as the automatic set-off may well have extinguished Crestar's debt even before the estate account was opened.

[96] As I understand the common law in this regard the bank always has the option to choose who it wants to hold liable. Once there has been a default by the (principal) debtor it is open to the bank in its election to decide whether it acts on the security or only sues the (principal) debtor.[7] This applies where there is a third party who provided a security deposit *(without any other undertaking to pay the debt of the (principal) debtor)*. Thus, the court held in the case referred to that the depositor of the security in the insolvent bank may have to lodge a claim in insolvency to obtain repayment of the security.

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[7] See *Re Bank of Credit and Commerce International SA* (No 8) [1997] 4 All ER 568 (hereafter *"BCCI 8"*)

[97] The argument raised by counsel for the executrix and Ghousbibi was that Crestar having defaulted on its debt obligations, demand having been made on Mr Omar and Ghousbibi, the effect of their capped suretyships coupled with the credit balances in the bank read with the terms of clause 12 of annexure "NSO9" produces a different result i.e. the bank had to give effect to the set-off prior to liquidation (or even the curatorship) to the extent that the latter operates automatically and on the basis that the principal debt is liquidated and so are the credit balances in Omar and Ghousbibi's accounts. This seems to be at odds with the result in *BCCI 8.* The simple answer is that it is not at odds with same. In the present matter Omar and Ghousbibi undertook to pay Crestar's debts in terms of their capped suretyships jointly and severally. There is authority for the notion that where a party is interposed as surety for the principal debtor the bank has no free choice once set-off is invoked..[8] Lord Hoffman explains the ostensible contradiction with regards to *Ms Fashions* as follows:

> "*But because the depositor was also personally liable jointly and severally with the borrower, an automatic set-off took place which discharged the borrower. The distinction is artificial because in no case would the bank wish to rely upon the depositor's personal liability, whether as principal or guarantor. It will simply keep his money in accordance with the letter of charge. It could be said that, for a bank which is thinking of becoming insolvent, the MS Fashions case is a trap for the unwary" [9]*

[98] Mr Peter for the bank pointed out that regard should be had to the banking practice of "sweeping" and clause 3 of annexure "FA3 " which states as follows:

> "*You authorise us (without our being obliged to do so) at any time to set-off any credit balance to which you are entitled on any account with us against all or part of the overdrawn amount or interest accrued thereon.*" [10]

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8 See *Ms Fashions (Pty)Ltd and others v Bank of Credit and Commerce International SA*(no 2) [1993] 3 All ER 769

9 See p 575

10 See annexure "A" to annexure "FA3"

[99] The above clause operates to negate set-off and allows in bank practice that payments due to a bank on another account of a debtor held with it, be sweeped and utilised as a credit and consolidated with a debit balance in the other account. This probably facilitated the monthly payment on the term loan account. The terms relied upon, however, apply to Crestar and not to the seventh and eighth respondents as sureties. No affidavit as to the practice of sweeping of accounts were filed by the bank in answer to the 10 May 2024 affidavit of the seventh and eight respondent nor were an opportunity sought to file such an affidavit. Once demand was made the bank has staked its claim and in my view the set-off occasioned by clause 12 in respect of the seventh and eight respondents account mandates' should start running utilising the credit balances held by them against the debt incurred by Crestar.as of 26 July 2021 at the latest, same being the date the present proceedings was issued.

[100] Over and above the aforesaid it was alleged that the bank/curator were negligent by not implementing clause 12.

[101] It was also submitted that:

[102] "*38 In regard to the curatorship, I annex marked* ***"NS01A"*** *and* ***"NSO10B"*** *the* South *African Reserve Bank Media Statement and Q & A documents reflecting the position. It is submitted that it would be contrary to public policy to not permit set-off in circumstances such as the present where the South African Reserve Bank was assuring depositors that their funds were safe but where they were not allowing funds to be withdrawn. They highlight that the demise of the applicant was due to mismanagement.*

> *39. Accordingly, even if the applicant could argue that set-off did not take place historically prior to the curatorship, and even if the applicant could prevent set off by its election, which is denied, it is submitted that set off would have to take place with effect from the date of the curatorship. This is because in terms of clause 12 of the terms and*

conditions, even if set-off did not take place, the funds were being held as security."

[103] This argument seems to be constructed on the false premise that the bank "*is deemed to already have appropriated the security in terms of its own terms and conditions.*"

[104] I can find no such deeming provision in the relevant terms and conditions or in the suretyships. The set-off may of course bring about such a result. (See *MS Fashions* fn 8)

[105] In addition it is alleged that the "security" is only bad because of curator's conduct in failing to rely upon such "security". In my view the "security" formed part of the credit balances in the various accounts which was already subject to set-off prior to the curator being appointed. The issue of security being realised simply does not arise.

[106] Annexure NSA 10A places the reader on notice. The mismanagement of the bank is said to predate the curatorship and the involvement of the SA Reserve Bank in its capacity as the Prudential Authority under the Habib Overseas Bank will continue to operate during the period of curatorship, subject to the assessment of the curator. The curator will assume the powers of the Board and management and will make decisions regarding the bank's continued granting of loans and sound banking activities generally. The curator is also required to recover and take possession of all the assets of Habib Overseas Bank. Habib Overseas Bank remains liquid, with a liquidity coverage ratio above the regulatory requirement, and there are no immediate concerns for depositors, which means their funds remain safe at the bank. The curator will keep customers informed of any significant new developments at the bank.

[107] Annexure NSA10B the question and answer annexure makes it clear beyond any doubt that the bank was riddled by fraud and insider trading. Any statement made by the Prudential Authority at the stage the curator is appointed by definition is based on the reports the Reserve Bank received

from the bank. There is full disclosure that the systems migration was in a mess and that the Auditors could not perform their functions properly. The notion that the bank is liquid is clearly based on the information fed by the management to the Prudential Authority prior to the curatorship. In the context of the set-off taking place earlier i.e. from 26 July 2024 all the curatorship details are probably irrelevant.

[108] The executrix's daughter made her election prior to the curatorship on 27 March 2023 to leave the funds of the seventh and eight respondents there. (Assuming any funds remained post set-off).This of course continued to render the credit balances if any remained, to be set-off against the claims of the bank. In my view the set-off was by now already a foregone conclusion and all that may remain is a right to recover in either the name of seventh respondent or eight respondent (depending which entity has a credit balance post the set-off) and the obvious right to recover will be in the bank's insolvency.

[109] I am of the view that It would appear that the automatic set-off would by now have already extinguished Crestar's debt and that the issue of security is a matter of history.

[110] A further point which was raised was that to not hold that the debt has been settled is an arbitrary deprivation of the seventh and eighth respondent's property rights. Firstly the funds given as security became the property of the bank. The rights to the deposit constituting the security was pledged to the bank. The contract with the bank gave rise to the deprivation of the respondents rights by virtue of clause 12 –a contract freely entered into by the seventh respondent and Ghousbibi. There is thus no room for the argument of an "arbitrary deprivation". In any event the set-off argument renders this submission completely superfluous.

[111] There is actually no formal counterclaim before me for set-off and only a prayer. I am not in a position to calculate the set-off balances precisely and given the interest running on capital outstanding on the bank's claim the liquidators will have to calculate the set-off on a running basis against the

bank's claim at least from 26 July 2021 and the seventh and eighth respondents will only have any remaining liability if the credit balances in their accounts do not extinguish the claim of the bank (the set-off can of course not exceed their individual limits of R6million each.

'

[112] One other aspect should still be dealt with i.e. whether section 359 of Act 61 of 1973 of the old Companies Act operates as a bar to the proceedings. It is clear that the liquidators of the bank and that of Crestar both hold final appointments. Section 359 (1) operates for a liquidator's benefit.

[113] The section reads as follows:

> *"(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200- (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and*"
>
> *(2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.*"

[114] The commentary in Henochsberg on the Companies Act with regard to section 359 (1) states as follows:

> *"The suspension effected by s 359(1)(a) operates, in the case of a voluntary winding-up, upon the registration of the special resolution in terms of s 200 (s 359(1); and see eg, Corigrain Trading SA v Resora (Pty) Ltd 2004 (2) SA 348 (W)), and, in the case of a winding-up by the Court, only once a liquidation order has been granted (and not merely upon the lodgement of the application with the Court) (LL Mining Corporation Ltd v Namco (Pty) Ltd (in liquidation) 2004 (3) SA 407 (C)*

at 413). The suspension operates until the appointment of a liquidator; he would, however, proceed at some peril to himself as against the creditors of the company if as soon as he is appointed he were to continue with the proceedings without obtaining authority as envisaged by s 386(3). But the lack of such authority would not ground a valid objection by the other party to the proceedings to their continuation "

[115] As to section 359 (2) the commentary states as follows:

A surety for the company has no locus standi to invoke the provisions of sub-s (2)(a) in order to avoid liability under a judgment granted against the company on the basis that the creditor had failed to comply with its provisions (see, eg, Barlows Tractor case supra at 884F-G; Millman NO v Koetter 1993 (2) SA 749 (C); Nedcor Bank Ltd v Samuel 2005 (2) SA 439 (W) at 441).

[116] In the present matter the liquidators of Crestar were substituted as parties in lieu of Crestar as far back as 18 November 2022. If section 359(2) found application they could have raised it, given that same exists for their protection and not the sureties of Crestar. The seventh and eighth respondents will thus not be able to rely on the above. With regards to the liquidation of the bank the liquidators proceeded and raised no objection under section 359 (1) or (2) at all and specifically did not file any answering affidavit raising such defence against the seventh and eight respondents' prayer for set-off.

[117] I now have regard to the test for the admission of such a late supplementary affidavit.

[118] A court will exercise its discretion to permit the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. For this reliance was placed on Erasmus: Superior Court Practice.[11] I refer to the

[11] See RS 23,2024, D1 Rule 6-31-6-32

most recent update available on the Jutastat Evolve product which states as follows:

> "*The factors that the court will consider are the following:*
> *(a) The reason why the evidence was not produced timeously.*
> *(b) The degree of materiality of the evidence.*
> *(c) The possibility that it may have been shaped to 'relieve the pinch of the shoe'.*
> *(d) The balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted.*
> *(e) The stage which the particular litigation has reached. Where judgment has been reserved after all the evidence has been heard and, before judgment is delivered, an applicant applies for leave to place further evidence before the court, it may well be that he will have a greater burden because of factors such as the increased possibility of prejudice to the respondent, the need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the court.*
> *(f) The 'healing balm' of an appropriate order as to costs.*
> *(g) The general need for finality in judicial proceedings.*
> *(h) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client."*

[119] The defence of set-off could hardly have been conducted without obtaining the necessary documentation from the bank, Although it is raised late the complexity of the issues are such that I allow the late affidavit to supplement the seventh and eight respondents case. In fact given the content of the new affidavit they have no case at all but the defence of set-off.

[120] Plaintiff's claim against the seventh and eighth respondents will have to be dismissed to the extent that it is extinguished by set-off. I am unable to declare it fully extinguished hence the proviso. I will deal with costs at the end of the matter.

The case for the 1st to 6th and 10th to 12th respondents.("the remaining respondents")

[121] The first defendant, Crestar, initially opposed the matter and as already stated ended in final liquidation on 5 May 2022 after an unsuccessful business rescue application.

[122] Prior hereto on 15 March 2022 an affidavit was filed by Ikraam Jaffer by his attorneys Jaffer Inc. c/o Chiba Jivan Attorneys in Greenside on behalf of first to sixth respondents and ninth respondent. He states that he is the second respondent and a director of the first respondent. He also states that as a matter of convenience that he deposes to his affidavit on behalf of the first to *seventh* respondents and ninth respondent in the main application and the tenth to twelfth respondents in the joinder application. I point out that to the extent that he purports to speak on behalf of the seventh respondent that contradicts the filing page under cover of which his affidavit is filed and that a copy of his affidavit is actually served on I Nieuwoudt Attorneys who at the time acted for the seventh and eighth respondents. Be that as it may the seventh and eighth respondents have stated their position and prayer as set out above.

[123] His affidavit is structured as follows:

> *"7.1. I firstly deal with the points in limine as it relates to the first respondent in business rescue and the applicant's failure to seek permission from the duly appointed business rescue practitioner, alternatively, leave from the honourable court as mandated, inter alia, in terms of section 131 of the Companies Act 71 of 2008 under case number **10129/21** in the Gauteng Division situate in Pretoria;*
>
> *7.2. The security tendered and held in trust by the first respondent's business rescue practitioner in lieu of the business rescue proceedings;*
>
> *7.3. The right and entitlement of both the eighth and ninth respondents to intervene in the application with leave of the Office of the Master in*

Pretoria under their duly authorised executors once the letters of executorship with the requisite authority;

7.4. The jurisdiction of the honourable court in the circumstances where the Office of the Master situate in Pretoria is vested with the deceased estates of the estate late Ahmed Hassan Jaffer under Master's reference ***005507 /2021;***

7.5. The surety and liability of the fifth respondent herein without the requisite power of attorney, her liability and notice of withdrawal pending the lodgement of the power of attorney;

7.6. Opposition to the joinder application to the extent necessary as sought herein;

7.7. The answering affidavit as it relates to the applicant's main application;

7.8. The basis for a Rule 7(1), Rule (35)(12)(a) and counter application in terms of Rule 6(13) together with an appropriate counter application for a statement and debatement of the aforesaid account;

7.9. The allegations as contained in the affidavits of Dassoo and the eighth respondent's nominated official in the stead of the deceased."

[124] I refer to paragraphs 7.1 and 7.2 first. I have dealt with the business rescue application in paragraph 34 to 46. There is no business rescue practitioner or a basis for debatement of the account and hence these defences fail. I have considered that the bank may well not have been entitled to launch the proceedings against Crestar at the time, due to the pending business rescue application, but at present given that the business rescue application was dismissed it would be artificial and overly formalistic to order the bank to reissue proceedings against Crestar. The liquidators' of Crestar did not appear or object and the remaining respondent as sureties have no

standing to raise the defence and could in any event have been sued irrespective of whether a claim could be launched against Crestar at the time.

[125] The issue of the eight and ninth respondent is raised in paragraph 7.3 above. Given that the applicant no longer seeks relief against the ninth respondent the point is moot. The eighth respondent's position and entitlement to set-off has been dealt with above and the second respondent as surety has no say in Ghousbibi's case as conducted by its counsel.

[126] I accept that the ninth respondent is not properly cited and that no executor has been appointed. Given the bank's decision to seek no relief against the ninth respondent that is the end of the matter. The remaining respondents and their attorney also have no *locus standi* to argue the point.

[127] The fifth respondent cannot unilaterally withdraw from the matter based on the sketchy allegation that the letters P.O.A. as a sidenote on Annexure "FA3" refers to a power of attorney. Mr Hassan has dealt with that allegation in his replying affidavit. If counsel for the fifth respondent wanted to deal with this as a *bona fide* factual dispute he should have sought a reference to evidence before arguing the case and by arguing and not seeking a reference to trial or cross-examination thereon effectively placed me in a position where I have to rule whether there is a triable defence raised by her. The fact that she did not take part in the business is of no assistance and her suretyship stands.[12] If she wanted to dispute her signature, she should have engaged a handwriting expert deposing to an affidavit that she never signed it. I am of the view that she raised no triable defence and should suffer the consequences thereof.

[128] An allegation made by the second respondent to the effect that the fifth respondent (Dr Tanwir Jaffer) was not a member of the trustees that authorised the second respondent to sign the Ahmed Jaffer Family Trust suretyship - sixth respondent) is patently false.[13]. I have checked the

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12 See paragraphs 48 and 49 of the 2nd respondent's answering affidavit.
13 See paragraphs 44 – 45 of the second respondent's answering affidavit.

caselines reference given i.e. 3-21 and her signature appears as one of the trustees authorising the second respondent to sign a suretyship on behalf of the sixth respondent. This resolution is dated 12 November 2019.

[129] To the extent that the joinder issue is raised by second respondent as a defence – I assume he refers here to the joinder of the tenth, eleventh and twelfth respondents - it is a matter of same being a *fait accomplit.* On 21 April 2022 the tenth– twelfth respondents were formally joined as trustees for the time being of the Ahmed Jaffer Family Trust, thus ensuring the trust is properly before the court. In this regard to the twelfth respondent's attempt to waive her rights to be joined as trustee is ineffective since the trust can only be cited in a court by all trustees acting jointly. She is not entitled to withdraw in her official capacity given that the trust will then not be able to give instructions to its attorneys on the basis of joint decisions made by the trustees.

[130] With regard to paragraph 7.7 which seems to deal with the defences raised as to the merits of the bank's claim I could found nothing in second respondent's affidavit and thus the third, fourth, fifth and sixth respondents' supporting affidavits that amount to triable defences.

[131] The challenge to the deponent to the founding affidavit's authority to bring the proceedings is ill-conceived. Such a challenge should be brought under rule 7 of the Uniform Rules of Court. An applicant in motion proceedings is no longer required to attach a resolution as to his authority.[14]

[132] The denials as to the status of the bank and the fact that it is registered under the NCA was refuted in reply by Mr Hassan.

[133] The status of the ninth respondent is of no consequence given that the Applicant is seeking no relief against the as yet unidentified ninth

[14] See *Erasmus* Rule 7(1), *Eskom v Soweto City Council* 1992(2) SA 703 (W) and the other cases discussed in the commentary under Rule 7.

respondent. The second respondent and his attorneys have for the same reasons no authority to act for the ninth respondent.

[134] I have already dealt with the fifth respondent's position.

[135] The remaining respondents admit the term loan and facility agreement and the securities required for same.

[136] They also admit the contents of paragraph 17 of the founding affidavit and thus the terms of Annexure "A" to Annexure "FA3". It is pleaded that due to Covid -19 pandemic the requisite financial statements could not be produced.

[137] The second respondent admits paragraph 18 pertaining to the suretyships required (repeating the denial in respect of the fifth respondent) together with the balance of the remaining respondents. This admission includes annexure "FA4" (the Ghousbibi resolution) the correct annexure "FA4" later being provided by Mr Hassan.

[138] Second respondent also admits para 19.1 – 19.6 of the founding affidavit i.e. the suretyships signed by him, the third and fourth respondents. The third and fourth respondents take no issues with same.

[139] He denies paragraphs 19.9 – 19.16 as well as annexures "FA 9.5" – "FA 9.8". He complains of sloppy copy and paste methods and insists that the annexures "FA 9.5" – "FA 9.8" should be struck as irrelevant. No such application was argued by Mr Kȍhn who appeared for the remaining respondents and the second respondent also demands a costs *de bonis propriis* order against the applicant's attorneys. The effect of the sloppy drafting and copy and pasting is that all the suretyships he seeks to strike out are supposed to be that of the fifth respondent when in fact these annexures are the suretyships of the sixth, seventh and eighth respondents. Whilst I do not approve of the sloppy drafting and incorrect identification of these suretyships a simple reading of same corrects any identification problems and neither the seventh or eighth respondents complained about this. I cannot

entertain this complaint. The remaining respondents know which suretyships pertain to them and are not prejudiced by the erroneous identification in the founding affidavit.

[140] The remaining respondents also allege that the applicant's attorney was indolent in other respects in as much as an incomplete set of papers were served and on two other occasions the papers had to be supplemented before his attorneys finally had a complete set of papers. For this reason he believes the respondents should have another opportunity to set a version implying that fresh papers should be served again. This was argued by Mr Kȍhn coupled with the fact that the bank should not have issued papers whilst the business rescue application was pending. As to the latter I have already stated my view. With regard to the sloppy drafting and incorrect identification of the parties and their suretyships I do not believe that the remaining respondents have been prejudiced at all. As far as the first incomplete set of papers are concerned the respondents were afforded a fresh period to enter an appearance and file affidavits. No additional accommodation is required.

[141] With regard to paragraphs 19.17 – 19.18 dealing with the terms of the suretyships the second respondent denied the meaning thereof and stated that same will be dealt with once the court's leave to rely on these suretyships were obtained. In substance it is only the Ahmed Jaffer Family Trust suretyship that really affected the second to sixth respondents. The other annexures involved the seventh and eight respondents who had no difficulty with these terms once the set-off approach was followed. The ninth respondent is a non-issue.

[142] The remaining respondents deny that the bank failed in full to provide the standard banking practices it held out to provide and failed to account in full to Crestar's directors. Save for the aforesaid paragraph 20-24 was admitted. The latter deals with the account mandate also known as "*An account opening application*".

[143] The second to sixth respondents answer here is vague to the extent that there is no indication of what they were given and what they were not

given. As far as the issue of accounting is concerned this has been dealt with. There is no fiduciary relationship between a bank and its clients, and thus the bank has no duty to account.

[144] Paragraphs 25-30 of the bank's founding affidavit deals with Crestar's breaches of the various terms and conditions as well as its requests to bring the account back within limits. From about the middle of 2020 the credit turnover in Crestar's bank account had substantially decreased and was not commensurate with the credit limit afforded to it. Notwithstanding the aforesaid and undertakings by the second and third respondents that the credit turnover will be made commensurate with the credit limit afforded to Crestar the breaches continued. In support hereof annexure "FA11" is annexed, being a reconciliation statement reflecting an analysis of Crestar's account which was not being conducted in a satisfactory manner. Mr Ali also verbally informed second and third respondent that it would instruct its legal team to fully recover Crestar's outstanding liability to the bank.

[145] In the ensuing months despite Crestar's assurance that it would extinguish its liability to the bank, same not only increased in excess of the facility but Crestar failed to reduce the liability.

[146] The bank also asserts in a letter dated 11 May 2021 attached as annexure "FA12" that Mr Omar wanted a release of the Sunderland property and that Crestar never responded hereto. According to the Founding Affidavit Crestar was to provide a sustainable replacement security. This never happened. Seventh and eighth respondents accepted that neither were ever released from their respective suretyships.

[147] In this letter repayment of an amount of R 9 239 557,07 was demanded within 30 days of the date of the letter or an arrangement to provide alternate security to cover its liabilities, failing which the bank would take appropriate action.

[148] The second respondence response hereto was that in the bank's conversations with him and the third respondent the bank failed to

appropriately record Crestar's concerns as to business rescue proceedings and its financial distress as a consequence of the Covid 19 pandemic.

[149] The second respondent also alleges that Mr Ali was not the normal contact point of Crestar and that Mr Ali conveniently fails to enlighten the court of the various telephone discussions with Crestar's normal contact point directly. I should mention that the remaining respondents also do not inform the court as to the identity of Crestar's usual contact point.

[150] The second respondent also alleges that the bank is not compliant with standard banking practice in terms of the Banking legislation applicable in South Africa. It is unclear what this allegation seeks to convey.

[151] The bank is challenged to produce the purported undertakings referred to in paragraphs 26.2, 28 and 29 together with the assurances referenced in paragraph 27 of the founding affidavit. The bank never suggested that it had written proof of same and thus the challenge and counter application for same is disingenuous.

[152] I also find it inconceivable given Crestar's concerns about business rescue that second respondent would thereafter forget to include the bank as a party in the business rescue proceedings. This lends support to the assertion that the bank's exclusion was a stratagem.

[153] The second respondent then denies that annexure "FA11" is *not* a banking document or appropriately reconciled banking document. I am not sure what this is supposed to mean. Annexure "FA11" carefully demonstrates the continuous debits and excess with regard to the overdraft limit of Crestar.

[154] The bank thereafter employed Dassoo Attorneys who demanded repayment of Crestar's liability within 48 hours as per annexure "FA13" dated 10 June 2021 and also demanded repayment as per annexure "FA14.1" from the second respondent and trusting him to prevail on Crestar to repay its liability to the bank forthwith. Similar demands were sent to the third, fourth and fifth respondents as sureties same being Annexures "FA14.2" – "FA 14.4"

[155] The second respondent seems to think annexure “FA13” is directed to him rather than to Crestar and annexure “FA14.1” is directed to Crestar.

[156] The second respondent is upset in as much as he regards the second letter as written in a disrespectful tone in circumstances where there is no intention of the bank to indicate which steps it took to accommodate “*the applicants*” in relation to the business rescue proceedings and other pending litigation. I presume the second respondent meant Crestar should have been accommodated notwithstanding the bank’s patience. The notion that the bank should know about the business rescue proceedings and the repeated reference thereto seems contrived given the earlier explanation that it was an oversight not to include it in the application for business rescue.

[157] For some or other reason the second respondent sees unreasonableness and malice in the demand to pay before close of business the next day given fact that the credit facility is revoked and given Crestar’s inability to plead the full circumstances of its financial distress and the failure of the bank and its attorney to take cognisance thereof, and more specifically bearing in mind that his father passed away as recent as 3 February 2021.

[158] It would appear that the second respondent forgets Annexure “FA12” where Crestar was afforded thirty days to respond after 11 May 2021. The failure to rectify the account is the obvious reason for the acceleration in the process. In any event one would have expected some correspondence from Crestar or the second respondent explaining the distress and alerting the bank about a possible business rescue application.

[159] The second respondent accuses the bank of instituting this application without a proper approach and without properly considering to bring the correct parties before the court or filing a peremptory Rule 41A(2)(a). I have already dealt with the Rule 41A defence above. All the parties except for the ninth respondent was correctly before the court by the time I had to hear the matter.

[160] He also complains that the bank issued this application on 26 July 2021 after a further demand on 15 June 2021 and unreasonable demands on 17 June 2021. Again the demand referred to was sent to the third fourth and fifth respondents as sureties and to Crestar. On this occasion the sixth, seventh and eighth respondents also received similar demands.

[161] All of the aforesaid is referred to, is to demonstrate the bank's "disrespect."

[162] In paragraph 30.1 a reference is made to seventh and eighth respondents wishing to be released from their respective suretyships so that the property of the ninth respondent (the Eldoraigne property) can be released from the bond. This property was co-owned by the fourth and ninth respondents and subject to a surety bond pursuant to their respective suretyships. It has nothing to do with the seventh and eighth respondents suretyships which Mr Omar wanted to be released from which would have freed the Sunderland property from the relevant surety bond. This is borne out by Annexure "FA12". The reference to the Eldoraigne property is probably just another example of sloppy drafting.

[163] Based on the content of paragraph 30.1 of the founding affidavit the second respondent concludes: "…. *that the applicant has been interfering in the financial affairs of the respondent and there exists no reason why the ninth respondent could have taking the release up with me or the third respondent.*"

[164] I am of the view that the inference drawn by the second respondent as to the bank's alleged interference is unsustainable.

[165] He also accuses the bank and its attorney of attempting to implicate cost at the door of the "*respondent's*" for its own failures. Although it is stated that I was to be addressed on this at the hearing I do not recall Mr Kȍhn doing so in this context.

[166] The second respondent further states:

" I further deny that the costs as alleged by the applicant is exorbitant and inappropriately inflated. I do know that the applicant in a number of other cases have incorrectly calculated the interest, or inappropriately included non-existent interest, and for this reason the balance, certificate of balance and any other document produced by the applicant is challenged.

73.14. In light hereof, I further seek a full statement and debatement of the account with the applicant, should this not be possible, such statement and debatement be referred to the incumbent business rescue practitioner to adjudicate and assist the first respondent in such astronomical alleged interest reflected in annexures ***FA11*** *and* ***FA16.***

73.15. To the extent that applicant is able to prove[s] the purported allegations as it relates to the statement reconciliation and the amounts reflected in the certificates of balance, and in order to enable first respondent and/or its duly appointed business rescue practitioner to ascertain its alleged indebtedness to applicant, first respondent seeks a statement and debatement of the aforesaid alleged balance reflected in the certificate of balance on the following grounds:-

73.15.1. Applicant alleges in terms of a written agreement that the first respondent is entitled to receive invoices and statements;

73.15.2. Applicant has a fiduciary relationship to account to first respondent in terms of the alleged written agreement;

73.15.3. Applicant alleges a contractual written agreement in support of its alleged claim as contained in the certificate of balance;

73.15.4. Applicant has failed, neglected or refused to account to the first defendant in terms of the alleged agreement as it is obliged to do and should applicant fail to account for to the first respondent, there is no liability in respect [of] any claim as alleged."

[167] Firstly there is no business rescue practitioner to have a debate with. Secondly and as stated before the banker's relationship with his client is one of debtor and creditor.[15] There is no fiduciary relationship entitling a debatement of an account arising out of contract, or a statutory provision[16]

.

[168] In addition the second to sixth and tenth to twelfth respondents are bound by the terms of their suretyships.

[169] Mr Köhn argued that as far as the Ahmed Jaffer Family Trust is concerned the letters appointing the sixth, and tenth to twelfth respondents were issued by the Master in Pretoria and hence jurisdiction is there. The same would have applied if the applicant was still seeking relief against the ninth respondent. As far as the Trust is concerned the sixth, and tenth – twelfth respondents are natural persons and the Gauteng Division: Johannesburg has concurrent jurisdiction with the Gauteng Division: Pretoria. This is by now trite law and I therefore have to disagree with him on this point. This court has jurisdiction over the Trust as nominally represented by the sixth, and tenth to twelfth respondents. To the extent that I have to decide about its liability as surety for the debt of Crestar I may do so.

[170] He also argued that even if the applicant was unaware of business rescue application it nevertheless issued the present application while the business rescue application was pending. Irrespective of the fact that the business rescue failed the mere fact that it was pending prohibited the applicant from launching proceedings.[17]

[171] I have already dealt with this and cannot conceive that the legislature intended this to have effect where the applicant is unaware of the business rescue proceedings when the application is launched and ultimately no business rescue is granted and the application is dismissed as was the case here. To suggest that on this basis proceedings should be reissued and commence afresh is overly formalistic and could not have been the intention

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15 See *Absa Bank Bpk v Janse van Rensburg* - 2002 (3) SA 701 (SCA) para 15
16 See *Absa Bank* above para 15-16
17 See Section 133 of Act 71 of 2008.

of the legislature. Given the aforesaid coupled with the failure to notify the bank of the application this defence has to be rejected if for no other reason than the fact that it seems to have been brought without notifying the bank deliberately. I do not understand how the bank could not have been regarded as a creditor by the second respondent.[18]

[172] Another ground was raised as to why proceedings should start afresh. It is alleged that even after the applicant's attorneys served what was believed to be a complete set of papers and allowed the time to enter a notice to oppose to run afresh as well as the time to file an opposing affidavit, the application as re-served was still incomplete in as much as the first page of the surety bond registered against the Surety Mortgage Bond No. 86348/2020 pertaining to the Eldoraigne property was not part of the application. When this was discovered and on 7 October 2021 the applicant's attorney caused same to be served upon all the respondents.[19] Applicants counsel dealt with this point on the basis that if there is any irregularity in the proceeding the proper course of the opposing party is not to proceed as if there is no such proceeding at all but to notify the other side timeously that it is required to remedy the irregularity complained of.[20] I am in agreement with him. The remaining respondents conduct is indicative of a deliberate failure to make use of the machinery provided so as to orchestrate a delay. To suggest that for this reason alone the whole application should commence afresh and that after the respondents have filed their affidavits is idle.

[173] A further argument put up by Mr Köhn was that the applicant made his case in reply and not in its founding affidavit. This was based on several features i.a that the bank did not attach proof that it was a registered bank under the Bank's Act and registered credit provider under the NCA. The founding affidavit of the bank contained the requisite allegations and it was only because of a denial hereof that Mr Hassan referred thereto in the bank's replying affidavit. Another issue was that in the founding affidavit annexure

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18 See para 11 of his affidavit

19 See paras 16-18 of the Supplementary Affidavit of Emraan Essop Dassoo dated 12 October 2021 and the supporting affidavits thereto

20 See Uniform Rule 30

"FA4" was the incorrect annexure and the correct one only surfaced in Mr Hassan's reply as annexure "RA3". This was a special resolution passed by Crestar in terms of which it accepts the offer by the bank. The Ahmed Jaffer Trust could not bind itself as surety for Crestar's debt without a resolution adopted by all the trustees. This was annexed as annexure "RA2" and it transpires from same that the second respondent was authorised to sign the suretyship on behalf of the trust. As far as the dismissal of the business rescue procedure is concerned the bank only dealt with it in the reply after it was raised as a defence by the second to sixth and tenth to twelfth respondents and to some extent by the seventh and eighth respondents who no longer relied on same after they changed tack and sought leave to file the supplementary affidavit in support of the set-off defence.

[174] The bank also sought to expand on the Rule 46A requirements after it was criticised for not dealing with same in its founding affidavit. With regard to the latter there might have been some truth in the criticism that it made out its case in the replying affidavit. The conclusions I have reached have led me to a result where there is at this time no need to declare the Eldoraigne and Sunderland properties executable. The applicant will not be granted this relief due to the order I intend to make with regard to the set-off.

[175] This put paid to any notion that the applicants can rely on the Rule 46A notices. For this reason as well as the order pertaining to set-off I am not prepared to declare the Eldoraigne and Sunderland properties executable.

Conclusion

[176] But for the set-off issue I would have concluded that the bank's claim against Crestar must succeed in as much as no *bona fide* defence was raised by it prior to liquidation and the joint liquidators having been joined also did not raise any defence or opposition to the application. The bank will, however, not be entitled to judgment if the extent of the automatic set-off that will follow from the defences raised by the seventh and eighth respondents extinguishes the whole of the principal debt. For this reason I intend to postpone the bank's application for judgment in the amount claimed with an order that should its

quantum not have been extinguished by the effect of the automatic set-off it may approach this court for judgment in the amount remaining due duly supplemented by the necessary affidavits with its calculations. The set-off defence raised by the seventh and eighth respondents should succeed to the extent that the credit balances in the seventh and eighth respondents accounts have extinguished Crestar's debt to the bank. Mutuality prevailed from the stage that the bank issued proceedings against Crestar and the sureties given that as of then the sweeping arrangement for the term loan and the obligation that set-off does not apply between Crestar and the bank must have fallen away from at the latest 26 July 2021.

[177] It must be accepted that the seventh and eighth respondents had credit balances in their accounts which should be set-off from the bank's claim to the extent that the seventh and eighth respondents did not utilise such funds. An immediate set-off of at least R6million held in the name of Ghousbibi seems inevitable. To the extent that the credit balances in the seventh and eighth respondent's accounts are utilised as set-off same may not exceed the limit of R6million in respect of each of the seventh and eighth respondents suretyships. Although mention is made of a counterclaim to the same effect there is no such counterclaim by them before me. Only a prayer to that effect. That does not prevent me from issuing a declaratory order to the effect of such a prayer. Given that I cannot be certain as to the ultimate outcome of such calculation I am not prepared to dismiss the applicant's claim outright. It would in any event be entitled to judgment but for the prayer that that such claim is extinguished by automatic set-off. If such claim is not fully extinguished the applicant should be entitled to judgment for the balance. In any event it should be entitled to attorney and client costs up to 10 May 2024 when the set-off was first raised. As far as costs are concerned as between the applicant and the seventh and eighth respondent the latter parties are on the face of it entitled to costs as from 10 May 2024. Set-off is described as *compensatio* which is nothing but a form of payment. To the extent that such credit balances do not extinguish the debt of Crestar and the limit of R6 million is not yet exceeded in respect of any one or both of the seventh and eighth respondents suretyships they remain jointly and severally liable for Crestar's debts with the second to fifth respondents and with the Ahmed Jaffer Family

Trust duly represented by the sixth, tenth to twelfth respondents in as much as any balance remains due to the bank, the one paying the other to be excused. The second to fifth respondent and the Ahmed Jaffer Family Trust's defence and counterapplication for a debatement of account must be dismissed with costs on the party and party scale "C". The complexity of the matter as a whole justifies the applicant launching proceedings in the High Court despite the fact that it could have issued proceedings in the Magistrate's Court. Accordingly, I make the following order:

177.1 The seventh and eight respondents' application for leave to file the supplementary affidavit dated 10 May 2024 in support of a defence of set-off is granted with costs on the party and party scale "C" against the applicant, such costs to include the costs of the engagement of one senior counsel and one junior counsel and calculated as from 10 May 2024 and including the hearing of the matter on 16 May 2024;

177.2 The joint liquidators of the applicant are directed to restate the applicant's account with the first respondent taking into account the credit balances held by the seventh and eighth respondent in any account held with the applicant and to set same off against the debit balances of the first respondent in the accounts held by the first respondent with the applicant as from 26 July 2021 on the basis that such set-off operated automatically as from that date;

177.3 The joint liquidators of the applicant is ordered to recalculate the outstanding interest in respect of the daily debit balances of the first respondent in alignment with the automatic set-off in paragraph 173.2;

177.4 The maximum credit balance that may be set-off as declared in paragraph 173.2 is limited to R6million in respect of each of the seventh and eighth respondents, same being the maximum due in terms of the suretyships signed by them, respectively, in respect of the first respondents debt to the applicant;

177.5 The second to fifth respondents, the Ahmed Jaffer Family Trust, nominally represented by the sixth, and tenth to twelfth

respondents as well as the seventh and eight respondents are declared liable for the applicant's costs on the attorney and client scale up to 10 May 2024 same being the date the set-off was first invoked, such liability being joint and several, the one paying the other to be excused.

177.6 The first to fifth and the Ahmed Jaffer Family Trust's counterclaim is dismissed with party and party costs on Scale "C";

177.7 The applicant's claim against the first respondent is postponed *sine die* and the applicant is granted leave to approach the court on duly supplemented papers setting out the calculation of the effect of the set-off invoked by the seventh and eighth respondents, for any further relief required to the extent that the set-off may not have reduced the quantum of its claim to nil and in which event the remaining liability, of the first to fifth respondents, the Ahmed Jaffer Family Trust (nominally represented by the sixth, and tenth to twelfth respondents), and that of the seventh and eighth respondents (to the extent that the set-off does not exceed the limit of R6million on their respective suretyships), to the applicant will be joint and several, the one paying the other to be excused and in that event it should recover any additional costs occasioned by such postponement on the attorney and client scale.

S VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

Date Judgment reserved: 16 May 2024

Date Judgment delivered: 31 October 2024

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