REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 47062/2018

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

…….. ……...

Date **ML TWALA**

In the matter between:

NURCHA DEVELOPMENT FINANCE PROPRIETARY) LIMITED **APPLICANT**

AND

MAONO CONSTRUCTION AND PROPERTY DEVELOPMENT (PTY) LTD **FIRST RESPONDENT**

HANTSI BHETILDA MAYEZA **SECOND RESPONDENT**

MAONO HOLDINGS (PTY) LTD **THIRD RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 19th of June 2020.

TWALA J

[1] In this application, the applicant, a financier who advances bridging finance and funding to emerging contractors who have secured contracts with government institutions for the promotion and completion of low-cost housing and infrastructure projects, seeks the following orders against the respondents in its amended notice of motion:

1.1 Granting leave to the applicant to file its supplementary founding affidavit deposed to by Sindisa Adenford Nxusani;

1.2 Granting rectification of the deed of suretyship signed by the second respondent, dated 15 February 2017, alternatively 22 February 2017, and attached to the applicant's main founding affidavit as annexure "SN4,1 in the following manner:

1.2.1 Where the name National Urban Reconstruction and Housing Agency (NPC) (Registration Number: 1995/004248/08) appears it is replaced with Nurcha Development Finance (Proprietary) Limited (Registration Number: 2005/014239/07);

1.3 Granting rectification of the deed of suretyship signed by the third respondent dated the 15 February 2017, alternatively 22 February 2017, and attached to the applicant's main founding affidavit as annexure "SN4.2") in the following manner:

1.3.1 Where the name National Urban Reconstruction and Housing Agency (NPC) (Registration Number: 1995/004248/08) appears

it is replaced with Nurcha Development Finance (Proprietary) Limited (Registration Number: 2005/014239/07)

1.4 Payment in the amount of R1 815 286.02

1.5 Interest thereon from 1 June 2018 at the rate of 10% per annum to date of final payment

1.6 Costs of suit on the attorney and client scale.

[2] The first respondent is a construction and property development company. The second respondent is the sole director of the first respondent. The third respondent is a private and a holding company of the first respondent. In opposition to these proceedings, the respondents filed their answering affidavit and supplementary answering affidavit to the proposed amended notice of motion. However, the second and third respondents intimated at the case management meeting held on the 7th of May 2020 that they are no longer proceeding with their opposition to the applicant's prayers for the rectification of the suretyship agreements concluded and signed by them in favour of the applicant and are leaving the determination thereof in the hands of the Court.

[3] The genesis of this case is the Infrastructure and Community Facility Programme Loan Agreement ("the loan agreement") concluded by the applicant and the first respondent on the 22nd of February 2017 together with the deeds of suretyship signed by the second and third respondents on the 22nd of February 2017 in favour of the applicant. As a term of the agreement, the applicant was given a power of attorney and became the only authorised signatory of an account opened with FNB in the name of the first respondent (the repayment account) wherein the Free State Department of Human Settlement ("the Department") will pay all money due to the first

respondent for work done based on the construction contract between them. Once the payment has been received in the repayment account, the applicant will transfer what is due to it in terms of the loan facility and pay the balance on the account over to the first respondent.

[4] It is common cause that the applicant granted a loan facility to the first respondent in terms of the loan agreement. It is not in dispute that on the 1st of June 2018, when transacting on the repayment account, the applicant, instead of transferring an amount of R1 815 286.02 into its own account, it transferred the said sum of R1 815 286.02 into the account of the first respondent. Furthermore, it is common cause that the respondents have on numerous occasions undertook to pay or refund the applicant the said sum of R1 815 286.02, however to date it has only paid a sum of R300 000 to the applicant leaving a balance of R1 515 286.02.

[5] In seeking rectification of the suretyship agreements, the applicant averred that due to a bona fide mutual error between the parties, the suretyship agreements did not reflect the common intention of the parties correctly in that it erroneously reflects the name of the applicant's holding company as the lender or creditor and not the applicant. Contrary to what appears from the suretyship agreements, it was the common and continuing intention of the parties that the applicant was the creditor or lender.

[6] Although the respondents are no longer actively opposing the rectification relief, it is worth noting their testimony in their answering affidavit. The testimony of the respondents was that, whilst the approval of any loan by the applicant to the first respondent was dependant on the conclusion of the suretyship agreements, the second and third respondents only stood surety for loan amounts advanced to the first respondent in terms of the loan facility agreement concluded between the applicant and the first respondent and not for payments made in error into the account of the first respondent.

[7] It is now settled law that a deed of suretyship which does not comply with the requirements of section 6 of the General Law Amendment Act 50 of 1956 cannot be rectified so as to make it to comply. Section 6 of the Act provides as follows:

> *"No contract of suretyship entered into after the commencement of this Act, should be valid, unless the terms thereof are embodied in the written document signed by or on behalf of the surety……."*

[8] In *Inventive Labour Structuring (Pty) Ltd. V Corfe (31/2005) [2005] ZSCA 139 (18 November 2005)* the Supreme Court of Appeal stated the following:

> *"Para (6) As a general rule the determination of whether rectification of a suretyship should be ordered or not involves a two-stage enquiry. The first is to determine whether the formal requirements contained in s 6 are met. The focal point at this stage is whether the written document, on its face, constitutes a valid contract of suretyship or not. If it does not, the enquiry ends there. If it does, then the enquiry moves to the second leg which focuses on whether a proper case for rectification has been made out. If the answer to the latter question is in the affirmative, an order for rectification must be granted."*

[9] I deem it appropriate at this stage, in order to put matters in the correct perspective, to quote the relevant clauses of the suretyship agreement which read as follows:

> *"1. I, the undersigned, Hantsi Bhetilda Mayeza, identity number: […], a citizen of the Republic of South Africa, warranting that I am married out of community of property, do hereby bind myself to and in favour of National Urban Reconstruction and Housing Agency (NPC),*

(Registration Number 1995/004248/08) (hereinafter referred to as the "Lender"), a non-profit company in accordance with the Company Laws of the Republic of South Africa, and/or to anyone who takes transfer of the Lender's rights under this suretyship, as surety and co-principal debtor for full payment and performance, jointly and severally with Maono Construction and Property Development (Pty) Ltd (Proprietary) Limited, Registration Number: 2007/008767/07 (hereinafter referred to as the ("Borrower"), a private company with limited liability incorporated in accordance with the laws of the Republic of South Africa, for the due payment by the Borrower of all or any moneys which the Borrower may now or from time to time hereafter owe to the Lender arising from, pursuant to or in connection with the loan agreement (as same may be amended from time to time) entered into between the Borrower and Lender on or about 15 February 2017 ("the indebtedness").

2. It is agreed and declared that all admissions or acknowledgements of indebtedness by the borrower or proof of claim against the insolvent estate of the borrower, shall be binding on me."

[10] It is noteworthy that the two deeds of suretyship in this case are similar in form and substance and were signed by the second respondent in her personal capacity and in her capacity as director of the third respondent authorised and empowered thereto by the resolution of the board of directors of the third respondent dated the 15th February 2017. I am therefore satisfied that the requirements in terms s 6 of the Act have been met in that both deeds of suretyship ex facie constitute the agreement between the parties.

[11] Considering the second leg of the inquiry which is whether the applicant has made out a case for rectification of the deeds of suretyship, the applicant testified that it has been sharing the occupation of its premises together with

its holding company and they were using the same staff members. Both the applicant and its holding company were providing the same services as financiers and had develop similar templates with regard to the loan facility agreement and the attended deed of suretyship. In error, the employee who was tasked with the conclusion of the agreement, utilised the deeds of suretyship meant for the holding company instead of that of the applicant.

[12] In *Tamryn Manor (Pty) Ltd v Stand 1192 Johannesburg (Pty) Ltd (785/15) [2016] ZSCA 147 (30 September 2016)* the Supreme Court of Appeal stated the following:

> *"Para 14 On the face of it, there is no dispute that the written agreement clearly identifies who the seller and the purchaser are, as well as what the merx and the agreed price are. These are the essential elements of a valid contract of sale. It is not in dispute that the agreement for the sale of the immovable property was reduced to writing, and duly signed by the parties. Ex facie the written agreement, all the statutory requirements set out in s 2(1) of the Alienation of Land Act have been met. As a result I find that the agreement is formally valid. It follows ineluctably that, having passed this hurdle, this agreement is capable of rectification."*

[13] I am unable to disagree with counsel for the applicant that the respondents only dealt and concluded a facility loan agreement with the applicant and not its holding company. I can find no reason why the respondents would conclude deeds of suretyship in favour of the holding company of the applicant when the loan facility agreement, which makes the granting of the loan facility dependant on the conclusion of the suretyship agreement was concluded with the applicant. Furthermore, I do not understand the respondents to be saying that they did not conclude deeds of suretyship in favour of the applicant but that they concluded these suretyships for loan

amounts advanced by the applicant to the first respondent and not amounts transferred in error as alleged by the applicant. Therefore, the irresistible conclusion is that the applicant succeeded in making out a case for rectification in that the deeds of suretyship are valid agreements and capable of rectification.

[14] I now turn to deal with the application for the monetary claim. The applicant averred in its founding papers that in terms of the loan facility agreement concluded between the parties, the first respondent ceded its rights in and to the repayment account opened in the name of the first respondent to the applicant. Furthermore, the first respondent passed and gave a power of attorney in favour of the applicant to be the sole signatory of the repayment account. It is a further term of the agreement, so it is contended, that all payments due by the first respondent to the applicant in terms of the loan agreement would be fully due and payable and be effected by the Department of Human Settlement Free State ("the Department") on behalf of the first respondent to the applicant directly into the repayment account, within ninety (90) days after each loan advance. Further, so the argument goes, in error, the applicant transferred the impugned sum into the first respondent's operating business account which amount the first respondent was not entitled to nor was there any cause therefore – hence the first respondent was unduly enriched at the expense of the estate of the applicant.

[15] It is further contended by Advocate Larney for the applicant that, although the applicant did not quote any particular clause that was breached by the respondents in terms of the loan agreement, the facts as testified in the founding affidavit clearly prove a breach of the terms of the agreement by the first respondent. The first respondent has acknowledge its indebtedness to the applicant and has already made payment in the sum of R300 000 towards liquidating its indebtedness. However, in terms of the loan

agreement, the first respondent is to pay all amounts due and payable to the applicant within ninety (90) days and the first respondent has for the past two years failed to pay the sum of R1 815 286.02. The second and third respondents, so the argument goes, bound themselves to and in favour of the applicant as surety and co-principal debtors for the full payment and performance, jointly and severally, for the due payment by the first respondent of all or any moneys which the first respondent may now or from time to time hereafter owe to the applicant arising from, pursuant to or in connection with the loan agreement.

[16] The respondents submitted that the first respondent was not unjustifiably enriched by the transfer of the said sum of R1 815 286.02 from one of its bank account to another. The applicant, so the argument goes, was acting in its capacity as the agent of the first respondent when it transferred the impugned amount from the one bank account of the first respondent to another. Put differently, the applicant made an inter-account transfer between the bank accounts of the first respondent. The applicant could, so it is submitted, therefore not have been impoverished for it did not transfer the impugned amount from its own bank account in error into the account of the first respondent thereby enriching the first respondent. The applicant, so it is contended, did not own these funds and therefore could not have been impoverished as these funds belonged to the first respondent being payment from the Department due to the first respondent for services rendered in terms of a construction contract entered into between the first respondent and the Department.

[17] Advocate Peer for the respondents contended further that the definitions of the loan agreement did not give substantive rights to the parties unless there is a clause in the agreement which does give those rights. The applicant was appointed in terms of the power of attorney as an agent to act on behalf of

the first respondent and not as the owner of the repayment account and was therefore, not the owner of the funds paid into the account by the Department. The repayment account was, so the argument goes, created as a mechanism to facilitate payment of the debt due and owing to the applicant but did not transfer ownership of the account to the applicant.

[18] It was further submitted by Advocate Peer that the applicant has failed to quote a provision in the agreement which is alleged to have been breached by the first respondent and therefore the applicant has failed to prove a breach of the agreement by the first respondent. Furthermore, the second and third respondents did not sign the deeds of suretyship to cover all debts that may be incurred in the interactions of the parties but specific debts that may arise in relation to the loan agreement. The applicant avers, so it is argued, that it made payment into the account of the first respondent in error – thus the said error does not arise from the loan agreement and therefore the second and third respondents cannot be held liable for they did not sign surety for such a debt.

[19] To put matters in the correct context, it is salutary to quote the relevant clauses of the loan agreement at this point:

"Clause 1.5

"Ceded Rights" means collectively, the Repayment Accounts Ceded Rights and the Contract Income Ceded rights;

Clause 1.24

"Irrevocable Payment Instruction and undertaking to Pay" means a written, irrevocable, unconditional, valid and binding payment instruction by the Borrower to the Employer and undertaking by the Employer, for the benefit of and in favour of the Lender, in the form of Annexe B to this Agreement or such

other form acceptable to the Lender, pursuant to which the Borrower instructs and the Employer undertakes to pay all Contract Income which may at any time be due and payable by the Employer to the Borrower, into the Repayment Account;

Clause 1.45

"Repayment Account Ceded Rights" means all of the Borrower's rights, title and interest in and to the Repayment Account, whether existing as at the Effective Date or at any time thereafter;

Clause 1.46

"Repayment Account" means the bank account in the Republic of South Africa opened in the name of the Borrower, as set out in clauses 1.5 of the Specific Details Schedule, being Annexe F to this Agreement, being the only account into which all monies due to the Borrower in respect of the Construction Contract and the Approved Project are to be paid;

Clause 12 Payments Generally and Final Repayment

12.1 All payments (including all interest and Fees accrued, including penalty interest, if applicable) by the Borrower to the Lender in terms of this Agreement shall be:

12.1.1 fully due and payable and effected by the Borrower to the Lender, directly into the Repayment Account, within ninety (90) days after each Loan Advance;

12.1.2 ……..

12.1.3 applied to the indebtedness of the Borrower to the Lender and shall be appropriated in the first

instance to the payment of any costs, charges, or expenses or Fees then due and payable, thereafter to interest then due and payable and finally in reduction of the Capital;

Clause 14 Utilisation of any Payment in terms of the Construction Contract

Any payment made by or on behalf of the Employer to the Borrower in term of the Construction Contract (which it is recorded shall be made only into the Repayment Account in terms of the Irrevocable Payment Instruction and Undertaking to Pay) shall be in the following order of preference:

14.1 firstly, to discharge in full any amount due and payable by the Borrower to the Lender in terms of this Agreement in accordance with clause 12.1.3;

14.2 ……..

Clause 16 Ceded Rights

16.1 As security for the due, proper and timeous performance and payment in full of advances made to the Borrower, and all of the Secured Obligations on the terms and conditions set out in this Agreement, the Borrower hereby:

16.1.1 Cedes to the Lender as security for its indebtedness, all of the Ceded Rights as continuing covering security on the terms and conditions set forth hereunder, which cession will remain in force and shall

terminate only upon the unconditional and irrevocable discharge in full of all payments and liabilities due by the borrower and the Secured Obligations owed to the Lender.

16.1.2 ……..”

[20] Pursuant to the conclusion of the loan agreement, the first respondent signed and gave an irrevocable and unconditional power of attorney appointing the applicant as its agent in the following terms:

“1. Appoint Nurcha Development Finance (Proprietary) Limited (“Nurcha”), as our lawful agent in our name, place and stead to sign all documents, effect all transfers of money and do or cause to be done all other things that may be necessary in order to operate in all respects and conduct all transactions pertaining to the following bank account opened in our name:

REPAYMENT ACCOUNT
BANK: FIRST NATIONAL BANK
BRANCH: ROSEBANK
BRANCH CODE: 253305
ACCOUNT NUMBER: […]

2. As fully and effectually, for all intents and purposes, as we might or could do if personally present and acting herein and we hereby agree to ratify, allow and confirm all and whatsoever that my said agent shall lawfully do, or cause to be done by virtue of these presents; and

3. Instruct our said agent to:

3.1 apply all finds from time to time to the credit of the said bank account in extinguishing or if there are insufficient funds to do

so, reducing by the maximum possible amount, any indebtedness which we may at any time have or incur to NURCHA or their respective successors in title."

[21] It is trite law that in interpreting any document, the Court must consider all the facts and the circumstances under which such document came into being or if it's a contract the circumstances under which it was concluded. However, the starting point remains the words used in the document, the background facts and the intention of the parties.

[22] In *Novartis v Maphil [2015] ZASCA 111*, the Supreme Court of Appeal stated the following:

"*[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.*

[28] The passage cited from the judgment of Wallis JA in Endumeni summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paragraphs 10 to 12 and in North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paragraphs 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in Coopers & Lybrand & others v Bryant [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look at surrounding circumstances, Wallis JA said (para 12 of Bothma-Botha):

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and

surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].

[30] Lord Clarke in Rainy Sky in turn referred to a passage in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where

Hoexter JA repeated the dictum of Lord Wright in Hillas & Co Ltd v Arcos Ltd 147 LTR 503 at 514:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

[23] The fundamental question to be determined in this case is whether the applicant is entitled to the funds paid into the repayment account. It is not in dispute that at the conclusion of the loan agreement, the first respondent, in terms of the conditions thereof, gave a power of attorney to the applicant to operate the repayment account. Furthermore, the first respondent gave the employer, which is the Department, an unconditional and irrevocable payment instruction and undertaking to pay all moneys due to it in terms of the construction contract into the repayment account. In a document marked as annexure H to the loan agreement which was an instruction to the bank appointing the applicant as the sole operator and or signatory to the account as empowered by the power of attorney, it was stated at paragraph 3.3.2 that the applicant shall apply all funds standing to the credit of the repayment account to extinguish, or reduce by the maximum possible amount any indebtedness which the first respondent may have or incur to the applicant.

[24] It is noteworthy also that in the irrevocable payment instruction given to the Department, the first respondent acknowledged that it had provided security in terms of which the applicant agreed to advance bridging finance to it and that the instruction to the Department and the bank may only be changed with the written consent of the applicant. Furthermore, the applicant has testified in its founding papers that it would not have advanced the finance to

the first respondent had it not been provided with security as provided for in the agreement which security includes the cession of rights in the repayment account.

[25] I find myself in agreement with the respondents that the definitions in the loan agreement do not on their own create substantive rights between the parties. However, considering the factual background and the wording and context of the loan agreement and all its annexures in this case, I cannot but find that there was a cession of rights of the first respondent to the applicant in terms of clause 16 of the agreement empowering the applicant to be the sole signatory to and operate the repayment account, to apply the funds standing to the credit of the repayment account to extinguish the indebtedness of the first respondent to the applicant or to reduce such indebtedness to a maximum should the funds be insufficient to extinguish the indebtedness. I do not agree that the repayment account was just a mechanism of payment between the parties and no substantive rights may arise therefrom.

[26] According to the language used in the loan agreement and its annexures, which are commercial documents executed by the parties with a clear intention that they should have commercial operation, the common thread in these documents is a clear and unambiguous intention of the parties that the applicant has the sole responsibility to operate the repayment account as security for the amounts loaned or advanced by it to the first respondent. I am therefore unpersuaded by the contention that the applicant was not entitled to the impugned amount as it was in the account of the first respondent and the applicant was only acting in its capacity as an agent of the first respondent. As long as there is an indebtedness in extant by the first respondent in favour of the applicant, in my respectful view, the applicant is entitled to money standing to the credit of the repayment account to the extent of that indebtedness.

[27] In *Absa Bank Limited v Baugarten NO and others [2017] ZAFSH 111 (29 JUNE 2017)* the court stated the following:

> *"It has been established law that four requirements, at the very least, must be met for an enrichment liability to arise. Firstly the defendant must be enriched; secondly the plaintiff must be impoverished; in the third place the defendant must be enriched at the expense of the plaintiff; and lastly, the defendant's enrichment must be unjustified or sine causa."*

[28] It follows that the ineluctable conclusion is that the applicant was entitled to the impugned amount which according to the testimony of the applicant is equal to the amount it advanced to the first respondent. There was no cause for the applicant to make a payment in the said sum of R1 815 286.02 to the first respondent since in terms of the loan agreement there was an indebtedness due to it by the first respondent in the said sum of R1 815 286.02 and it was entitled to appropriate this amount to itself. The applicant or its estate has been impoverished by the transaction whilst the first respondent has been unduly and unjustifiably enriched thereby. The respondent does not dispute that it received the money but alleges that it has been engaging the applicant with regard to arrangements as how it purports to pay back the money and has since paid a sum of R300 000 towards liquidating its indebtedness to the applicant. It is my respectful view therefore that the requirements of the conditio sine causa have been met.

[29] As it appears above, rectification of the deeds of suretyship concluded between the parties has been ordered by this Court. There is no merit in the argument that the second and third respondents did not sign surety for payments made in error but for debts that arose from the loan agreement. Put differently, the second and third respondents are not responsible as sureties

for any other interactions between the parties except for debts that arise from the loan agreement. It was agreed and declared by the parties in paragraph 2 of the deeds of suretyship, which are similar in form and substance that all admissions or acknowledgements of indebtedness by the first respondent shall be binding on the surety. The first respondent has testified that it has been negotiating to pay back the money and has so far paid a sum of R300 000 towards liquidating its indebtedness to the applicant. The irresistible conclusion is that the first respondent has by conduct acknowledged its indebtedness to the applicant and therefore both sureties are jointly and severally liable, the one paying the other to be absolved, to pay the applicant the said sum of R1 815 286.02 with interest minus whatever has been paid by the first respondent towards liquidating its indebtedness to the applicant.

[30] I find it unnecessary to deal with the issue of the alternative claim of the applicant since the determination of the main claim is dispositive of the whole matter. Furthermore, I can find no reason why the costs in this matter should not follow the result in both applications. The scale to be applied has been incorporated and agreed upon in the loan agreement as being between attorney and client and I have no reason to decide otherwise.

[31] For the above reasons, I make the following order:

1. Leave is granted to the applicant to file its supplementary founding affidavit deposed to by Sindisa Adenford Nxusani;

2. Rectification of the deed of suretyship signed by the second respondent, dated 15 February 2017 is granted in the following manner:

2.1 Where the name National Urban Reconstruction and Housing Agency (NPC) (Registration Number: 1995/004248/08) appears it is replaced with Nurcha Development Finance (Proprietary) Limited (Registration Number: 2005/014239/07);

3. Rectification of the deed of suretyship signed the third respondent dated 15 February 2017 is granted in the following manner:

3.1 Where the name National Urban Reconstruction and Housing Agency (NPC) (Registration Number: 1995/004248/08) appears it is replaced with Nurcha Development Finance (Proprietary) Limited (Registration Number: 2005/014239/07)

4. The respondents are to pay the applicant the sum of R1 515 286.02 jointly and severally the one paying the other to be absolved;

5. The respondents are liable to pay the applicant interest on the sum of R1 815 286.02, jointly and severally the one paying the other to be absolved, from 1 June 2018 at the rate of 10% per annum to date of final payment

6. Costs of suit on the attorney and client scale.

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TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **5th June 2020**

Date of Judgment: **19th June 2020**

For the Applicant: **Adv. E Larney**

Instructed by: **DMO Attorneys**
Tel: 011 463 6693

For the Respondents: **Adv. Y Peer**

Instructed by: **Zikhali Inc**
Tel: 010 110 8725