

REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO A5030/2012

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

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DATE

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SIGNATURE

In the matter between

ERNST PHILIP PIETERSE N.O.

FIRST APPELLANT

ERNST PIETERSE N.O.

SECOND APPELLANT

BIG COUNTRY INVESTMENTS (PTY) LIMITED

THIRD APPELLANT

**SOUTHERN STAR ORGANISATION (PTY)
LIMITED**

FOURTH APPELLANT

HICHANGE INVESTMENTS (PTY) LIMITED

FIFTH APPELLANT

PIETERSE, ERNST PHILIP

SIXTH APPELLANT

and

**AFRICAN DAWN PROPERTY TRANSFER
FINANCE 3 (PTY) LIMITED**

FIRST RESPONDENT

KAREN KEEVY N.O.

SECOND RESPONDENT

LEBOGANG MICHAEL MOLOTO N.O.

THIRD RESPONDENT

J U D G M E N T

WEPENER J:

[1] This is an appeal against the judgement of Teffo AJ, with the leave of the court below.

[2] The first respondent brought an application against the appellants for the payment of money, the appellants having been sureties and co-principal debtors in favour of the first respondent for the general indebtedness of Southern Star Organisation (South Africa) (Pty) Ltd ('Southern Star'). The latter company has been liquidated. Teffo AJ granted judgment against the appellants for the payment of the sum of R 4 300 696.74 and interest from 1 July 2010.

[3] The second and third respondents were respondents in the court below but took no part in the proceedings. For reasons unknown, they have again been cited as respondents in the appeal. They play no part in the matter.

[4] Pursuant to agreements of loan the first respondent lent and advanced monies to Southern Star from time to time on certain terms and conditions. Repayments were also made from time to time.

[5] It was alleged that Southern Star breached the agreement by failing to repay all the amounts which it should have. The agreement of loan and suretyship documents also provide that a certificate of balance setting out Southern Star's indebtedness to the first respondent would be prima facie proof of such indebtedness of Southern Star or any surety. Such a certificate was indeed attached to the founding affidavit.

[6] The appellants, however, attacked the certificate and the amounts owing, resulting in the first respondent amending it in reply in order to supply, what it contended to be, the correct amount owing.

[7] On appeal, the appellants argued that the amount arrived at by the first respondent in its calculation and certificate of balance in the replying affidavit is still incorrect. I do not tabulate these incorrect calculations although the effect of these calculations is that there would be a difference in the amount to which the first respondent is entitled to and the amount for which judgment was granted, the former being a lesser amount than the latter.

[8] On appeal, the appellants raised three issues. Firstly, that the calculations by the first respondent in the founding affidavit and the replying affidavit are incorrect. Secondly, that the first respondent was not entitled to raise new matter in the replying affidavit and thirdly, that the fifth appellant could not be held liable as surety and co principle debtor, for reasons referred to later in this judgment.

[9] Mr H.P. van Nieuwenhuizen, who appeared on behalf of the appellants, abandoned the argument that the issues raised in the replying affidavit were new matter which was impermissible to be taken into account in application proceedings. By virtue of decisions such as *Shepherd v Mitchell Cotts Sea-Freight (SA) (Pty) Ltd* 1984 (3) 202 (T) at 205G, *Scotch Whisky Association and Another v Totpak Manufacturing Division (Pty) Ltd and Others* 2006 JOL 17235 (T) (and the cases therein referred to) and *Van Zyl and Others v Government of RSA and Others* (2005) 4 ALL SA 96 (T) at p148-149, the appellants were well advised not to pursue the issue regarding the alleged new matter contained in the replying affidavit as the facts therein contained are in amplification or explanation of what the first respondent had said in its founding affidavit. Nothing more needs to be said about the argument.

[10] That brings me to the second issue, namely, that the first respondent admittedly erred in its calculation in the founding affidavit and according to the appellants' argument, also erred in its calculations in the replying affidavit. This argument can be shortly dealt with.

[11] The first respondent instituted application proceedings for the payment of the amount of R 4 300 696.74 and ancillary relief. It attempted to prove the amount owing to it by the inclusion of the certificate of balance as provided for in the suretyship agreement. The first respondent admitted that certain calculation errors had been made and in reply the first respondent conceded that it erred in the founding affidavit in that it included an amount of interest in contravention of the *in duplum* rule. It consequently reduced its claim by the amount which was in excess of the *in duplum* rule.

[12] The appellants were still not satisfied with the first respondent's calculation of the amount owing as the first respondent showed in reply that the amount owing was R 7 965 463.37 at the time when a new agreement was entered into between first respondent and Southern Star. The new agreement, however, recorded that '*...the settlement figure shall be an agreed amount of R8m notwithstanding the prior settlement date*'.

[13] The appellants, as sureties, are not privy to the agreement and Mr van Nieuwenhuizen was unable to advance any reason on what basis the appellants can attack the validity of the agreement between Southern Star and the first respondent. Whilst the agreement is in existence (and the fact that the agreement is in existence is common cause) and considering that no attempt has been made by any party to rectify it or set it aside on any basis, it stands as a valid agreement between Southern Star and the first respondent. In supplementary heads of argument Mr van Nieuwenhuizen argued that there was an incorrect common assumption between Southern Star and the first respondent when they agreed to the sum of R8m and that the sureties can rely on such mistaken common assumption, *iustus error* or on a rectification citing Forsyth & Pretorius: *Caney's The Law of Suretyship* 5th ed.

2002 JUTA p. 188, para (b). There is no merit in the argument. The factual basis for such incorrect common assumption or *iustus error* is missing. No rectification of the agreement of loan has been sought by any of the parties entitled to seek a rectification.

[14] The difficulty with which the appellants are saddled is the fact that Southern Star and the first respondent agreed that the amount of R8m was to be paid. This happens when parties settle issues and enter into agreements. The fact whether Southern Star actually owed the sum of some R 35 000.00 less than the R8m would be immaterial. It undertook an obligation for R8m.

[15] The agreement consequently provides for an indebtedness of R8m by Southern Star and that interest could be charged at a rate of 5% per month from 26 April 2008. In a schedule of amounts owing since 26 April 2008, Mr Bishop, appearing for the first respondent, demonstrated that by pure arithmetical calculations, and taking into account interest as provided for in the agreement and payments made from time to time, that the total outstanding balance owing by Southern Star as at 30 June 2010 was the sum of R4,8m. The schedule is attached to this judgment as 'A'.

[16] Mr van Nieuwenhuizen accepted the correctness of the calculations in the schedule. He, however, argued that the initial amount should not have been R8m, which argument I have indicated has no merit. It is quite apparent that the calculations supplied to Teffo AJ were incorrect as she granted judgment for the lesser amount of R 4 300 696.74 only. The first respondent has not applied to amend its claim by filing additional affidavits to increase the amount awarded by the court below.

[17] The appellants have advanced no basis on which the agreed amount to be paid by Southern Star can be varied or set aside.

[18] Even if one would be generous to the appellants and calculate the amount outstanding based on the initial amount of R 7 965 463.37 being the amount that the appellants argued should be used instead of the sum of R8m,

the outstanding balance as at 30 June 2010 would be in excess of the amount of the judgment granted by Teffo AJ. This is clear from the calculations handed in by Mr Bishop and attached as 'B' hereto.

[19] The various calculations of the appellants to indicate that the agreed amount of R8m was incorrectly arrived at, is of no assistance. Calculations based on the alleged incorrect point of departure i.e. the R8m have no value and the appellants are bound by the amount as contained in the written agreement between Southern Star and the respondent.

[20] The last issue to be considered is the liability of the fifth appellant as surety for the amount owing by Southern Star. The fifth appellant is a company of which the sixth appellant and his father, Mr Ernst Pieterse, were the sole directors. The sixth appellant avers that his father positively refused that the fifth appellant be bound as surety.

[21] What neither the sixth appellant nor his father say is when such refusal occurred, why such positive refusal was not disclosed to the first respondent as and when it was known and, most importantly why the sixth appellant signed the deed of suretyship on behalf of the fifth appellant in the face of such alleged refusal. The sixth appellant stated that he prepared a resolution on a standard form in anticipation of his father's signing it. The resolution reads:

'RESOLUTION PASSED AT A MEETING OF THE DIRECTORS OF HICHANGE INVESTMENTS (PTY) LIMITED, REGISTRATION NUMBER: 1969/010538/07 ("the Company")

HELD AT _____ *on* _____ *DAY OF FEBRUARY 2009*

WHEREAS the Company wishes to bind itself as surety and co-principal debtor with Southern Star Organisation SA (Pty) Limited [In Liquidation] which borrowed an amount of R4 310 183.27 plus interest at 3% per month from African Dawn Property Transfer Finance 2 (Pty) Limited and;

WHEREAS the company is desirous to bind itself as surety and co-principal debtor with Southern Star Organisation SA (Pty) Limited [In Liquidation] which borrowed an amount of R7 263 653.35 plus interest at 5% per month from African Dawn Property Transfer Finance 3 (Pty) Limited and;

IT WAS RESOLVED THAT:

1. *Ernest Pieterse and/or Ernest Philip Pieterse is hereby authorised to act on behalf of the Company and sign all and any such documentation in respect of the suretyship in favour of African Dawn Property Transfer 2 (Pty) Limited; and*
2. *Ernest Pieterse and/or Ernest Philip Pieterse is hereby authorised to act on behalf of the Company and sign all and any such documentation in respect of the suretyship in favour of African Dawn Property Transfer 3 (Pty) Limited.*

CERTIFIED A TRUE EXTRACT

Ernest Pieterse – Director

SIGNED

Ernest Philip Pieters – Director

It is signed by the son but not by the father. Extracts of minutes of meetings require no signatures to show that such a meeting indeed occurred or that a resolution was passed thereat. On the face of it, the resolution is a regular document showing that a meeting of directors occurred where it was resolved that, inter alia, the sixth appellant could sign the suretyship on behalf of the fifth appellant. Absent any explanation by father and the son, the directors, why the son (sixth appellant) then signed the suretyship on behalf of the fifth appellant, the version proffered by them flies in the face of the objective facts.

[22] The fifth appellant relied on the fact that its Articles of Association, which are contained in a public document and thus deemed to be known by the first respondent, provides as follows:

- '81. *In regard to the proceedings of directors, the following provisions shall have effect, namely:-*
- (a) *TWO (2) directors shall be a quorum.*
 - (b) *The continuing directors may act notwithstanding any vacancy in their number.*
 - (c) *A resolution in writing, signed by all the directors for the time being shall be as valid and effectual as if it had been passed at a meeting of directors duly called and constituted.'*

[23] It was argued that, because the resolution was not signed by all the directors, it was not a proper and valid resolution and the knowledge thereof has to be imputed to the first respondent that all the directors had to sign a resolution, and failing such signature, to be invalid.

[24] The argument misses the fact that resolutions need not to be signed by all directors to be valid. Resolutions taken at a meeting of directors fall under paragraph 81(a) of the Articles. No signature is required. Paragraph 81(c) of the Articles only deal with a situation where no meeting is held and a decision is taken by 'round-robin'. In such an event the resolution must be signed by all the directors to be valid as if passed at a meeting.

[25] The document in which the resolution is contained, on the face of it, is evidence of a meeting of the directors where the resolution was passed. Subsequently the sixth appellant signed a deed of suretyship on behalf of the fifth appellant in accordance with the wording of the resolution. The sixth appellant, as director of the fifth appellant, would, in my view, ordinarily be authorised to sign such documents, on behalf of the fifth appellant as he did for other companies of which he and his father are the sole directors. The failure of the sixth appellant and his father to explain why the sixth appellant signed the suretyship on behalf of the fifth appellant, in my view, is so glaring that the allegations that the father refused that the fifth appellant be a surety can be rejected as it is completely at odds with their conduct. The father did refuse that the son sign a suretyship on behalf of Southern Star South Cape (Pty) Ltd and that party's name was deleted from the suretyship document with an initial affixed next to the deletion. The sixth appellant, however, signed the suretyship document on behalf of the fifth appellant and Southern Star. In addition, the statement that the resolution is 'a standard form' is false. The resolution is clearly a resolution of the fifth appellant, with reference to definite amounts, amounts of interest and the fact that either the father or the son was authorised to sign the 'surety documentation'. It is not a standard form and the document itself belies the allegation by the appellants.

[26] In these circumstances, I am of the view that the version offered by the father and son (the latter being the sixth appellant), is farfetched and untenable and that a court is justified in rejecting it merely on the papers. *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C, *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) (SA) 570 (SCA) at 582. Having come to this conclusion, the fifth appellant

is indeed liable as surety with the other appellants and I need not decide whether the fifth appellant should be held liable by virtue of any ostensible authority.

[27] In the circumstances, I would propose that the appeal be dismissed with costs.

**WEPENER J
JUDGE OF THE HIGH COURT
SOUTH GAUTENG**

I agree, it is so ordered

**SALDULKER J
JUDGE OF THE HIGH COURT
SOUTH GAUTENG**

I agree.

**NICHOLLS J
JUDGE OF THE HIGH COURT
SOUTH GAUTENG**

COUNSEL FOR APPELLANTS: H P Van Nieuwenhuizen

APPELLANTS ATTORNEYS: SSH Inc

COUNSEL FOR THE RESPONDENTS: Anthony Bishop

RESPONDENTS ATTORNEYS: Peterson Hertog & Associates

DATE/S OF HEARING: 13 September 2012

DATE OF JUDGMENT: 21September 2012

CALCULATION OF SIMPLE INTEREST:**‘A’**

Monthly period	Interest at 5%	Cumulative interest	Balance outstanding
30 April 2008			R8 000 000.00
1 May 2008 – 31 May 2008	R400 000.00	R400 000.00	R8 400 000.00
1 June 2008 – 30 June 2008	R400 000.00	R800 000.00	R8 800 000.00
1 July 2008 – 31 July 2008	R400 000.00	R1 200 000.00	R9 200 000.00
1 August 2008 – 31 August 2008	R400 000.00	R1 600 000.00	R9 600 000.00
1 September 2008 – 30 September 2008	R400 000.00	R2 000 000.00	R10 000 000.00
1 October 2008 – 31 October 2008	R400 000.00	R2 400 000.00	R10 400 000.00
	(R8 000 000.00)	R0.00	R2 400 000.00
1 November 2008 – 30 November 2008	R120 000.00	R120 000.00	R2 520 000.00
1 December 2008 – 31 December 2008	R120 000.00	R240 000.00	R2 640 000.00
1 January 2009 – 31 January 2009	R120 000.00	R360 000.00	R2 760 000.00
1 February 2009 – 28 February 2009	R120 000.00	R480 000.00	R2 880 000.00
1 March 2009 – 31 March 2009	R120 000.00	R560 000.00	R3 000 000.00
1 April 2009 – 30 April 2009	R120 000.00	R680 000.00	R3 120 000.00
1 May 2009 – 31 May 2009	R120 000.00	R800 000.00	R3 240 000.00
1 June 2009 – 30 June 2009	R120 000.00	R920 000.00	R3 360 000.00
1 July 2009 – 31 July 2009	R120 000.00	R1 040 000.00	R3 480 000.00
1 August 2009 – 31 August 2009	R120 000.00	R1 160 000.00	R3 600 000.00
1 September 2009 – 30 September 2009	R120 000.00	R1 280 000.00	R3 720 000.00
1 October 2009 – 31 October 2009	R120 000.00	R1 400 000.00	R3 840 000.00
1 November 2009	R120 000.00	R1 520 000.00	R3 960 000.00

– 30 November 2009				
1 December 2009 – 31 December 2009	R120 000.00		R1 640 000.00	R4 080 000.00
1 January 2010 – 31 January 2010	R120 000.00		R1 760 000.00	R4 200 000.00
1 February 2010 – 28 February 2010	R120 000.00		R1 880 000.00	R4 320 000.00
1 March 2010 – 31 March 2010	R120 000.00		R2 000 000.00	R4 440 000.00
1 April 2010 – 30 April 2010	R120 000.00		R2 120 000.00	R4 560 000.00
1 May 2010 – 31 May 2010	R120 000.00		R2 240 000.00	R4 680 000.00
1 June 2010 – 30 June 2010	R120 000.00		R2 360 000.00	R4 800 000.00

CALCULATION OF SIMPLE INTEREST:**‘B’**

Monthly period	Interest at 5%	Cumulative interest	Balance outstanding
30 April 2008			R7 965 463.67
1 May 2008 – 31 May 2008	R398 273.18	R398 273.18	R8 363 736.85
1 June 2008 – 30 June 2008	R398 273.18	R796 546.36	R8 762 010.03
1 July 2008 – 31 July 2008	R398 273.18	R1 194 819.54	R9 160 283.21
1 August 2008 – 31 August 2008	R398 273.18	R1 593 092.72	R9 558 556.39
1 September 2008 – 30 September 2008	R398 273.18	R1 991 365.90	R9 956 829.57
1 October 2008 – 31 October 2008	R398 273.18	R2 389 639.08	R10 355 102.75
	(R7 994 791.50)	R0.00	R2 360 311.25
1 November 2008 – 30 November 2008	R118 015.56	R118 015.56	R2 478 326.81
1 December 2008 – 31 December 2008	R118 015.56	R236 031.12	R2 596 342.37
1 January 2009 – 31 January 2009	R118 015.56	R354 046.68	R2 714 357.93
1 February 2009 – 28 February 2009	R118 015.56	R472 062.24	R2 832 373.49
1 March 2009 – 31 March 2009	R118 015.56	R590 077.80	R2 950 389.05
1 April 2009 – 30 April 2009	R118 015.56	R708 093.36	R3 068 404.61
1 May 2009 – 31 May 2009	R118 015.56	R826 108.92	R3 186 420.17
1 June 2009 – 30 June 2009	R118 015.56	R944 124.48	R3 304 435.73
1 July 2009 – 31 July 2009	R118 015.56	R1 062 140.04	R3 422 451.29
1 August 2009 – 31 August 2009	R118 015.56	R1 180 155.60	R3 540 466.85
1 September 2009 – 30 September 2009	R118 015.56	R1 298 171.16	R3 658 482.41
1 October 2009 – 31 October 2009	R118 015.56	R1 416 186.72	R3 776 497.97
1 November 2009	R118 015.56	R1 534 202.28	R3 894 513.53

– 30 November 2009					
1 December 2009 – 31 December 2009	R118 015.56		R1 652 217.84		R4 012 529.09
1 January 2010 – 31 January 2010	R118 015.56		R1 770 233.40		R4 130 544.65
1 February 2010 – 28 February 2010	R118 015.56		R1 888 248.96		R4 248 560.21
1 March 2010 – 31 March 2010	R118 015.56		R2 006 264.52		R4 366 575.77
1 April 2010 – 30 April 2010	R118 015.56		R2 124 280.08		R4 484 591.33
1 May 2010 – 31 May 2010	R118 015.56		R2 242 295.64		R4 602 606.89
1 June 2010 – 30 June 2010	R118 015.56		R2 360 311.20		R4 720 622.45