IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 18678/2017

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	YES/NO
2.OF INTEREST TO OTHER JUDGES:	YES/NO
3.REVISED	
.....	.....
DATE	**SIGNATURE**

In the matter between:

NATIONAL EMPOWERMENT FUND TRUST **(Registration number IT 10125/00)**	Plaintiff
and	
MOJAHO TRADING (PTY) LIMITED **(Identity number […]83)**	First Defendant
VINCENT MOKHELE MOKHOLO **(Identity number […]88)**	Second Defendant
ERIC SOBI MOKHOLO **(Identity number […]85)**	Third Defendant

MOGMAD RHAMEES NORDIEN Fourth Defendant

JUDGMENT

DIPPENAAR J:

[1] The plaintiff claims specific performance against the first defendant, the principal debtor and the second to fourth defendants as sureties and co-principal debtors, based on a written agreement of settlement concluded between the plaintiff and first defendant on 25 February 2015 and a written deed of suretyship executed by the second, third and fourth defendants in favour of the plaintiff on 23 and 31 December 2005 respectively. The facts were by and large common cause between the parties.

[2] It was common cause that a loan facility and preference share subscription agreement ("the facility agreements") were concluded between the plaintiff and the first defendant on 23 December 2005 and that the second to fourth defendants concluded the written suretyship relied on by the plaintiff in its terms. The terms of the aforesaid agreements were common cause.

[3] It was common cause that the plaintiff instituted proceedings against the defendants in this court on 8 February 2013 under case number 04890/2013 for payment of amounts of R22 849 606.04 and R4 030 937.48 due under the facility agreements.

[4] It was further common cause that a written settlement agreement was concluded between the plaintiff and first defendant on 25 February 2015. The agreement was

signed by all four the defendants. The relevant portion of the settlement agreement provided:

> *"1 The parties record that this litigation has been settled on the basis recorded in the correspondence exchanged between the parties and annexed as "A, B and C. 2 Consequently the first defendant will make payment to the plaintiff of the sum of an amount of R8 055 431.00 in instalments as follows…"*

[5] It was common cause that in terms of the settlement agreement, the last instalment became due and payable on 31 July 2019. During argument, the defendants conceded that the denial in their plea lacked merit.

[6] It was common cause that pursuant to the conclusion of the settlement agreement, only R650 000.00 was paid by the first defendant, leaving an amount of R7 405 431.00 due and owing to the plaintiff. It was not disputed that the plaintiff was entitled to judgment against the first defendant in that amount.

[7] The only dispute between the parties centered around the liability of the sureties, the second to fourth defendants.

[8] During the course of the trial it became apparent that the defendants did not effect a consequential amendment pursuant to the plaintiff amending its particulars of claim in November 2019, with the result that there were various paragraphs of the amended particulars of claim which were not pleaded to by the defendants. After argument, the defendants were afforded an opportunity to effect a consequential amendment.

[9] The defences to the plaintiff's claim which emerged from the defendants' amended plea can be summarised follows:

[9.1] "*It is noted that the plaintiff's current claim is by virtue of a deed of suretyship. It is denied that the second, third and fourth defendants are jointly and severally bound as sureties in respect of the settlement agreement.*

[9.2] *"The settlement agreement does not refer to the suretyship agreement and the parties did not intend that sureties be bound jointly and severally as sureties in respect of the settlement agreement. The second, third and fourth defendants are not parties to the settlement agreement and are accordingly not bound as such";*

[9.3] The plea further contained a denial that the amount is due.

[10] The conclusion of the suretyship agreement in its terms was not disputed by the defendants.

[11] Two witnesses gave evidence. The second defendant presented evidence on behalf of the defendants. This evidence was related to the conclusion of the settlement agreement. His evidence that the second, third and fourth defendants only signed the settlement agreement as witnesses was unchallenged and was argued as common cause during argument. His evidence that it was the intention of the parties that the settlement agreement was to be concluded only by the first defendant, was not challenged.

[12] The second defendant further testified that he drafted the settlement agreement, which it is undisputed was signed by the plaintiff. His intention was to only bind the first defendant and not the sureties.

[13] Ms Karishma Authar testified on behalf of the plaintiff. She represented the plaintiff at the time of conclusion of the settlement agreement. She testified that the necessary processes pertaining to the release of the second to fourth defendants as sureties under the suretyships were not followed and that there was never any intention to release the suretyships. The sureties were never released under the suretyships. This evidence was accepted by the defendants who admitted this evidence in argument.

[14] The matter is thus to be determined based on the interpretation of the suretyship, the common cause facts and the admitted evidence.

[15] The defendants argued that as the second to fourth defendants were not parties to the settlement agreement, they are not bound to the suretyship as the settlement agreement did not pertain to any indebtedness in relation to the loan agreement.

[16] The plaintiff on the other hand, argued that the second to fourth defendants were liable under the deed of suretyship. Relying on The City of *Tswane Metorpolitan Municipality v Blair Atholl Homeowners Association*[1] *("Blair Atholl")*[2], it further argued that the parol evidence rule applied and that the second defendants' evidence regarding the settlement agreement was inadmissible. The evidence led by the second defendant however provided context to the conclusion of the settlement agreement, and, as such, was admissible.[3]

[17] Plaintiff further argued that in terms of the suretyship, the plaintiff was entitled to compromise its claim against the principal debtor, the first defendant, without compromising its rights against the sureties under the suretyship.

[18] The relevant principles pertaining to the interpretation of documents are trite and have been enunciated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4], They have again been restated in *Blair Atholl*, which emphasised that the parol evidence rule still applied, being that if a document is intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning[5].

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[1] [2018] ZASCA 176 (3 December 2018)
[2] Para 65
[3] Blait Atholl para 66
[4] 2012 (4) Sa 593 (SCA)
[5] Baased n Johnson v Leal 1980 (3) SA 927 (A) 943B

[19] In the interpretation of the suretyship, the point of departure is the language of the document in question[6]. A restrictive consideration of words without context is to be avoided. It is also trite that the distinction between context and background circumstances has been jettisoned.

[20] The relevant provisions of the suretyship are clauses 2.1, 2.3, 2.5 and 3. These clauses provide:

> *"2.1 The sureties hereby jointly and severally bind themselves, with effect from the effective date, s surety and co-principal debtor, with the debtor to the creditor for the due, proper and timeous performance by the debtor of all its obligations to the creditor arising out of or in connection with the loan facility agreement.*
>
> *2.3 The sureties agree and declare that all admissions and acknowledgements of indebtedness by the debtor shall be binding on them, that the creditor shall be at liberty, without affecting its rights hereunder, to release securities or compound or make any other arrangement with the debtor without reference to them, and that in the event of winding up, judicial management or compromise, no such winding up, judicial management or compromise, and no payments which the creditor may receive from the debtor or any other person or persons, company y or companies, or from the sureties shall prejudice the rights of the creditor to recover from the sureties to the full extent of this suretyship any sum which after the receipt of such payment may remain owing by the debtor.*
>
> *2.5 Each of the sureties hereby renounces the benefits arising from the legal exceptions, excussion, division, cession of action, error calculi, non causa debiti, revision of accounts and no value received, with the meaning of which the sureties declare themselves to be fully acquainted, and the sureties hereby agree and declare that this agreement is to be in addition and without prejudice to any other suretyship(s) and security(ies) now or hereafter to be held by the creditor and that it shall remain in force as a continuing covering security notwithstanding any intermediate settlement of account and notwithstanding the winding up or judicial management of the debtor, were any other person/s have bound themselves to the creditor as surety and co principal debtor in solidum for the debtor, the liability of the sureties and all such co- sureties shall be joint and several in all respects."*
>
> *3 No addition to and no variation, modification or consensual cancellation of this agreement and no waiver by the creditor of any of its rights hereunder, shall be of*

[6] Blair Atholl supra para 61 and 63

any force or effect, unless reduced to writing and signed by or on behalf of the creditor".

[21] Clause 2.1 of the suretyship binds the second to fourth defendants to the plaintiff for the due proper and timeous performance by the first defendant of all its obligations *"arising out of or in connection, with the loan facility agreement".*

[22] It is undisputed that the suretyship was concluded to secure the first defendant's indebtedness under the facility agreements. It is also undisputed that the settlement agreement compromised plaintiff's claim pertaining to the facility agreements with the first defendant.

[23] Upon a proper interpretation of the provision, considering the context, I am satisfied that the plaintiff's present claim against the second to fourth defendants falls within the ambit of *"arising out of or in connection with the loan facility agreement",* as defined in clause 2.1 of the suretyship. The interpretation contended for by the defendants lacks merit.

[24] Clause 2.3 of the suretyship entitled the plaintiff to proceed against the sureties, irrespective of any compromise of its claim against the first defendant.

[25] As on the defendants' own version, the second to fourth defendants did not sign the settlement agreement as parties, the plaintiff's claim against them was not compromised. The settlement agreement only determined the amount of the principal indebtedness as far as the sureties are concerned.

[26] It follows that the plaintiff is entitled to judgment for the amount claimed.

[27] The plaintiff and defendants each sought costs orders against each for time wasted during the course of the hearing. On the one hand, the plaintiff claimed the costs of the matter standing down on 4 February for a period of some 1.5 hours. The plaintiff

abandoned the *de bonis propriis* costs order initially sought against the defendants' attorney of record, who represented it at the hearing.

[28] On the other hand, the defendants claimed the costs of the time spent in an argument on a point *in limine* objecting to the defendants presenting evidence at the trial in relation to the settlement agreement. This point *in limine* was determined in favour of the defendants. A commensurate amount of time was spent in relation to each. The parties were in agreement that the trial would endure between 1 and 2 days. The matter was finalised within this time period. It would not be in the interests of justice to grant either of the costs orders sought.

[29] . The normal principle is that costs follow the result. There is no basis to deviate from this principle.

[30] In its summons, the plaintiff did not seek costs on the scale as between attorney and client. This prayer was only included in the draft order which was presented at the end of the hearing and was not raised in argument. No motivation was presented in argument as to why the plaintiff was entitled to the new costs order sought. In the circumstances, it would not be in the interests of justice to grant such a costs order.

[31] The plaintiff sought interest against the defendants from the date on which each instalment was due by the first defendant under the settlement agreement. No evidence was presented that any formal demands were made of any of the defendants once the first defendant failed to pay each of the instalments on due date. The returns of service on the defendants reflecting the date/s of service were not filed of record.

[32] I grant the following order:

[1] Judgment is granted against the first, second, third and fourth defendants, jointly and severally, the one paying, the other to be absolved for:

[1.1] Payment of the amount of R7 405 431.00;

[1.2] Interest on the amount in [1.1] above at the rate of 10% per annum a tempore morae from date of service of the summons to date of payment;

[1.3] Costs of suit.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	03 and 04 February 2020
DATE OF JUDGMENT	:	17 February 2020
PLAINTIFF'S COUNSEL	:	Adv S Hussein-Yousuf
PLAINTIFF'S ATTORNEYS	:	Mothle Jooma Sabdia Inc Mr E Jooma
DEFENDANT'S ATTORNEY	:	Mr Lesomo
DEFENDANT'S ATTORNEYS	:	Seokane Lesomo Inc Mr Lesomo