iREPUBLIC OF SOUTH AFRICA

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

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

13.12.2019
SIGNATURE DATE

CASE NO: 15/15095

In the matter between:

ELECTRIC DIESEL SERVICES (PTY) LTD Plaintiff

and

IRT PROJECTS (PTY) LTD 1st Defendant

HADLEY DAVIS STEVENS 2nd Defendant

LINETTE EVELINE STEVENS N.O. 3rd Defendant

(In her capacity as the duly appointed Executrix in the Estate of the Late Jerome Gladwin Stevens)

JUDGMENT

WINDELL J:

INTRODUCTION

[1] The plaintiff, Diesel Electric Pty Ltd ("Diesel"), is an incorporated company that has been in existence since the 1990's. Diesel is in the business of providing clean power and supplying large 'industrial' generators, un-interrupted power supply ("UPS"), batteries, and invertors to customers. Mr Kevin Donaldson ("Mr Donaldson") is the sole shareholder and director of Diesel.

[2] The first defendant is IRT Projects Pty Ltd ("IRT") an incorporated company established in January 2002. IRT started as a close corporation with only one member, the late Mr Jerome Gladwin Stevens ("Mr Stevens Snr"), now represented by Mrs L Stevens N.O. as executrix of Mr Stevens Snr's estate (the third defendant). During January 2002 IRT converted from a close corporation to an incorporated company and Mr Donaldson and Mr Stevens Snr were appointed as directors thereof. Mr Stevens Snr held 60% of the shares in IRT, Diesel 20%, and a third party held the remaining 20% of the shares.

[3] Diesel and IRT entered into an agreement during or about 2002/2003 (the first agreement). The exact nature and the terms of the first agreement are in dispute. Diesel alleges that it was a written agreement in terms of which Diesel supplied goods and or services to IRT and its customers, and IRT alleges that it was an oral joint venture agreement in terms of which IRT would subcontract work to Diesel, who would then provide the materials and perform the work.

[4] During November 2012 the parties entered into a replacement agreement (the second agreement). The second agreement was in writing and a copy is attached to the summons. Diesel contends that the terms and conditions of the first agreement were the same as the second agreement. The material terms of the second agreement are the following:

1. Diesel would supply IRT with goods and services at IRT's special instances and requests;

2. The price invoices by Diesel to IRT was the agreed price of the goods and services.

3. Payment terms would be 30 days from date of invoice. (It is common cause that the 30 days requirement was not enforced)

[5] During 2011 Diesel established that Mr Stevens Snr's wife's company, Integrated Premise Solutions (Pty) Ltd, had been the recipient of unauthorized loans from IRT in the sum of R7.7 million. On further enquiry it was also established that over and above the R7.7 million, IRT was also indebted to Diesel for outstanding invoices.

[6] On 4 July 2013 Mr Stevens Snr and the second defendant, Mr Stevens Jnr, signed surety agreements whereby they bound themselves jointly and severally for the past, current and future debts or IRT to Diesel. The deeds of suretyship were drafted under the express instruction of Mr Stevens Snr. On 30 July 2013 IRT, through its duly appointed auditors, acknowledged that it owed Diesel an amount of R16 516 807.06.

[7] In April and May 2014 letters of demand were sent to the defendants demanding payment of an amount of R 13 669 015.77. IRT's directors denied that IRT had been paid by its customers and alleged that the obligation to make payment to Diesel in terms of the back to back invoices had therefore not yet arisen. In April 2015 Lorna Geen, an ex-employee of IRT, advised Mr Donaldson that IRT's customers had in fact paid IRT.

[8] Diesel instituted action against IRT and its sureties on 22 April 2015 based on the first agreement and deeds of suretyship. Diesel's first claim is against IRT for payment of invoices in an amount of R 13 669 015.77, rendered for goods and services (Claim 1). The second claim is against the second and third defendants as sureties, jointly and severally, for the indebtedness of IRT to Diesel (Claim 2). In the third claim Diesel seeks an order declaring the second and third defendant liable for the loss suffered by Diesel in terms of section 218 (2) of Companies Act 71 of 2008 ("the Companies Act") and further a declaration of delinquency against the second defendant in terms of the section 162 (5)(c) of the Companies Act (Claim 3).

[9] In their pleaded case the defendants admit that the goods were delivered and the services rendered. The defendants' defence, in the main, is that Diesel failed to prove the terms of the first agreement and that its claim should therefore fail. In paragraph 9 of their initial plea they reiterated that payment will only be made once IRT's customers paid it, and persisted with the denial that their customers have not paid them. The defendants also pleaded prescription of the debt, alternatively, a denial that the amount is due, owing and payable. The second and third defendants

pleaded that the suretyships were null and void for lack of compliance with the General Law Amendment Act and because the principal debtor, IRT, is referenced in the document as a surety.

[10] The trial commenced on 6 March 2018. On 1 March 2018, the defendants filed a supplementary discovery affidavit incorporating IRT's customers' general ledger for the period 2009 to 2015. On the day of the hearing, 6 March 2018, the defendants amended their plea to incorporate a reconciliation of Diesel invoices against IRT invoices. It was clear from the supplementary discovered documents received, and the reconciliation incorporated into the defendants' plea that IRT had, in most instances, been paid. At the request of the defendants the trial was postponed on 7 March 2018 for the defendants to consider the plaintiff's consequential adjustments to its replication. The postponement was granted and costs were reserved.

[11] The trial continued on 26 August 2019. Diesel had categorized the defendants' plea and at the resumption of the trial the defendants admitted the plaintiff's categorization with a few minor movements of certain items. This is reflected in exhibit 'K' and "L" and follows the following categorization:

1. **Category 1** relates to IRT's invoices being paid by its customers but no payment being made to Diesel, the total value of the invoices in this category amount to **R3 902 998.49;**

2. **Category 2** relates to IRT's invoices being paid by its customers but no payment being made to Diesel due to alleged queries on the invoices or overcharges, the total value of the invoices in this category amount to **R1 372 132.60**;
3. **Category 3** relates to IRT's invoices being paid by its customers and alleged payment being made to Diesel, the total value of the invoices in this category amount to **R2 966 902.49**;
4. **Category 4** relates to IRT's invoices to its customers against which IRT passed credit notes, the total value of the invoices in this category amount to **R3 414 284.20**;
5. **Category 5** relates to IRT failing to invoice its customers despite being in receipt of the correlating invoice from Diesel, the total value of the invoices in this category amount to **R195 694.68**;
6. **Category 6** relates to IRT's invoices to its customers not being paid the total value of the invoices in this category amount to **R11 487.17**; and
7. **Category 7** relates to an invoice in respect of which IRT was to revert back. The total value of the invoice in this category amount to **R789 555.78**.

[12] The following are the disputed issues as per the pleadings:

1. What were the terms of the first agreement?
2. Does IRT owe any money to Diesel?
3. Is the surety agreement null and void?
4. Should the second and third defendant be held personally liable as directors in terms of section 218 of the Companies Act?
5. Should the second defendant be declared delinquent in terms of section 162 of the Companies Act?

[13] The plaintiff called three witnesses: Mr Kevin Donaldson the managing director of Diesel, Mr Adrian Stevens the son of Mr Stevens Snr and brother of the second defendant, and Mr Kamalie the accountant in the employ of IRT from 2014 to sometime in 2018, and now in the employ of a related company IRT Distribution. The defendants called no witnesses and adduced no evidence.

THE EVIDENCE

The First Agreement

[14] Mr Donaldson testified on behalf of Diesel. What follows here below is a summary of his evidence.

[15] Diesel and IRT have been in a "partnership" since 2001. The goal of the "partnership" was to embark on the enterprise development of IRT. Diesel's role was to assist in the financing and coaching of IRT in order for them to become an active participant in the clean power supply marketplace. During 2002/2003 IRT signed a 'counter-top' credit application, the first agreement, with Diesel. The credit

application was a pre-requisite to doing business with Diesel and the terms of the agreement are precisely those as stated in the second agreement. This was for account number 1. (All the invoices in dispute fall under account number 1).

[16] As stated earlier, the first agreement provided for payment to be made on 30 days from date of invoice, but this requirement was not enforced. It was agreed between the parties, either tacitly or by conduct that IRT would only make payment to Diesel once IRT received payments from its customers. The parties therefore issued back to back invoices for the goods supplied and the services rendered.

[17] IRT confirm that this arrangement pertained to the invoices on which Diesel currently claim payment under account number 1. It is therefore common cause between the parties that Diesel did not insist on compliance with the requirement that payment be made on 30 days of invoice and that payment would only become due to Diesel when IRT's customer paid IRT. From the evidence it is clear that the non-insistence on 30 days was applied by the parties to all invoices. Mr Donaldson testified that on non-project related work the 30-day period ought to have applied, but in effect based on the conduct of both parties these invoices were similarly only paid when IRT's customer paid this accords with what is pleaded by both parties in terms of the payments. On all project work IRT would charge 3% on Diesel's fee as a management fee to the customer. However, if IRT sourced work on its own and utilized Diesel for the supply of goods and services IRT could charge any fee it deemed appropriate. Diesel would only invoice IRT once the work (goods delivered, and services rendered) had been completed. On receipt of these invoices IRT would

draw up the corresponding invoice and submit it to the customer for payment. IRT had an obligation to render the back to back invoices to the customers.

[18] The defendants admit that there was an agreement between the IRT and Diesel and that goods and services were rendered by Diesel, but dispute the nature and terms of the first agreement as pleaded by Diesel. The defendants plead a different agreement, the so-called joint venture agreement. The *onus* is on Diesel to prove the terms of the agreement it relies upon and the defendants bear the *onus* to prove the joint venture agreement they rely upon.

[19] The defendants failed to put any evidence before the court in either support of their version or to contradict the plaintiff's version. The second defendant, Mr Stevens Jnr, was present in court throughout the trial and his version was put to Mr Donaldson. At the close of plaintiff's case the defendants closed their case without leading any witnesses or evidence. Counsel on behalf of the plaintiff contends, with reference to *Waste Products Utilization (Pty) Ltd v Wilkes and Another*[1], that an adverse inference should be made against the defendants for their failure to call any witness, and more specifically, for their failure to call the second defendant. It is contended that the reason the second defendant was not called to testify was because '*the defendants' legal advisors had no confidence in him as a witness*'.[2] I agree. No explanation has been furnished why the second defendant was not called

[1] 2003 (2) SA 515 (W) at page 570 C-D.
[2] Galante v Dickinson 1950 (2) SA 460 (A) – p 464 – 465 Schreiner JA" *In the case of the party himself who is available , as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well because of the facts known to him, damage his case by giving evidence and subjecting himself to cross-examination."*

to testify. The only inference that can reasonably be drawn from his failure to testify is that he would not have been able to support the version of the defendants put to the witnesses during cross examination.

[20] The plaintiff's version of the agreement is the only version before court and stands uncontroverted. Irrespective of the fact that the original agreement was lost the evidence demonstrates that the parties conducted themselves according to the terms of the agreement pleaded by the plaintiff, save for a variation regarding the terms giving rise to payment. The defendants did not produce any evidence to prove that the joint venture agreement was the contract governing the relationship between the parties. The statements made during cross-examination are not evidence. Mr Donaldson's evidence constitutes *prima facie* evidence as to the existence of the first agreement. *Prima facie* evidence as pointed out by Stratford JA in *Ex parte Minister Of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478 is:

> *"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.

[21] I am satisfied that Annexure K, reflecting Diesel's invoices with the reciprocal invoices from IRT and payment or non-payment by IRT's customers, demonstrates

the parties contracting with each other as per the first agreement. Diesel's version of the agreement as pleaded is therefore accepted.

The invoices

[22] For convenience and clarity's sake Diesel's evidence will be dealt with as per the defined categories of its invoices as rendered to IRT; and IRT's reconciliation thereof (Exhibit "N").

Category 1 & 2

[23] IRT admits that it did not make payment to Diesel on the invoices in Category 1 and 2, despite receiving payment from its customers. Category 2 invoices were not paid due to alleged queries on the invoices or overcharges. The total value of the invoices in these two categories are R5 274 131.09. The only invoices placed in dispute by the defendants in this category are the following line items: 58, 64, 80,105,114,149 and 249. The total amount of the disputed invoices is the amount of R1 318 990.92.

[24] Mr Donaldson testified that Diesel was never notified by the defendants that these invoices had been paid. It was only in early 2015 that an ex-employee told him that IRT customers had in fact made payment to IRT on various back to back invoices, but that no payment was made to Diesel. The first time the defendants acknowledged any form of payment as against the back to back invoices claimed by Diesel was in March 2018 when the defendants served their reconciliation and

supplementary discovery on Diesel with their amended plea. If Diesel weren't advised by IRT, its directors or employees that its customers had in fact paid Diesel would have no knowledge of such payment and the debt would not arise. Diesel and Mr Donaldson were further never advised of any queries on any invoices or any issues raised with regards to any alleged overcharges on these invoices.

[25] Mr Kamalie, the accountant of IRT confirmed that once IRT received payment of their invoices from their customers it would be the responsibility of IRT to notify Diesel that IRT's invoice had in fact been paid and that it would be incumbent on IRT to raise concerns of overcharging and issues relating to any invoices with Diesel. Mr Kamalie further testified that he had not seen any IRT documentation relating to the allegations about concerns of overcharging and issues relating to any Diesel invoices. Mr Kamalie confirmed that these amounts ought to have been paid to Diesel.

[26] The defendants admit that they received payment from its customers for the invoices in Category 1 & 2. No evidence was tendered by the defendants to explain why Diesel was not paid. I am satisfied that an amount of R5 274 131.09 is due owing and payable to Diesel.

CATEGORY 3

[27] The total value claimed by Diesel in this category is an amount of R2 966 902.49. The line items in dispute in this category are the following: 1,2,3,29,60,164 and 286-302. The defendants plead by way of their reconciliation that payments were made to Diesel and that these payments were allocated by IRT

against Diesel invoices in this category. Mr Donaldson testified that Diesel's books did not reflect these payments against these invoices and that all these invoices were reflected as not having been paid on Diesel books. Diesel also never received any instruction, advise or remittance for these invoices against these payments. Attempts were made to allocate payments received from IRT based on discussions between both parties' accounts departments or receipt of remittance advises. In most instances the parties would agree as to what was paid to make sense of what was short paid and overpaid. Mr Donaldson explained that in the event that there was no agreement or communication or remittance advise provided by IRT as to which invoice was being paid to Diesel, Diesel would engage in an exercise to collate invoices to make up the figure and should this not be possible then it would be allocated to the oldest debt. This verification and allocation would be done multiple times, but the obligation to advise, instruct and or to send a remittance advise to Diesel, lay with IRT. If no advice, instruction or remittance was forthcoming and Diesel could not find a way to adequately collate the payments against projects the payment would then go to the oldest debt.

[28] Mr Donaldson confirmed that all the payments stated by IRT did in fact reflect in Diesel's books and on the running statement which would be provided to IRT from time to time. These payments had an allocation on these statements as "various". Mr Donaldson and Mr Kamalie confirmed that when IRT received the statements and saw the allocation to various, it was incumbent on IRT to raise a query at the time and advise Diesel as to precisely where these payments should be allocated. Mr Donaldson and Mr Kamalie confirmed that no such queries were ever raised in respect to the allocation of these payments to "various".

[29] Mr Kamalie confirmed that the following amounts reflect as being paid on Diesel - IRT Statements and that the payment reduces the running balance owing to Diesel on the statement:

1. R3,971,901.37 on 10 May 2010, this payment reduced the running balance on the account from R33 million to R29 million [these are rounded off figures];
2. R4,500,000.00 on 3 December 2010, this payment reduced the running balance on the account from R25 million to R20.4 million [these are rounded off figures];
3. R1,848,126.61 on 9 May 2010, this payment reduced the running balance on the account from R32.5 million to R30.5 million [these are rounded off figures];
4. R863,381.82 on 5 October 2010, this payment reduced the running balance on the account from R13.4 million to R12.6 million [these are rounded off figures]; and
5. R627,783.17 on 8 January 2013, this payment reduced the running balance on the account from R12.7 million to R12.1million [these are rounded off figures].

[30] Mr Kamalie testified that it was standard practice for IRT to inform Diesel as to which invoices would be allocated and that it was IRTs' obligation to inform Diesel to appropriate the funds to these invoices. IRT had not done so. In cross-examination Mr Donaldson was referred to various documents in the defendants' bundle's 1 and

2 and in particular pages 1 to 17 of bundle 1. Mr Kamalie confirmed that pages 1, 8, 10-17 were snap shots taken from the IRT supplier age analysis. He confirmed that he did this exercise in March 2018 in preparation for trial. He could not confirm the veracity of the information and transactions as he was not the person who inputted the information into the system as he only commenced his employment with IRT in 2014.

[31] Both Mr Donaldson and Mr Kamalie were referred to the D reference numbers in particular D-02-16, D-09-009, D-04--12, D-01-044, D-09-14, D-10-010. Mr Kamalie testified that these numbers were the IRT cashbook reference numbers. He further testified that these summarized age analyses documents had not been shared with Diesel until trial. Mr Donaldson testified that the D reference numbers had no meaning to Diesel. He further confirmed that none of the documents reflecting the payment and the actual invoice paid against were given to Diesel before March 2018.

[32] It is contended on behalf of Diesel that in light of IRT's failure to instruct, advise, inform or remit a payment advise to Diesel in respect of the amounts paid Diesel was entitled after attempting to allocate the amounts to invoices to make payment towards the oldest debt.

[33] When determining where payment should be made in the absence of an instruction from the debtor, Lawrence JP said the following in the matter of *Stiglingh v French*[3]:

> "The first rule is that the debtor, when he makes payment, is at liberty to declare under what head or to what account he wishes it to be entered ... The second rule, as laid down by Van der Linden, is that 'when the debtor neglects to appropriate the creditor is at liberty when he has different accounts against the debtor to specify by his receipt the account which he means to place it'. Pothier quotes the rule as laid down in the Digest and discusses at some length the commentary of Bachovius to the effect 'that as long as the thing is still entire and as long as the debtor has not received from the creditor an aquittance, importing the implication, he may object to the application which the creditor would make to the account of those debts which the debtor had at least interest to acquit, and consequently may demand that the creditor should either make an equitable application by his acquittance or restore the money'."
>
> And at p411
>
> "The rules as to the appropriation of payments are well known. It is for the debtor, and, failing him, for the creditor, to indicate at the time of payment to which of more items than one such payment shall be imputed, and it is only on failure of both that the law steps in to make the appropriation. The debtor, and, failing him, the creditor, must declare his intention before or at the time of payment, in order that it may still be open to the creditor not to accept it upon the debtor's terms, and to the debtor not to make it upon the creditor's terms (Voet, 46. 3. 16). If the debtor's intention had been declared before payment and not withdrawn, the creditor would be quite justified in acting

[3] [1891]-[1892] 9 SC 386 at page 393

upon it, and if he did so act upon it there would be no necessity for any declaration of his intention. If the course of dealing between the parties has been such that the creditor has been reasonably led to believe that any payment was intended to be imputed to a particular item and has acted upon that belief; the debtor cannot afterwards claim that the law shall step in to make the appropriation."[4]

[34] The payments as claimed by IRT have been reflected in Diesels Statement to IRT. These various payments over the relevant periods have reduced the running balance on the account. Diesel was entitled to allocate the payments as it has in the absence of any instruction from IRT. Mr Kamalie in any event confirmed that even if the invoice hadn't been allocated properly, the running balance of the account would remain the same. Accordingly, as per IRT's reconciliation provided on 6 March 2018 these invoices have been paid by IRT's customer and the amount of R2 966 902.49 is due, owing and payable to Diesel.

CATEGORY 4 & 5

[35] Category 4 deals with credit notes passed and were dealt with in evidence in a fair amount of detail. Diesel pleads that the passing of credit notes amounts to fictional fulfilment of the conditions of the agreement, thereby entitling Diesel to

[4] This rule was confirmed in *Bergville Mall (Pty Ltd v Biltworx (Pty) Ltd*[4]learned Justice De Vos applied the aforesaid rule, in the absence of an instruction from the debtor the creditor is entitled to allocate the payment to an outstanding debt.

payment. In the alternative, Diesel pleads that the passing of a credit is in effect akin to payment against the customers invoices which entitles Diesel to payment. Mr Donaldson testified that Diesel was never advised that credit notes had been passed on the end user customer invoices and that Diesel had never consented to the passing of any of these credit notes. The first time Diesel became aware of IRT's actions in passing these credit notes was on 6 March 2018 when it was presented with the reconciliation. Mr Kamalie confirmed that IRT were obliged to discuss the passing of any credit notes on the back to back invoices with Diesel.

[36] At the conclusion of the trial and during argument the defendants no longer disputed line Item 4 (R1 387 293.75); Item 172 (R215 606.58); Item 236 (R193 331.33); Item 283 (R198 346.18) and Item 308 (R1 147 937.92). In terms of these invoices, which were in fact paid, IRT owes payment thereof to Diesel in the sum of R 3142 515.76.

[37] IRT had no entitlement to credit these invoices and in so doing have defrauded Diesel and at best for it, it intended to prejudice Diesel by contriving a basis to avoid payment. This is particularly clear from the following line items: Item 308 was an invoice (IN014526/IN014575) in the amount R 1 147 606.58. This invoice was credited twice and reinvoiced to Claassen Auret. Mr Donaldson indicated that Claassen Auret was a consultant to MTN and if there were issues in the MTN budget, certain payments of MTN's invoices would be made by Claassen Auret. Mr Donaldson received confirmation from Claassen Auret that it had in fact paid the amount of R1 147,937.92 in respect of the work done at MTN to IRT on 22 October 2013. Mr Donaldson and Mr Kamalie further confirmed that the payment from

Claassen Auret of R1 147,937.92 is reflected in IRT's bank statements. Considering payment by Claassen Auret to IRT for the full value of this invoices, IRT was obliged to make payment to Diesel for these invoices in the total amount R1 147 937.92. IRT had no entitlement to credit the invoice and not reflect the replacement invoice, in so doing IRT have defrauded Diesel.

[38] Diesel places reliance on the doctrine of fictional fulfilment for the remainder of the invoices not dealt with in Category 4, being items 25, 59, 304 and 310 in the reconciliation. These invoices total the amount of R414 364.50. Diesel also places reliance on the doctrine of fictional fulfilment for Category 5 invoices where IRT failed to invoice its customers. It is submitted that the passing of credits amounts to an intentional act made by IRT, which results in the end customer not being required to make payment for goods delivered and services rendered. The consequence of passing credits against these customers invoices, so it is argued, is that there is then no obligation on the customer to make payment to IRT. This then in effect means that the condition for payment from IRT to Diesel cannot arise. By passing credit notes IRT have wilfully obstructed the condition that its customers make payment which would then result in payment being due to Diesel.

[39] I agree with counsel for Diesel's contentions in this regard. In terms of the agreement between IRT and Diesel, IRT are obliged to invoice its customers. Mr Donaldson testified that Diesel would only invoice IRT once the work (goods delivered, and services rendered) had been completed. On receipt of these invoices IRT would draw up the corresponding invoice and submit it to the customer for payment. IRT had an obligation to render the back to back invoices to the customers

and that obligation arises once Diesel had invoiced IRT. The invoices to the customer are required in order for IRT to be paid by the customer and thereafter for Diesel to be paid by IRT. The obligation for IRT to pay Diesel cannot arise unless IRT have fulfilled their obligation and invoiced their customer.

[40] By failing to invoice its customers IRT has intentionally obstructed the condition for payment to Diesel to be fulfilled. A party may not take advantage of its own default (whether by act or omission)[5] to the detriment of another party.[6] In *Scott v Poupard* supra[7], Holmes JA that *"Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him."*

[41] In *Thanolda Estates*[8], Wunsh J held as follows:

> [22] Whatever the position may be with regard to the degree of proof required to a condition would have failed even if the promisor who deliberately prevented its fulfilment had not done so, where, as here, the defendant had a positive duty to take steps to try to have the condition fulfilled but neglected to do so, it is equitable to hold the defendant liable as though the condition had been fulfilled unless it can be shown that the steps to be taken would have been an utter waste of time and money."
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> [23] As indicated in Scott v Poupard (supra) the onus to show the absence of a causal connection between the defendant's conduct and the failure of the condition should rest on the defendant. (See R H Christie The Law of Contract in South Africa

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[5] *Lekup Prop Co No4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at [12]
[6] *Thanolda Estates supra* at [15]
[7] At 378G - H
[8] At page 207 at [22]-[23]

3rd ed (1996) at 168.) The same should apply where the defendant contends that any effort to have the condition fulfilled would have been futile."

[42] The defendants failed to fulfil the condition (by failing to invoice and by the actions in passing credit notes thereby negating the need for customers to pay) which would enable Diesel to claim payment from it. It is submitted that without any contrary evidence from the defendants they had the intention of frustrating the fulfilment of the condition which would entitle Diesel to payment. Accordingly, the unfulfilled condition must be deemed to have been fulfilled. By fictional fulfilment of the condition for payment, Diesel is entitled to payment of the sum total of category 4 and 5 invoices.

CATEGORY 6

[43] This category makes up an amount of R11 178.78. The defendants did not testify as to what steps they took to secure payment. Further to this it is evident that the defendants have been remiss in their obligations relating to payment, passing of credits notes, failing to invoice, failing to advise regarding payment allocation and so forth. I am satisfied, on the evidence presented, that Diesel is entitled to payment of this amount on these invoices in the sum of R11 478.78.

CATEGORY 7

[44] This category deals with a single invoice rendered to IRT in the sum of R 789 555.40. This is item 222 on the reconciliation. The defendants were to revert back, they have not.

[45] Mr Donaldson testified that he was of the view that this invoice related to goods received at IRT's offices in Northlands for their own use or for purposes of resale. Until March 2018 Mr Donaldson and Diesel were not aware of whether this invoice pertained to a customer or not. Mr Donaldson and Mr Kamalie testified that the delivery note indicated that the goods were delivered at IRT's offices. IRT were in possession of the goods and therefore payment for the goods is due in the sum of R789 555.40.

CONCLUSION

[46] Mr Kamalie as the accountant for IRT testified that as at 22 August 2019 as per the books of IRT and the supplier age analysis relating to Diesel, IRT owed Diesel the sum of R12 453 381.98. He further confirmed that short of approximately R200 000, this balanced with annexure K and the reconciliation put together by IRT. It is submitted that Diesel is entitled to payment of the amount as reflected on Exhibit K being the total of R12 652 046.40. Further to this as per the agreement Diesel is entitled to interest on the outstanding invoices at its bankers prime lending rate plus 2%, not compounded as per Exhibit "N". The total interest as at 30 September 2019 was an amount of R10 591 425.78.

VALIDITY OF THE SURETYSHIP

[47] The defendants deny that the suretyship agreements are valid and binding. They base these denials on the following two propositions:

1. In terms of clause 1.2 of the suretyship agreements, they agreed to be liable for the due and punctual payment and performance by IRT of all debts and obligations which it may owe to Diesel in terms of another agreement which would be attached to the suretyship agreement and marked Schedule A; and

2. IRT is referred to as both a surety and a co-principal debtor in the suretyship agreements. The defendants contend that the suretyship agreements are therefore null and void because the same party cannot be both the surety and principal debtor.

[48] Section 6 of the General Law Amendment Act 50 of 1956 provides that in order for a suretyship agreement to be valid, its terms must be embodied in a written document which is signed by or on behalf of the surety. In *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd*[9], the Appellate Division provided instructive guidance to assess compliance with this provision:

> "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 the principal debtor, and the nature and amount of the principal debt, must be capable of

[9] 1978 (4) SA 1 (A) at page1.

> ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification other than evidence by the parties (i.e. 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'."

[49] The suretyship agreements *in casu* comply with section 6. The agreements and the terms thereof are embodied in written documents and were signed by the second and third defendants as sureties. Clauses 1.1 and 1.2 of the suretyship agreements each describe the nature of the principal debts and the bases upon which the second and third defendants can be held liable. Clause 1.1 is stated very broadly to encompass "all sums of money which [the first defendant] now owes to the creditor, or may from time to time hereafter owe...". Clause 1.2 is more limited in its scope in that it applies specifically to debts or obligations arising from another agreement which was to be attached to the suretyship agreements as schedule A.

[50] The defendants' objection to the validity of the suretyship agreements relates only to clause 1.2 and is premised on the fact that the other agreement, the intended schedule A, was not attached to the suretyship agreements at the time of their signing.

[51] The failure to attach the other agreement does not in my view render the suretyship agreements noncompliant with the General Law Amendment Act. The defendants do not explain the practical effects of not attaching the other agreement to the suretyship agreements, nor do they provide any other factual basis to demonstrate how the suretyship agreements fall short of the requirements of section 6 as defined in *Sapirstein supra.* The provisions of clause 1.1 are enough to give efficacy to the agreements of suretyship. I agree with counsel for Diesel that the defendants' argument that the suretyship agreements are void due to the failure to attach the intended schedule A is misplaced and falls to be rejected.

[52] The court is further required to consider what consequences, if any, should befall the suretyship agreements because they refer to IRT as both a surety and principal debtor. Diesel contends that the parties did not intend to bind IRT as both surety and principal debtor. Accordingly, it is seeking a rectification of the suretyship agreements to give effect to the parties' intention.

[53] It is not in my view unnecessary to deal with this issue in much detail. It is also my view that it is not necessary for a rectification of the surety agreements. IRT cannot stand surety for its own debt. The purpose of a suretyship agreement is to provide a safeguard for creditors in the event that the debtor defaults on the debt. This was the case when Diesel concluded the suretyship agreements with the Mr Stevens Snr and Mr Stevens Jnr. The defendants are incorrect in their assertion that the agreements are unenforceable against them. The liability of the sureties is stated to be joint and several. The fact that IRT was included as a surety itself does not impact on the liabilities of Mr Stevens Snr and the second defendant.

DECLARATION OF DELINQUENCY

[54] Section 162 (5) of the Companies Act states that (5)..."*A court must make an order declaring a person to be a delinquent director if the person-*

.....

(c) while a director-

(i) *grossly abuse the position of director;*

(ii) .....

(iii) *acted in a manner-*

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the directors functions within, and duties to, the company, or

(bb) contemplated in section 77 (3) (a), (b), (c).

[55] Reference in this respect was made to payments to Integrated Premise Solutions and payment for personal expenses of Mr Stevens Snr. Mr Donaldson in his evidence conceded that the payments to IPS Integrated Premise Solutions, was in respect of the R7 million rand that was settled and paid for. Mr Donaldsonadmitted in his evidence that if the personal expenses were debited to the loan accounts, then that would be in order.

[56] Firstly; the second defendant is not implicated under this ground. Secondly; the second defendant became a director of IRT on 6 December 2012 and the conduct complained of occurred before he was appointed as a director.

[57]. Diesel also contends that the second defendant, as a director of IRT, would have been aware of the debt owed to Diesel. On 30 July 2013, whilst the second defendant acted in his capacity as a director, IRT issued a letter to Diesel requesting confirmation of the amount owing by IRT to Diesel. Despite this express acknowledgment of the indebtedness by IRT, IRT under the guidance of its directors and the second defendant failed to make payment to Diesel. In advancing this ongoing denial from December 2012 (after his appointment) to March 2018, Mr Stevens Jnr has traded the business of IRT recklessly; conducted the business of IRT with gross negligence; conducted the business of IRT with the intent to defraud its creditor, Diesel; conducted the business of IRT for fraudulent purposes.

[58] This, in my view, is not the type of conduct envisaged by Section 162 5(aa) or 77 (3) of the Companies Act. Section 77 states as follows:

> *(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having—*
>
> (a) *acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorize the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;*
>
> *(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22 (1);*
>
> *(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose.*

[59] There is no evidence that the second defendant in any way knew or for that matter acquiesced in the conduct of the business of IRT in any manner identified in the Section 77 (3) (a) to (c) of the Companies Act.

PERSONAL LIABILITY

[60] Section 218 of the Companies Act states as follows:

> *"Civil actions.....*
>
> *(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.*

[61] No loss or damage has been proven and there is not sufficient evidence to make such a finding. The defendant's are also liable for the reserved costs of the postponement on 7 March 2018.

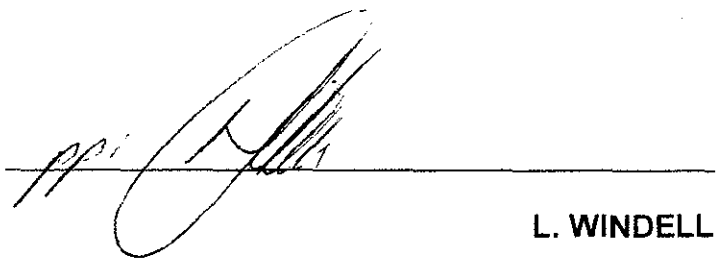
CONCLUSION

[62] Diesel has made out a case in terms of claims 1 and 2 of its particulars of claim.

[63] I am satisfied that the dishonest conduct of the defendants, in general, as well as their obstructive conduct during the trial justifies a punitive costs order being made against both of them

[64] In the result the following order is made:

1. The draft order marked "X" is made an order of court.



L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for plaintiff:	Adv. N Strathern
Instructed by:	Ismail & Dhaya Attorneys
Counsel for respondents:	Adv M. Smit
Instructed by:	Cliffe Dekker Hofmeyer
Date matter heard:	6 -7 March 2018, 26-28 August 2019, 3 September 2019.
Judgment date:	13 December 2019

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

13/12/2019

CASE NUMBER: 2015/15095

ON THIS THE 13th DAY OF DECEMBER 2019
BEFORE THE HONOURABLE JUSTICE WINDELL J

In the matter between: -

ELECTRIC
DIESEL SERVICES (PTY) LTD Plaintiff

and

IRT PROJECTS (PTY) LTD First Defendant
HADLEY DAVIS STEVENS Second Defendant
LINETTE EVELINE STEVENS N.O. Third Defendant
(In her capacity as the duly appointed Executrix
In the Estate of the Late Gladwin Stevens)

DRAFT ORDER

THE COURT GRANTS an order in the following terms:-

1. Rectifying Annexure "C" to read 'IRT PROJECTS (PTY) LTD' whenever the words 'JRT PROJECTS (PTY) LTD' occurs.

2. The first defendant, second and third defendants are ordered to jointly and

severally, the one paying the other being absolved, to make:

2.1 payment in the amount of R12 652 046.40;

2.2 Interest on the above amount at the bankers prime lending rate plus 2%, not compounded with the total interest as at 30 September 2019 being R10,591,425.78;

3. Costs of the action on the attorney and client scale.

4. The defendants shall pay the reserved costs occasioned by the postponement on 7 March 2018.

By the Court

REGISTRAR