REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21128/2015

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

..... 25/06/2019....
SIGNATURE **DATE**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

LEAH ANN MCCRAE Respondent

JUDGMENT

WEINER J

Background

[1] This matter concerns whether or not the respondent lacked contractual capacity at the time that she signed a deed of suretyship. This was one of the defences raised by the respondent in an application brought before this Court ('the application'). Several other defences relied upon by the respondent were dismissed by this Court in December 2018. In regard to the respondent's contractual capacity, I referred the issue to oral evidence.

[2] In June 2015, the applicant launched an application against the respondent for payment of the sum R4 331 375,75 plus interest; payment of the sum of R42 524,19 plus interest; and payment of the sum of R4 139 820,67 plus interest.

[3] A written loan agreement had been concluded between the applicant and Strike Productions (Pty) Ltd ('Strike') on 12 November 2009. Securities were required, which included a pledge of US$800 000 held in the name of Robert Andrew McCrae ('Robert') at Standard Bank Jersey/Guernsey. In terms of the written loan agreement, an event of default would occur if Strike was liquidated. In such event, the applicant would require full payment of all Strike's indebtedness under the loan agreement. An overdraft agreement was also concluded on 20 November 2009.

[4] On 26 May 2011, the respondent signed a deed of suretyship in favour of the applicant in respect of the indebtedness of Strike. This matter concerns the validity thereof.

[5] A written addendum to the loan agreement was also concluded by the applicant and Strike on 5 July 2011. The addendum related to the deletion of a clause in terms of which Robert had to pledge the amount held at Standard Bank Jersey/Guernsey to the applicant. Instead the collateral required was an irrevocable undertaking by Robert in a form and substance acceptable to the bank. Further agreements were also concluded between Strike and the applicant, including a written fleet management agreement dated 12 December 2011. There was also a rescheduling of the payment structure. The conclusion of all of these agreements is common cause.

The suretyship

[6] The signature by the respondent and the terms of the deed of suretyship are also not in dispute. Strike was liquidated in 2014 and thus all amounts owing by Strike to the applicant became due and payable. A certificate of balance was relied upon and although the respondent disputed the contents thereof, there was no factual or legal basis put up as to why the certificates were not valid. Accordingly, in the application, I found that the certificate became sufficient proof of the indebtedness.[1]

[7] As appears from the judgment handed down by this Court on 6 December 2016, the other defences raised by the respondent being non-disclosure, failure to explain the implications of the suretyship, and duress and/or undue influence were raised. These defences were dismissed in my judgment.

[8] In the application the respondent admitted that she had signed the deed of suretyship. She contended that during May 2011 she was not in a mental state to freely and voluntarily make an election to sign a deed of suretyship, alternatively that she lacked the necessary mental capacity to have understood what she was signing.

[9] She relied in this regard solely on a report and affidavit of a clinical psychologist, Ms Lorraine Barbara de Raay ('De Raay'). De Raay stated in her report that in May 2011 the respondent's state of mind was such that she would not have appreciated what she was signing. In the December 2016 judgment, I found that although the evidence in this regard was not totally convincing, it would be just and equitable to refer that aspect to oral evidence.

[10] It is common cause that the respondent has the *onus* to show that at the time she signed the deed of suretyship she lacked contractual capacity.[2]

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[1] *Solomon NO and Others v Spur Cool Corporation (Pty) Limited and Others* 2002 (5) SA 214 (C) paras 70-72.
[2] See *Di Giulio v First National Bank of South Africa Ltd* 2002 (6) SA 281 (C) at para 28.

The oral evidence

[11] The respondent gave evidence. She also relied on the expert evidence of De Raay and Professor Viren Rambiritch ('Rambiritch') a qualified pharmacologist. The respondent had also served a notice in terms of Rule 36(9)(*b*) in respect of one Rakesh Seeberath ('Seeberath') a qualified pharmacist. He did not testify. Shortly prior to the resumption of the matter on 11 December 2018 (the matter having been postponed on several occasions prior to that), the respondent sought to reopen her case to present the evidence of Dr Larissa Panier-Peter ('Dr Panier-Peter') in rebuttal of the evidence of the applicant's expert witness, Dr Leon Arthur Fine ('Dr Fine'). This report was filed at a very late stage after the experts of both parties had already given evidence. It also appeared from the contents of Dr Panier-Peter's report that it did not take the matter further. I stated that full reasons would be given in this judgment why the application by respondent to reopen her case was refused. These will be dealt with later.

[12] When the respondent testified, her version was markedly different to that which she had had deposed to in the application. She now stated that she did not recall signing the suretyship. Upon receipt of the applicant's application, she asked Robert about the circumstances of the signing of the suretyship and he told her what had transpired on that day. She also testified that she had not read the suretyship.

[13] In both her answering affidavit deposed to on 27 January 2016 and her supplementary affidavit deposed to on 4 January 2018, the respondent did not mention that she did not remember signing the suretyship, or that Robert had explained to her the circumstances of her signing the suretyship. She also did not state in her answering affidavit that she had not read the suretyship. This latter point was only stated in her supplementary affidavit.

[14] In the answering affidavit the respondent stated:

'... I was not advised by the Applicant and its duly authorised representatives, that when signing the Annexure "FA8" [the suretyship]... the collateral security required by the Applicant for the loan to the Company Strike ... had not been obtained.

Furthermore, it was not explained to me by the Applicant what document I was signing nor the implications thereof.

At the time that I signed Annexure "FA8" ....the Applicant's duly authorised representative, Suman Padayachee ("Padayachee"), was aware of the turmoil in my life ... Padayachee knew that I was going through a mental breakdown and a divorce, as I had confided in him at a point in time in this regard. He informed me, however, that unless I signed Annexure "FA8" ... the Applicant would terminate the existing Loan Agreement/s and demand repayment of all funds. ...'

[15] In the supplementary affidavit, she stated:

'... Looking back now, I don't believe I knew what I was doing and there are definitely many gaps for me during that period prior to and post my divorce for a period of about a year. I definitely was not in my sound and sober mind when I signed the applicant's documentation on the 26th of May 2011.... I did not and could not apply my mind to what was happening around me when signing those documents and which I subsequently came to understand was a deed of suretyship. ... it was wrong of ... Padayachee to have pressured me to sign a deed of suretyship .... without disclosing to me that Robert had not provided the security that the applicant had sought initially.'

[16] There is thus no mention in the respondent's affidavits that she did not remember signing the suretyship or that Robert had explained to her the circumstances of her signing the suretyship.

[17] These statements in her affidavits are in total contrast to what she stated in her testimony before this Court. The fact that she did not remember signing the deed of suretyship arose for the first time at the hearing of oral evidence.

[18] Under cross-examination the respondent attempted to explain these contradictions by testifying that she had informed her attorney of this fact and that she did not know why this version did not appear in her answering or supplementary affidavits. Her oral testimony is that she has no recollection of the events of 26 May 2011. The respondent failed to call Robert as a witness, who was either present or at the same premises. According to her, whilst she did not remember anything about

signing the suretyship Robert told her what had occurred on that day. It was thus essential for her to call Robert to confirm her version on this material issue.

[19] The respondent testified that during the period March 2011 to July 2011, she was consuming a cocktail of medication and lacked the capacity to conclude legal agreements. However, during this period, she signed the divorce settlement agreement on 26 March 2011, the variation to the overdraft agreement on 12 April 2011 (which she signed on behalf of Strike) and variations to the term loan agreement on 5 July 2011 (also signed by the respondent on behalf of Strike). Robert had resigned as a director of Strike on 19 November 2010, leaving the respondent as Strike's sole director. The applicant contends that none of these documents have been challenged, only the one where the respondent is personally liable.

[20] The respondent argues that her evidence that she could not recall what happened from March 2011 to 26 May 2011 is uncontroverted. The respondent contends that there was no witness for the applicant who refuted this. This submission, however, misses the point. The respondent cannot recall the events. Robert was there at the time. She needed to prove what happened. It is not for the applicant to disprove her version. The onus rested on her to show that at the time she lacked contractual capacity. It is of no relevance that some five years later, she cannot remember the event.

[21] The respondent also testified that it was never envisaged that she would sign a suretyship in respect of the debts of Strike. Her evidence was also that she was never informed that Robert had not provided the security required. The applicant refers to the divorce settlement agreement signed by the respondent and Robert on 25 March 2011, approximately two months before she signed the deed of suretyship. Clause 19.1 makes it clear that the security had not yet been provided. The clause reads:

'19.1 The Defendant undertakes to furnish the Standard Bank of South Africa with the requested unlimited Deed of Suretyship, alternatively, the Pledge of the Limited Surety, in the sum of US Dollars 800,000 being the sum held in the Defendant's Standard Bank Jersey Guernsey CFD Account, if again after signature hereof by the

parties hereto, be called upon again by the Standard Bank of South Africa to furnish either of these requirement of Standard Bank of South Africa' [emphasis added]

[22] Secondly, the applicant submits that clause 19.4 of the divorce settlement envisaged that the respondent may be required to sign a suretyship.

'19.4 After repayment of the full amount owing to Standard Bank, the Plaintiff and Defendant shall take all reasonable and necessary steps and sign all documentation necessary to procure both the Plaintiff's and the Defendant's release as sureties and co-principal debtors with Strike Productions (Pty) Ltd (if necessary) for the repayment of any monies owing to the Standard Bank in terms of the Loan Agreement signed between the Standard Bank of South Africa Ltd and Strike Productions (Pty) Ltd on 12 November 2009'

[23] The respondent's explanation was that that she did recall signing the settlement agreement, but that clauses 19.1 to 19.5 were not explained to her. Clause 19.1 makes it clear that her evidence that she did know that Robert had defaulted must be rejected. As to the inference in the settlement agreement that she may be required to sign a suretyship, that clause is not as clear as clause 19.1, but is immaterial to the final outcome. The fact that at some time prior to her being requested to sign the suretyship, it was not envisaged that same would be required, is immaterial. Things changed: Robert failed to provide security, Robert resigned as director, leaving her as sole director, and Strike was defaulting on its indebtedness.

[24] The evidence of Padayachee, on behalf of the applicant was that after a meeting of the Credit Review Committee (the CRC) on 5 May 2011, the CRC informed him that they required a suretyship from the respondent, as Robert had failed to provide the required security. He was tasked with procuring it.

[25] This event was preceded by several communications from the applicant. On 28 January 2011, a letter had been addressed by Padayachee to the respondent and Robert. The respondent and Robert both signed for receipt of the letter on 1 February 2011. In the letter the following is stated:

'3. Your specific attention is drawn to the following paragraphs in the MTL agreement:

13.2.2.1.2 provides that:

Pledge restricted the amount of US$800 000... of Standard Bank Jersey/Guernsey CFD account...

4. The company is in breach of the agreements in that it has failed to provide the required security in breach of the financial covenants referred to in 3 above.'

[26] This letter also makes it clear to the respondent that Robert had not provided the requisite security. Padayachee also testified that: '*As I said the early part of 2009 – middle of 2010 we were dealing with Robert and thereafter Leah asked us to deal with her. I can remember clearly I can remember the fleet request and I told her that Robert has not provided the US$800 000 facility.*' Accordingly, during 2009 to February 2011, respondent was made aware, on several occasions, that the security of US$800 000 had not been provided by Robert to the applicant.

[27] Padayachee testified further that when Robert's security proved illusory, the applicant obviously required further security. As the respondent was aware of Robert's failure to provide the necessary security, it could not have come as a surprise that her suretyship was required. After the CRC instructed him to procure a suretyship from the respondent, Padayachee made telephone contact with the respondent and Robert and informed them of the CRC's decision. He instructed his personal assistant to prepare an unlimited suretyship for signature by the respondent. He arranged to meet with the respondent and Robert on 26 May 2011.

[28] The applicant contends that on the day the respondent signed the suretyship she was able to append her signature thereto as well as her initials; she wrote out her business address; and was able to comprehend the requested information and to respond thereto. She gave a telefax number and her email address and wrote out the place where the suretyship was signed. She also dated the document and signed it. She confirmed that this was her handwriting. This was one of the issues that the experts disagreed upon. In view of the conclusion to which I have come, it is not

necessary for this Court to decide whether this behaviour indicated that the respondent was mentally competent to contract.

[29] Padayachee's evidence was not seriously challenged in cross-examination. He testified that although he could not recall all of the details of the meeting with the respondent, it was his practice, in similar circumstances, to explain the contents of the suretyship to the client. If he thought that the respondent did not understand what she was signing, he would not have proceeded to have the document signed. He would also have noticed if the respondent was acting strangely or in an untoward manner.

[30] Robert was available to the respondent to confirm the events of 26 May 2011 and that he had told her what had happened as she did not recall. Although not a medical expert, having been married to the respondent for many years, he could also have testified as to her condition on that day. She confirmed that she and Robert were on good terms at the time of the hearing and that he was in fact staying with her at the erstwhile matrimonial home. Thus there was no valid reason for him not to testify.

Expert evidence

[31] Although it is trite, it bears repeating that it is fundamental that the opinion of an expert must be based on facts that are established by the evidence. The court '*assesses the opinions of experts on the basis of "whether and to what extent their opinions advanced are founded on logical reasoning". It is for the court and not the witness to determine whether the judicial standard of proof has been met.*'[3]

[32] In *MV Pasquale della Gatta* Wallis JA stated:

'...the court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a prima facie basis then the court must consider whether the

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[3] *Imperial Marine Company v MV Pasquale della Gatta and Another; Imperial Marine Company v MV Filippo Lembo and Another* 2012 (1) SA 58 (SCA) paras 25. See also *Michael & another v Linksfield Park Clinic (Pty) Ltd & Another* 2001 (3) SA 1188 (SCA) paras 34-40.

expert's view is one that can reasonably be held on the basis of those facts. In other words, it examines the reasoning of the expert and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert the threshold will be satisfied. This is so even though that is not the only opinion that can reasonably be expressed on the basis of those facts. However, if the opinion is far-fetched and based on unproven hypotheses then the onus is not discharged.[4] In *PriceWaterhouse Coopers Inc v National Potato Cooperative Limited*[5] Wallis JA stated:

'The basic principle is that, while a party may in general call its witnesses in any order it likes, it is the usual practice for expert witnesses to be called after witnesses of fact, where they are to be called upon to express opinions on the facts dealt with by such witnesses.

[33] Similarly, Wessels JA, in dealing with the nature of an expert's opinion, in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH*[6] stated:

'...an expert's opinion represents his reasoned conclusion based on certain facts on *data*, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

[34] An opinion of an expert must therefore be based on facts which have been proven before the court. An opinion based on facts not in evidence has no value for the court.[7] A court has to ascertain whether the opinions expressed by the experts are

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[4] *MV Pasquale della Gatta* (note 3 above) para 26.
[5] *PriceWaterhouse Coopers Inc & others v National Potato Co-operative Ltd & another* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) para 80.
[6] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371F-H.
[7] *PriceWaterhouse Coopers* (note 5 above) para 99

based upon facts proved to it by way of admissible evidence. It is with these principles in mind that this Court will deal with the expert evidence tendered.

[35] The respondent's evidence in relation to her mental incapacity was that two medical practitioners, Dr Govender and Dr Christodolou, had prescribed the medication that she was taking at the time. She had seen both practitioners and apparently had not told the one about the other, thus both prescribed medication for her. She had prescriptions for a cocktail of medication prescribed by these doctors. These two medical practitioners who were treating the respondent at the time were not called to testify. Without this factual evidence as to what medication was prescribed by each, the dosage and duration, an essential link is missing from the respondent's case. If at the time she was in the state which she and De Raay testified to, due *inter alia* to the medication, can the court accept her version as to what amounts of medication she was taking. The applicant contends that the failure to call and Drs Govender and Christodolou to provide the factual basis for the experts to comment upon, must lead to an adverse inference that their evidence would not confirm her testimony, as to what she was taking and that she did not know what she was doing at the time that she signed the deed of suretyship. As was held in In *Tshishonga v Minister of Justice and Constitutional Development and Another*:[8]

'*The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case....*'

The experts' evidence

[36] The evidence of the parties' experts will thus be analysed in the light of what is stated in the authorities referred to. De Raay's evidence was that, in her notes, she

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[8] *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC) para 112; *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A); *ABSA Investment Management Services (Pty) Ltd v Crowhurst* [2006] 2 BLLR 107 (LAC).

recorded on 23 May 2011 the words "*breaking point?*" De Raay was aware that the respondent had been on medication, but doesn't seem to have enquired as to the details thereof. She did not consider that the respondent required hospitalisation for her condition. De Raay conceded that she could not state precisely what the state of mind of the respondent was on 26 May 2011. The respondent herself testified that she had bad days and better days. De Raay stated that the respondent was apparently functioning and holding it together at work and with her children. De Raay did not know what was going on in the business, but stated that there appeared to be a marked difference in how the respondent was functioning on a private level and at work. The entry on 30 May 2011 was that there was an improvement, and De Raay conceded that at this date she believed that the respondent would have been able to understand and apply her mind.

[37] Professor Rambiritch gave evidence on the possible adverse secondary or side effects of the medication that the respondent was apparently taking. He conceded that the adverse side effects were a possibility and not a certainty. His evidence was based upon a theoretical evaluation of what might have happened to the respondent, having regard to the medication she stated she was taking. His view was that the drugs in question cause memory impairment, confusion, sedation, drowsiness and cognitive impairment. When this combination is taken as a cocktail, the effects become compounded and could be addictive. This means that this specific cocktail would have a potentiating effect i.e. one plus one would not mean two but more; having an even greater effect when combined. The effect of this medication is therefore unpredictable. The medications have a likelihood of causing confusion, and that likelihood of confusion increases if you increase the number of medications which have the same side effect.

[38] Rambiritch also stated that the cocktail of medication could have impaired the respondent's ability to remember signing the suretyship on 26 May 2011 as well as impairing her long-term memory. Furthermore, the chances of cognitive impairment and memory loss are high.

[39] As stated above, his evidence has to be considered in the absence of a factual basis therefor. Firstly, as dealt with, it was never raised by the respondent in her

affidavits that that she did not remember signing the suretyship. So, this version must be rejected, as must the opinion of Rambiritch on this issue. Secondly, only the two prescribing doctors could have given evidence as to precisely what medication the respondent was prescribed and was taking. Other factual evidence could have been given by the pharmacists who filled the prescriptions. The respondent's say-so that that is what she was taking cannot be accepted, as on her own version she was in a totally confused and cognitively impaired state. Rambiritch's evidence is based solely upon the particular medications and their dosage, which was not proved.

[40] Dr Fine, the psychiatrist who gave evidence for the applicant, testified that he had a special interest and experience in forensic and medico-legal psychiatry. His evidence was that even if the respondent was taking the medication which she alleged, the dosages were relatively low and a person's cognitive ability would not be significantly affected. He testified that he had seen thousands of patients on a similar cocktail and there was no question of mental incapacity.

[41] Although the combination of drugs was in his view '*not the best combination*' the probability that this would have led to contractual incapacity was very low. He opined that '*contractual capacity is a highly complex process which involves the interaction of many parts of the brain and the effects in my opinion of this medication, it is highly unlikely that it would have had an effect to lead to a loss of contractual capacity.*' To have a loss of contractual capacity would imply huge functional loss. The respondent appeared to be suffering from a mood disorder and a lack of contractual capacity is on a far deeper level. The medication may have had an effect on her mood but it would not have had an effect on her executive functioning and contractual ability. '*This is a separate part of the brain ... and everything is connected but this does not imply at all that she would have been incapable of making an informed rational decision when she signed the paper.*' As appears from de Raay's evidence, the respondent was not displaying a loss of executive functioning. She continued to run her business, her home and deal with her children quite rationally.

Respondent's application to reopen her case

[42] At the resumed hearing, on 11 December 2018 the respondent sought to reopen her case to call another expert witness, Dr Panier-Peter, to testify on her behalf. I refused the application and stated that full reasons would be given in this judgment. The basis for such decision is set out hereunder:-

42.1. On 9 November 2016 an application was brought by respondent to join Robert as a second respondent and for a stay of the main application.

42.2. On 21 November 2016 the respondent applied for a postponement of the main application. This was refused. The matter was argued before me 22 November 2016. Judgment was handed down on 6 December 2016.

42.3. The matter was set down for the hearing of oral evidence on 11 December 2017. It was postponed at the behest of the respondent to 18 January 2018. The respondent was ordered to pay costs on the attorney and client scale and to file a supplementary affidavit and an expert report by 5 January 2018. The applicant was to file an expert report in reply by 12 January 2018.

42.4. In the respondent's supplementary affidavit, filed on 5 January 2018, she raised the issue of the effects of the medication for the first time. Initially in the application, the respondent's case was not that her contractual capacity was compromised due to the medication she was taking. Other than a reference to 'meds' in De Raay's report, no reliance was placed on the effects of her medication.

42.5. Dr Seeberath's report was filed on 5 January 2018. Dr Fine's report was filed on 12 January 2018. On 18 January 2018, the respondent requested a further postponement because she no longer sought to rely on the report of Seeberath but, instead, she wished to call Professor Rambiritch. I refused the postponement and the matter proceeded. The matter did not conclude on that day and after hearing some evidence, the matter was postponed to 11 and 12 April 2018.

42.6. The respondent thus filed the expert report of Professor Rambiritch on 15 February 2018. On 11 April 2018 Professor Rambiritch gave evidence. Dr Fine then gave evidence.

42.7. Dr Fine's evidence related to the effects of the cocktail of drugs that the respondent said she was taking. The respondent had criticised the evidence of Dr Fine, in his cross-examination and in the submissions made to reopen the respondent's case to call Dr Panier-Peter.

42.8. The respondent's counsel submitted that, after Dr Fine testified, she realised that the matter should have been dealt with by way of a proper assessment. Thus, the respondent sought a proper assessment by Dr Panier-Peter after hearing Dr Fine's testimony. There is no explanation as to why this assessment was not conducted between 2015 and 2018 and why it was only filed on 23 November 2018.

42.9. The respondent consulted with Dr Panier-Peter six months prior to the report being filed. There is no explanation as to why this delay occurred. The respondent sought to introduce this evidence on the basis that Dr Panier-Peter was a forensic psychiatrist and she would be able to say from her assessment exactly how the respondent would have been some 7 years prior.

42.10. The applicant's counsel contended that if one compared the contents of Dr Panier-Peter's report to the complaints lodged by the respondent in regard to Dr Fine's evidence, one can only find two references to Dr Fine in Dr Panier-Peter's report. Firstly, she says that she agrees with Dr Fine that a proper assessment based on a medico-legal basis needed to be done.

42.11. In her report, Dr Panier-Peter refers to the respondent's state of mind. In trying to extrapolate from the respondent's history, she comments that the cocktail was '*an injudicious prescription*' of medication. Dr Panier-Peter does not come to a conclusion in her report. Thus, the applicant contended that the evidence she would give would not assist the Court in arriving at any decision.

42.12. As stated above, the respondent had sought postponements on at least four occasions and the duration of the hearing was being prolonged on each occasion. There is no explanation as to why it took the time that it did for the report of Dr Panier-Peter to be filed. The application to reopen the respondent's case was launched on 23 November 2018, six months after the respondent saw Dr Panier-Peter. The consultation in May 2018 was approximately six weeks after Dr Fine had given his evidence. There is no explanation for that delay either.

42.13. What appears from this belated application and the several instances referred to above, is that when the respondent realises that there is some difficulty with her case, she launches a further application either for a stay, a postponement or to introduce further evidence. The respondent had already closed her case when Dr Fine's evidence was given.

42.14. Further delays may very well have occurred if Dr Panier-Peter was called as an expert witness, as Dr Fine would have to be recalled to deal with Dr Panier-Peter's evidence once her testimony was concluded.

42.15. The applicant also argued that the report of Dr Panier-Peter is a chronology of the marriage, the divorce, and the business problems. These had all been explored before by both the respondent and De Raay. There is no dispute in this regard. In regard to the medication Dr Panier-Peter says in her report:

'She consulted her psychologist and took a cocktail of ill-advised medication as prescribed by general practitioners to help her survive each day. The cumulative effect of these medications together with additional need and motivational difficulties in the context of a toxic marital situation cannot be underestimated. ... The entire psychiatric and psychological situation affecting Ms McCrae over the period of signing of the document is suboptimal and in my view very problematic and will need to be considered by the court in the context of the available information.'

42.16. Once again, without the evidence of the two prescribing doctors, Dr Panier-Peter's evidence is not factually based and cannot assist the respondent or

this Court in arriving at a decision as to the respondent's state of mind at the time of the signature of suretyship. Accordingly I refused the application to reopen the respondent's case to call Dr Panier-Peter.

Analysis

[43] The issue referred to oral evidence was based upon De Raay's report. The respondent's case then changed to encompass the effects of the medication on her contractual capacity. The experts who should have been called to testify to the facts relating to the medication she was prescribed and/or was taking, are Drs Govender and Christodoulou.

[44] Padayachee's evidence, that the respondent was fully aware of what she was signing, remains unchallenged. The respondent herself has no recall and thus cannot dispute his evidence. Correspondence was received by the respondent from the applicant to the effect that further security was required as Robert had failed to provide the security he promised. Padayachee had communicated with the respondent before the date of signature that if the security was not provided, the Bank would call up Strike's debts and the company could be liquidated. As her version was that she had no recollection of the events on that day, only Robert could have given evidence to challenge Padayachee's version. He did not.

[45] Her previous version in her affidavits was that she recalled signing the document, but didn't know what it was. The defences previously raised i.e. non-disclosure and duress, are totally dispositive of the version she now gives. If she had no recollection of signing the document, she would not recall that it was not explained to her and/or that she was pressurised into signing the suretyship. Her version must thus be rejected on the facts and the probabilities.

[46] Even if there is room for the respondent's present version to be corroborated by medical evidence, the opinions of the respondent's experts lacked a proper factual basis. The respondent's evidence is that, at the material time, she was in such a debilitating mental state that she has no recollection of the events that were unfolding. Furthermore she was seeing two medical practitioners, who had prescribed a cocktail

of medication that according to De Raay, rendered her 'confused, dazed and unable to focus, having difficulty making sense, and at breaking point'. The question which must then arise is: can this Court accept her version as to what medications she was actually taking? Thus, the evidence of Dr Govender, Dr Christodoulou and the prescribing pharmacists became crucial for her to establish that she was, in fact, taking such medications, and that she was suffering from the effects described by her and the other experts.

[47] In analysing whether the respondent has discharged the onus upon her, reference is made to *Stellenbosch Farmers' Winery Group Limited*[9] where the SCA, in dealing with the approach to resolving factual disputes, held:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one,

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[9] *Stellenbosch Farmers' Winery Group Limited and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).

occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."[10]

[48] In the event when there are two mutually exclusive versions, the court is obliged to qualitatively assess the truth and/or inherent probabilities of the evidence and ascertain which of the two versions are the more probable.[11] The estimate of the credibility of a witness is inextricably bound up with the consideration of the credibility to be judged in the light of proven facts and probabilities and not in isolation.[12]

[49] As was stated in *National Employers' General Insurance Company Limited v Jagers*,[13] it is only where the probabilities fail to indicate where the truth probably lies, that the court should have recourse to an evaluation of the credibility of the applicant's and the respondent's witnesses.

[50] In my view, having regard to the contradictory evidence given by the respondent in her affidavits compared to her testimony, her credibility does not pass muster. In addition, the probabilities based upon the common cause facts favour the applicant's version.

[51] The factual evidence relating to the medications was a prerequisite before any expert could comment on the effects of such medications. The failure by the respondent to call Robert and the two medical practitioners who prescribed the medication is fatal to the respondent's case. Without that factual evidence, the respondent cannot discharge the onus upon her.

[52] For these reasons I am of the view that the application must succeed.

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[10] Ibid at 14J-15E.
[11] See *National Employers' General Insurance Company Limited v Jagers* 1984 (4) SA 437 (A) at 440E-441A.
[12] See *Santam Beperk v Biddulph* 2004 (5) SA 586 (SCA) para 5.
[13] *Jagers* (note 11 above) 1984 (4) SA 437 (E).

Accordingly the following order is granted:

1. Payment of the sum of R4 331 375.75 plus interest thereon at the rate of 11,3% per annum calculated daily and compounded monthly in arrears from 25 February 2014 to date of payment;

2. Payment of the sum of R42 524,19 plus interest thereon at the rate of 11,3% per annum calculated daily and compounded monthly in arrears from 6 March 2014 2014 to date of payment;

3. Payment of the sum of R4 139 820,67 plus interest thereon at the rate of 10.5% per annum calculated daily and compounded monthly in arrears from 1 July 2016 to date of payment;

4. Costs on the attorney and own client scale.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	5 April 2019
Date of judgment:	25 June 2019

Appearances:

Counsel for the Applicant:	Adv. L Hollander
Instructing Attorneys:	Jason Michael Smith Inc. Attorneys
Counsel for the Respondent:	Adv. M Nowitz
Instructing Attorneys:	Nowitz Attorneys