IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 12161/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

DATE: ` 6 September 2024

SIGNATURE: [redacted]

In matter between

STANDARD BANK OF SOUTH AFRICA LTD	**PLAINTIFF**
and	
MARK ANDREW CLULOW	**FIRST DEFENDANT**
GAVIN CHRISTOPHER WOLFF	**SECOND DEFENDANT**

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

Introduction

[1] The plaintiff's claim is based on a written suretyship provided by the defendants to the plaintiff on or about 22 December 2008. The second defendant passed away prior to the trial and the action only proceeded against the first defendant, who will for ease of reference be referred to as the "defendant".

[2] In terms of the suretyship, the defendant bound himself as surety for all debts owed by Air Business Logistics Close Corporation ("the debtor") to the plaintiff. It is common cause between the parties that the defendant signed the suretyship and that he is bound by the terms thereof.

[3] In order to proof the amount due by the defendant to the plaintiff, the plaintiff relied on two certificates of balance, one dated 1 August 2017 and the other 4 June 2014.

Defences

[4] The defendant raised the following defences to the plaintiff's claim:

4.1 the plaintiff failed to proof the amount due in terms of the suretyship;
4.2 the limitation *alternatively* termination of the defendant's liability;
4.3 prescription;
4.4 non-compliance with section 6 of the General Law Amendment Act;
4.5 release from the suretyship obligations.

Failure to proof indebtedness

[5] In proving the defendant's indebtedness, the plaintiff firstly relied on clause 13 of the suretyship that reads as follows:

> "A certificate signed by any of the Bank's managers, whose appointment need to be proved, will on its mere production be sufficient proof of any amount due and/or owing by me/us in terms of the suretyship, unless the contrary is proved."

[6] The first certificate of balance dated 1 August 2017 was attacked by the defendant on several grounds, to wit:

6.1 the certificate was not signed by a manager of the plaintiff;
6.2 the date of the alleged indebtedness is incomplete;
6.3 the date from which interest is calculated; and
6.4 the rate of interest.

[7] The certificate of balance was signed by James Senior (Senior) in his capacity as Head Regulatory Ops, Personal and Business Banking Credit, South Africa, a division of the Standard Bank of South Africa Ltd. The defendant denied that the certificate complied with clause 13, in that *ex facie* the certificate it was not signed by a "manager" of the plaintiff.

[8] Ms Ludik, the attorney on behalf of the plaintiff, introduced the certificate of balance into evidence and testified that she knew Senior and she confirmed his signature on the certificate. According to her evidence, Senior was the head manager, Regulatory OPS at the plaintiff. During cross-examination, Ms Ludik's attention was drawn to the fact that the word "manager" does not appear in the certificate of balance. Ms Ludik conceded that the certificate did not reflect the word manager. Ms Ludik testified that, although Senior is referred to as "head" in the certificate, he was to her knowledge and throughout her dealings with him at the time, the "head manager".

[9] Although the certificate was signed by Senior on 1 August 2017, the certificate itself does not refer to the year on which the indebtedness was due. The relevant portion of the certificate reads as follows:

> "[D]o hereby certify that the amount due, owning and payable by the debtor and surety Gavin Christopher Wolff & Andrew Clulow to the Standard Bank of South Africa Ltd as at 01 August is the sum of R 1 037 778, 02 (one million thirty seven thousand and seven hundred and seven eight rand and two cents), together with interest thereon at the rate of 14,99% per annum from 25th of July 2017, to date of payment."

[10] Mr Amm, counsel for the defendant, enquired from Ms Ludik on which date, according to the certificate, was the amount due and payable. Ms Ludik with reference to the date on which the certificate was signed, stated on 1 August 2017. Mr Amm put it to Ms Ludik that the year "2017" does not appear in the certificate. Ms Ludik explained that the certificate of balance reflects the balance outstanding on the day it was signed, being 1 August 2017 and pointed out that the interest portion also refers to "2017".

[11] Insofar as the interest is concerned, Ms Ludik was referred to clause 14.11 of the overdraft facilities agreement that reads as follows:

> "A certificate signed by any of our managers, whose appointment need not be proved, will on its mere production be sufficient proof of any amount due and/or owing by you in terms of the Overdraft Agreement, unless the contrary is proved."

[12] Mr Amm put it to Ms Ludik that the clause does not refer interest, and the amount of interest owed. Ms Ludik stated that the clause provides for the current outstanding balance, which she assumes includes interest. The suretyship agreement contains a similar clause and, according to Mr Amm, suffers the same deficiency.

[13] Ms Ludik was, furthermore, referred to clause 3.2.1.3 of the overdraft facility dealing with interest. The clause reads as follows:

> "3.2.1.3.1 The rate of interest on the Limit will be charged at Prime plus 5.74% per annum, that is presently 14.74% per annum. Prime is currently 9% per annum; and
>
> 3.2.1.3.2 if we allow an excess on your Current Account any such excess availment will attract additional interest of 2,5% per annum above the rate quoted in clause 3.2.1.3.1 above."

[14] It was put to Ms Ludik that in order to determine which interest rate would be applicable, knowledge of the prime rate of interest for the duration of the facility would be required. Although Ms Ludik was not referred to the date on which interest is charged, Mr Amm, in his heads of argument, submitted that it is unclear why interest is calculated from 25 July 2017, when the date on which the debt is owing is stated as 1 August.

[15] In *Senekal v Trust Bank of Africa Ltd*,[1] the court considered the purpose of a certificate of balance clause and held as follows:

> "The main purpose of the certificate clause was clearly to facilitate proof of the amount of the principal debtor's indebtedness to the bank at any given time. A similar purpose underlies provisions, frequently found in reducible mortgage bonds and in bonds to cover future advances, that a prescribed certificate shall be sufficient or *prima facie* proof of the amount due thereunder."[2]

[16] In respect of the contents of the certificate the court held as follows:

> "As to the second of the grounds referred to above, Mr *Du Toit's* contention was, in effect, that once such a certificate is shown to be suspect as to its accuracy or reliability in any respect whatever, it has no evidential value and must be entirely disregarded. I have no doubt that that broad contention must be rejected. There might be several items to which such a certificate relates, some of which may appear to be unassailable while others may either be shown to be inaccurate or appear to be of dubious reliability or might require some modification or adjustment. I can find no reason why in such circumstances the certificate is to be entirely disregarded merely because it is found or thought to be inaccurate or unreliable in certain respects. At the end of the case, when all the evidence (which includes the certificate) is in, the Court must decide whether the party upon whom the *onus* rests has discharged it on a proper balance of probabilities. As was pointed out by STRATFORD JA in *Ex parte Minister Of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478:
>
> '*Prima facie* evidence, in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. 'If the *prima facie* evidence or proof remains unrebutted at the close of the case, it becomes 'sufficient proof' of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the *onus* of proof. (*Salmons v Jacoby* 1939 AD 588 at 593.)"[3]

[1] 1978 (3) SA 375 (A)
[2] Id at para 382A
[3] Id 382 FG-H -383.

[17] In respect of extrinsic evidence pertaining to the contents of the certificate concerned, in *Inter-Union Finance Ltd v Franskraalstrand Bpk*[4] the court held that:

> "The amount of the debt must be ascertained and the document must be sufficient in itself and not require extrinsic evidence to prove that the debt is due. This I think is the basic principle and is clear from cases such as *Inglestone v Pereira*, 1939 W.L.D. 55; *Martens v Rand Share and Broking Finance Corporation (Pty.) Ltd.*, 1939 W.L.D. 159; *Morris and Berman v Cowan* (1), 1940 W.L.D. 1, and cases referred to therein."[5]

[18] Applying the aforesaid principles to the certificate of balance in *casu,* the certificate clearly states that the amount due, owning and payable by the defendant is R 1 037 778,02. The defendant did not attack the certificate on the ground that the amount is not due, owning and payable. In this respect the certificate complies with clause 14 of the suretyship agreement and no extrinsic evidence is necessary to ascertain the debt that is due. The defendant's submission that the certificate has no probative value because the date of the indebtedness is not ascertainable from the certificate does not, in my view, affect the accuracy or reliability of the certificate. The certificate states that the due date of the debt is 1 August 2017. Senior signed the certificate on 1 August 2017. In the result, no extrinsic evidence is necessary to determine the year in which the debt is due. The year appear *ex facie* the certificate.

[19] Insofar as the word "manager" is not contained in the certificate, Mr Amm referred to *OSZ Tayob Trading Pietersburg (Pty) Ltd v Ramusi*[6] in which in it was held that a certificate issued in terms of a certificate clause must strictly comply with the requirements of the clause to be admissible as evidence.

> "[29] A certificate issued in terms of clause 18(e) must strictly comply with the requirements of the said clause to be admissible as evidence. The certificate failed dismally to comply with the requirements set by the clause. The effect of the failure to observe the basic requirements for a valid certificate, is that the certificate has no probative value. It cannot constitute *prima facie* evidence against the respondent and

[4] 1965 (4) SA 180 (W).
[5] Id at para 181G.
[6] [2020] ZALMPPHC 47.

must, therefore, be disregarded as proof of the indebtedness of the respondent towards the appellant."[7]

[20] Although the certificate does certify the amount due and the date of the indebtedness, it does not strictly comply with clause 14 of the suretyship in that the certificate was not issued by a "manager" of the plaintiff. Ms Ludik's evidence that Senior was a manager is extrinsic evidence and does not appear *ex facie* the certificate. The defect in the certificate in the *OSZ* did, however, not only relate to the capacity of the person who signed the certificate. The court summarised the defects as follows:

> "[28] Clause 18(e) makes no provision for a certificate of indebtedness to be issued by an accountant of the appellant. The clause requires that a certificate be issued by EM Hassim personally or be issued by a director or manager of the appellant. In addition, the certificate relates to an indebtedness for goods sold and delivered and monies lent and advanced which is not the cause of action against the principal debtor. The claim of the appellant is based on an incidental credit agreement entered into between the appellant and the CC in terms whereof goods were sold and delivered to the CC as the principal debtor. There is no suggestion or allegation, in the particulars of claim that monies were lent and advanced to the CC by the appellant."[8]

[21] The facts in *OSZ* are, therefore, distinguishable from the facts in *casu*. The debt in *OSZ* was not ascertainable from the certificate, and, in the result, the certificate in itself did not sufficiently prove that the debt is due. The evidence of Ms Ludik merely clarified the capacity of Senior and was not presented to proof that the debt was due as envisaged *Inter-Union Finance Ltd.* Having regard to the main purpose of a certificate clause as stated in *Senekal*, to wit to facilitate proof of the indebtedness of a debtor, I am of the view that the failure to refer to Senior as "manager", does not affect the accuracy or reliability of the certificate.

[22] I do, however, agree with Mr Amm insofar as the rate of interest is concerned. Firstly, clause 14 does not provide for the rate of interest to be proved by the

[7] Id at para 29.
[8] Id at para 28.

certificate of balance and secondly, in view of the interest clause in the overdraft facility agreement, extrinsic evidence will need to be let to prove the applicable rate of interest.

[23] When the second certificate of balance dated 4 June 2024 was introduced into evidence, Mr Shephard, counsel for the plaintiff, placed on record that the plaintiff does not abandon reliance on the first certificate for purposes of proving the debt of the defendant. The second certificate does not *ex facie* the document identify the "surety" and extrinsic evidence will need to be let, to identify the "surety". Accordingly, the certificate has no probative value and is disregarded as proof of the indebtedness of the defendant towards the plaintiff.

[24] In the result, I am satisfied that the plaintiff has, on a balance of probabilities, proven the debt due and owing by the defendant to be R 1 037 778, 02. Interest was not proved and will run *a temporae morae* from date of demand, to wit 22 November 2017 to date of payment.

[25] Should the above finding be incorrect, the plaintiff also relied on clause 15.1 of the suretyship to proof the indebtedness of the defendant which provides that "Any acknowledgement of indebtedness by the Debtor or proof of claim against the insolvent estate of the Debtor will be binding on me/us."

[26] In support of its reliance on clause 15.1, the plaintiff presented the evidence of Shaun Williams ("Williams"), the joint liquidator in the liquidation of Air Business Logistics (Pty) Ltd, the debtor. At the outset of Willaims' evidence Mr Shepherd placed on record that the defendant has no objection to the CM100 documents that will be utilised by Williams during his evidence.

[27] Williams referred to List A attached to the CM100, which reflects the company's unsecured creditors. The plaintiff is listed as an unsecured creditor for the amount of R 985 542, 40 in terms of an overdraft facility. Williams, furthermore, confirmed that the CM100 was signed by Gavin Wolff, the director of the company on 31 August 2015 and commissioned by a certain Yolande De Klerk. Lastly

Willaims confirmed that no funds were paid to the plaintiff in respect of the amount outstanding post liquidation.

[28] Although Williams was cross-examined on various aspects of his evidence, the aspect of the plaintiff being listed as an unsecured creditor in respect of an overdraft facility in the amount mentioned, was not challenged and is therefore undisputed. Mr Shepherd submitted that the evidence constitutes an unequivocal express acknowledgement under oath by the principal debtor of its indebtedness towards the plaintiff in the amount of R 985 552,40 on 31 August 2015 in respect of the overdraft facility.

[29] Mr Amm objected to the plaintiff's reliance on clause 15.1 of the suretyship on the ground that it does not form part of the plaintiff's pleaded case. In its particulars of claim the plaintiff pleaded the suretyship and annexed a copy thereof. The plaintiff, furthermore, pleaded that the terms of the suretyship are incorporated by reference and thereafter, pleaded certain terms of the suretyship. The provisions of clause 15 were not specifically pleaded and the plaintiff relied on the certificate of balance as proof of the defendant's indebtedness towards the plaintiff.

[30] The importance of pleadings was aptly summarised in *Imprefed (Pty) Ltd v National Transport Commission*[9]

> "At the outset it need hardly be stressed that: 'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'*(Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082.)This fundamental principle is similarly stressed in Odgers' *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22nd ed at 113:The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'"[10]

[9] 1993 (3) SA 94 (A)
[10] Id at para at 107 C-E.

[31] Mr Shephard submitted that the evidence of Willaims was clearly presented to proof the principal debtor's acknowledgement of its debt to the plaintiff. Mr Amm did not object to the evidence being led and cross-examined Williams extensively on the contents of CM100. Consequently, the clause 15.1 issue was fully canvassed during the trial and the defendant will not be prejudiced by the subsequent reliance on clause 15.1. Moreover, the terms of the suretyship were included by reference in the particulars of claim and was not disputed by the defendant.

[32] In *Imprefed* the court acknowledged the aforesaid principle and applied the principle to the facts of the matter. The principle was summarised as follows:

> "Nevertheless, it was the appellant's submission on appeal that 'it was abundantly clear from the evidence that the plaintiff relied upon clause 41 in support of its claim'; 'that the issue was fully canvassed at the trial'; and that the respondent was therefore not prejudiced by the subsequent reliance upon its terms. In support of this contention counsel referred to, *inter alia*, *Shill v Milner* 1937 AD 101 at 105 and *Marine & D Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 44D-45E. Both these decisions cite an earlier one of this Court, *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173, in which at 198 it was said:
> 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been'."[11]

[33] Mr Amm did not agree that the issue was fully canvassed. Mr Amm submitted that it was not necessary to challenge Williams' evidence in respect of the acknowledgement of indebtedness, because the plaintiff did not rely in its pleaded case on clause 15.1 to proof the defendant's indebtedness. The defendant's defence was directed at the certificate of balance clause that was pleaded.

[11] Id at para 108 C-F.

[34] This matter amply demonstrates the necessity for pleadings to clearly define the issues. Reliance on clause 15.1 as further proof of the defendant's indebtedness was not clearly defined in the pleadings and resulted in the defendant not fully canvasing the issue during the cross-examination of Williams.

[35] In the result, I agree with Mr Amm that the plaintiff cannot rely on clause 15.1 to proof the defendant's indebtedness to the plaintiff.

The limitation alternatively termination of the defendant's liability

[36] Clause 11 of the suretyship provides for the termination and cancellation thereof. In respect of the limitation of liability, the following sub-clauses are relevant:

> "Clause 11.3:
> I/We may limit my/our liability by written notice to the Bank which takes effect from the close of its business on the sixth day, excluding Sundays and public holidays, after the date of receipt of the notice ('the termination notice');"
> and
> "Clause 11.4
> From the termination date the amount of my/our liability under this suretyship will be the amount of the Debt as at the termination date (subject to any limit in 6.1) plus-''

Certain further charges appear in clauses 11.4.2 to 11.4.5, which charges are not relevant for present purposes.

[37] In support of his plea that his liability was limited, the defendant relied on an email dated 18 February 2014 which reads as follows: "See my BS & IS attached. Note contents of email above. I limit my surety per the agreement above to R 500k only. …"

[38] The defendant pleaded that his liability was limited from 26 February 2014, being the termination date calculated in accordance with clause 11.3. The defendant, however, did not present any evidence of the amount of the debt on 26 February

2014. In the result, the defendant did not prove the amount to which the suretyship was limited, and the limitation defence cannot succeed.

[39] Insofar as the termination of liability under the suretyship is concerned, clause 11.6 and 11.7 provides as follows:

> "Clause 11.6:
>
> 11.6 My/our liability for the Debts will only end when-
>
> 11.6.1 my/our liability has been extinguished;
>
> 11.6.2 the Bank gives me/us a written release from liability under this suretyship; or
>
> 11.6.3 the Bank cancels this suretyship in writing.
>
> Clause 11.7
>
> This suretyship may only be terminated, cancelled or otherwise brought to an end in the way provided for in this suretyship."

[40] The defendant presumably relying on either clause 11.6.2 or clause 11.6.3 referred to an email dated 27 August 2014 that reads as follows:

> "I confirm that I left Air Business on 31 August 2012 and that I have no involvement with the company. The agreement concerning my personal security is no longer in place and therefore I cancel any personal surety that you may have in favour of Air Business Logistics."

[41] According to the defendant, his liability under suretyship was, therefore, cancelled on 27 August 2014. Mr Dlamini ("Dlamini), a relationship manager, in the employee of the plaintiff, however, responded to the aforesaid email on the same day and advised as follows:

> "Hi Mark
>
> I hope you are well, I had a meeting with Mr Wolff who advised that there is an agreement between yourselves in place until such time that it expires we cannot release you as a surety, kindly discuss this matter with Mr Wolff."

[42] In the result, the plaintiff neither released the defendant from his liability under the suretyship nor did the defendant cancel the suretyship. Consequently, the termination of liability defence likewise fails.

Prescription

[43] The defendant's plea of prescription is based on two events:

43.1 the due dates in respect of the notices in terms of clause 11; and

43.2 the due date in respect of the principal debt.

[44] In view of the finding that the notices did not comply with the provisions of clause 11, I proceed to consider the plea of prescription in respect of the principal debt.

[45] It is common cause between the parties that the period of prescription, in terms of section 11(d) of the Prescription Act, 68 of 1969 ("the Act"), is a period of three years. The parties, however, differ on when the prescription period commenced to run. In terms of section 12(1) of the Act, prescription shall commence to run as soon as the debt is due.

[46] The debt of the debtor is contained in a Bank Facility Letter dated 17 February 2014. The letter confirms that an overdraft facility in the amount of R 1 000 000, 00 has been granted and clause 3.2.1.11 provides that the overdraft facility has an expiry date of 20 October 2014. In view of the aforesaid, Mr Amm submitted that principal debt became due and payable on 20 October 2014 and was extinguished by prescription on 19 October 2017. Summons was only served on the defendant on 22 February 2018 and therefore, the principal debt as well as the defendant's accessory debt in terms of the suretyship has prescribed.

[47] Mr Shepherd did not agree. Mr Shepherd contended that the undisputed evidence established that the facility was repeatedly extended pending a review of the facility to allow the debtor to utilise the facility in the meantime. The review of the

facility was done in terms of clause 3.5 of the facility agreement, which reads as follows: “In accordance with normal banking practice we would like to review the facilities referred to in this letter, together with your further requirements, by no later than 20 November 2014… “

[48] The evidence further established that the extensions seized on 10 April 2015 when a letter of demand was sent to the principal debtor. I pause to mention, that clause 10.2 of terms and conditions for the overdraft facility provides that the facility is repayable on demand.

[49] In *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*[12], the Constitutional Court considered a similar term and held as follows:

> “[47] In sum, the relevant principles may, in my view, be restated as follows. A contractual debt becomes due as per the terms of that contract. When no due date is specified, the debt is generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the time for performance, and that the debt becomes due only when demand has been made as agreed. Where there is such a clear and unequivocal intention, the demand will be a condition precedent to claimability, a necessary part of the creditor's cause of action, and prescription will begin to run only from demand…”[13]

[50] On the strength of the aforesaid authority, I agree with Mr Shepherd that the period of prescription only commenced to run on the date that demand was made, to wit 10 April 2015. Although clause 3.2.1.11 provides that the facility expires on 20 October 2014, the plaintiff and the debtor did not agree that the amount became due on 20 October 2014.

[51] The plaintiff and the debtor expressly and unequivocally agreed that the debt in terms of the agreement will only be due on demand.

[12] 2018 (1) SA 94 (CC)
[13] Id at para 47.

[52] The period of prescription, therefore, expired on 9 April 2018 and the plaintiff's claim has not been extinguished by prescription.

Section 6 of the General Law Amendment Act

[53] Section 6 of the General Law Amendment Act 50 of 1956, provides that "a suretyship agreement will only be valid if the terms thereof have been embodied in a written document signed by the surety." It is trite that a suretyship agreement must set out the identity of the creditor, the surety, the principal debtor and that the nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the suretyship.

[54] The defendant's attack on the suretyship is only in respect of the description of the principal debt. The "debt" is defined in the suretyship as "all the present and future debts of any kind". Mr Amm submitted that the aforesaid description fails to define the nature of the debt, is therefore invalid for want of compliance with section 6 and accordingly unenforceable.

[55] In *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd,*[14] the debt in the suretyship was defined in a similar manner, to wit: "all sums of money which the debtor may have in the past owed or may presently or in the future owe".

[56] In identifying the debt referred to in the suretyship, the court held as follows:

> "And, if such a contract of suretyship is recorded in writing, it follows that extrinsic evidence must necessarily be admissible to prove that the principal obligation has come into existence, and to establish the amount of the obligation if, as in this case, the guarantee is an unlimited continuing guarantee for **payment of all sums of money which the principal debtor may in future owe to the creditors."** (own emphasis")
>
> The provisions of s 6 of Act 50 of 1956 do not invalidate a contract of suretyship of this sort provided, of course, such contract is embodied in a written document, and it

[14] 1978 (4) SA 1 (A) at P10D.

is signed by or on behalf of the surety. What s 6 requires is that the "terms" of the contract of suretyship must be embodied in the written document. It was contended by counsel for plaintiff that this meant that the identity of the creditor, of the surety and of the principal debtor, *and* the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification other than evidence by the parties (ie the creditor and the surety) as to their negotiations and *consensus*. I agree with this contention. In my view, there can be no objection to extrinsic evidence of identification being given, either by the parties themselves, or by anyone else, unless the leading of such evidence can be said to amount to an attempt to supplement the terms of the written contract "by testimony as to some negotiation or *consensus* between the parties which is not embodied in the written agreement.

(see *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 991)."[15]

[57] From the aforesaid it follows that the plaintiff may lead extrinsic evidence in respect of the "present and future debts of any kind" mentioned in the suretyship.

[58] In identifying the "present debt of any kind" referred to in the suretyship, the plaintiff relied on the evidence of Dlamini. Dlamini confirmed that the overdraft facility agreement was entered into between the plaintiff and the debtor, and that the debtor is indebted to the plaintiff in terms of the agreement.

[59] The nature and amount of the debt was thus identified, and the suretyship complies with section 6 of the General Law Amendment Act.

Release from suretyship obligations

[60] The gist of the defendant's defence in this regard, is based on a meeting Dlamini had with Wollf and a certain Kinnear at the offices of Air Business Logistics on 2 April 2015. Dlamini send an internal note to the Account Executive after the meeting in which he sought authority to place the account on reduction. In the note Dlamini advised the Account Executive that Wolff informed him that the business will

[15] Id at P12A-D.

close down the following month and that Sandstone Global Express, represented by Kinnear, will take over the business, its employees and the debtor's book.

[61] I pause to mention that the plaintiff took cession of the debtor's book of the debtor as security for the overdraft facility.

[62] It was put to Dlamini during cross-examination that he, being fully aware that the plaintiff held a cession of the debtor's book as security, allowed the transaction to proceed. Dlamini denied the allegation and testified that he did not allow or agree to anything. He merely relayed to the Account Executive what he was told at the meeting.

[63] Dlamini was then confronted with the fact that he did not do anything to safeguard the plaintiff's security. Dlamini responded that the plaintiff did send a letter of demand to the debtor on or about 8 April 2015.

[64] Insofar as the amount of the debtor's book is concerned, Williams was referred to a balance sheet attached to an unsuccessful liquidation application by the debtor. According to the balance sheet the accounts receivable on 31 January 2015 was in excess of R4 million. In the CM 100 signed by Wolff on 31 August 2015 the books debts were, however, reflected as R 364 445, 50. Willaims was asked whether he investigated the discrepancy.

[65] Williams testified that he was concerned that the certain debtor monies were channelled to the new business operated by Kinnear. During his investigation it, however, proved difficult to establish the extent of the debtor's book because no invoices and/or proof of deliveries were available. Due to *inter alia* the aforesaid, Williams was of the view that an investigation into the affairs of the company should be conducted.

[66] As a starting point, it bears mentioning that the South African law of suretyship does not recognise a so-called "prejudice principle". [16]

[67] The prevailing legal position in respect of the release of a surety from his/her obligations under a suretyship was summarised in *ABSA Bank Ltd v Davidson*[17] as follows:

> "[19] As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances. In the event, however, Davidson failed to prove such a breach."[18]

[68] In order to succeed in this defence, the defendant must, therefore, allege the specific obligation the plaintiff had in terms of the overdraft facility agreement or suretyship relied upon and provide proof that the plaintiff breached the obligation, which resulted in prejudice to the defendant.

[69] In his plea, the defendant pleaded the obligation relied upon as follows:

> "7.7.1 [A]t all relevant and material times to the Plaintiff's action, and the First Defendant's obligations as surety in terms of annexure **B**, the Plaintiff owes the First Defendant a duty not to prejudice and/or unduly burden the First Defendant in his capacity as surety;"

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[16] *ABSA Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA); *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA)].

[17] 2000 (1) SA 1117 (SCA).

[18] Id at para 19.

[70] It appears from the defendant's pleaded case that reliance is placed on the so-called general "prejudice principle" and no reliance is placed on a specific obligation the plaintiff had in terms of the overdraft facility agreement or the suretyship.

[71] In support of the pleaded case, the defendant relied on Dlamini's evidence, to the effect that the plaintiff either consented to or allowed SandStone Global Express to purchase the business of the debtor which included the debtor's book. Dlamini denied this allegation and even if one accepts that the plaintiff did consent to or allowed the sale agreement to be concluded, it is not alleged which obligation in the overdraft facility agreement or suretyship the plaintiff breached in doing so.

[72] In the premises, the defendant has failed to provide any proof in substantiation of this defence and the defence must fail.

Costs

[73] Upon conclusion of the trial, the matter was postponed for written and oral submissions by counsel. At the commencement of the hearing, the plaintiff sought condonation to belatedly file a replication to the defendant's amended plea. The defendant opposed the application, and the application was subsequently withdrawn by the plaintiff.

[74] It follows that the plaintiff should pay the costs of the application. Mr Amm submitted that, due to lateness of the application, a punitive cost should be granted. I do not agree. The mere fact that condonation for the late filing of the replication was sought at the eleventh hour does not, in the circumstances, justify a punitive cost order.

[75] In respect of the costs of the action, clause 6.2 of the Suretyship makes provision for the payment of costs as between attorney and own client and such order will follow.

ORDER

In the premises:

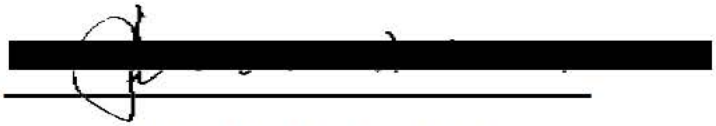
1. The defendant is ordered to pay to the plaintiff:

    1.1 the amount of R 1 037 778, 02;

    1.2 interest *a temporae morae* from 22 November 2017 to date of payment;

    1.3 costs as between attorney and own client.

2. The plaintiff is ordered to pay the costs of the application for condonation for the late filing of the plaintiff's replication to the first defendant's amended plea.



JANSE VAN NIEUWENHUIZEN, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATES HEARD:

03, 04, 05, 06 June & 15 July 2024

DATE DELIVERED:

APPEARANCES

For the Plaintiff:	Advocate MT Shepherd
Instructed by:	Findlay & Niemeyer Inc

For the First Defendant:	Advocate GW Amm SC
Assisted by:	Advocate BR Edwards
Instructed by:	David H Botha DU Plessis & Kruger Inc