REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

CASE.NO: 24934/2018

29/5/2019

In the matter of:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Plaintiff**

and

TRAVELCOL (PTY) LIMITED

(Registration Number: 2009/009850/07) **First Defendant**

PAVLOS KYRIACOU

(Identity Number: [….]) **Second Defendant**

THUMOS PROPERTIES (PTY) LIMITED

(Registration Number: 2007/010860/07) **Third Defendant**

JUDGMENT

Bam AJ

1. This is an application for summary judgement, in terms of Uniform rule 32,

a sequel to a summons issued by the Plaintiff on 16 April 2018. For convenience, I refer to the parties as they are in the summons.

Background

2. The Plaintiff sought to recover from the defendants, jointly and severally, the one paying the other to be absolved, various amounts arising out of two lines of credit extended to the first defendant, interest and costs. The costs sought as against first and third defendants is on a scale as between attorney and own client and, against second defendant, party and party.

3. In the first instance, Plaintiff sought to recover an amount of R1 555 667.07 plus interest, labelled Claim A in the particulars of claim, which derives from an 'Overdraft Facility' and governed by the terms and conditions of the Overdraft Facility Agreement. In the second instance, an amount of R3 048 970.39 plus interest, labelled Claim B, which stems from a Medium Term Loan and governed by the terms of the Medium Term Loan Agreement. In respect of both claims, the interest sought to be recovered is fully set out and pleaded accordingly in the particulars of claim[1].

4. As regards second and third defendants, plaintiff's claim rests on individual suretyship agreements, both of which have not been denied, in terms of which second and third defendants individually, together with first defendant bound themselves as surety and co-principal debtor for the payment, when due, of all present and future debts of any kind of the first defendant to the plaintiff. I record for completeness that the plaintiff holds as continuing security for the obligations of the third defendant a mortgage bond, which is fully described in the plaintiff's particulars of claim[2].

5. The Overdraft Facility, Medium Term Loan, the Suretyship Agreements and bond are all annexed to the Plaintiff's particulars of claim.

6. As regards all three defendants, it is a term of the individual agreements

[1] Page 23 paragraph 10.1 of plaintiff s particulars of claim; page 28 paragraph 22.2

that a certificate signed by any of the plaintiff's managers, whose appointment need not be proved, will on its mere production be sufficient proof of any amount due and/ or owing by the first, second or third defendant in terms of the relevant agreement, unless the contrary is proven. The relevant certificates are annexed to the particulars of claim in respect of each claim made and marked accordingly.

7. Following the summons, all three defendants filed notices of intention to defend during April 2018 to which plaintiff responded by lodging the present application for summary judgement. The application was previously set down for hearing during 2018 but for reasons not immediately apparent from the file, the hearing did not proceed. The application was again set down for hearing on 2 May 2019. The Defendants are opposing.

Claim A: Overdraft Facility

8. In view of the defences adumbrated in the defendants' opposing affidavit, a little more needs to be said about each of the agreements on which plaintiff's claim is based. On 10 October 2016, at Pretoria, first defendant, represented by its authorized representative, accepted in writing the terms and conditions of the Overdraft Facility Agreement, marked annexure B. The plaintiff was represented by its employee, namely, Chris Coetzee (Coetzee). In terms of this agreement, Plaintiff extended an overdraft facility of R1 500 000 and from which first defendant began drawing. The relevant material terms of the overdraft facility state:

    1. Clause 3.2.2.3.1 Interest: The rate of interest on the Limit will be charged at Prime plus, 8.35% per annum.

    2. Clause 3.2.2.7 Income and Expenditure: The major portion of your income and expenditure must pass through your Current Account.

    3. Clause 3.2.2.8: The Overdraft facilities are granted to you at our sole discretion. If there is a Material Deterioration in your financial

[2] Page 36 paragraphs 43- **44**

position we may immediately suspend or withdraw, without notice to you all or part of the Limit, or Reduced Limit (if applicable), and all amounts owing will immediately become due and payable to us. Material Deterioration is described in the Terms and conditions of the overdraft facilities as: 'material deterioration in our reasonable opinion'. (clause 1.14[3]) . Clause 10 defines Default to include Material Deterioration.

Claim 8: Medium Term Loan

9. On 23 March 2015 plaintiff and first defendant concluded a written loan agreement (the Medium Term Loan Agreement) in terms of which plaintiff loaned R7 400 000 to the first defendant. Coetzee represented the plaintiff while first defendant was represented by its authorized representative. The relevant material terms of this agreement can be briefly stated as:

   i. Clause 4.1: The variable interest rate is linked to Prime interest rate by a margin of 4.25% above the prime rate and is therefore subject to change[4].
   ii. Clause 14.8: You may not without our prior written consent, which will not be unreasonably withheld:

      - cease carrying on business; and/or
      - sell or otherwise dispose of or attempt to sell or dispose of any of your assets, except in the ordinary course of your business.

Facts giving rise to the present litigation

Overdraft facility

10. Plaintiff was of the reasonable opinion that the first defendant's financial position had materially deteriorated as, during or about December 2016, first defendant sold its business, the Spar retail business, and ceased to carry on business as such. The plaintiff was further of the view that first

[3] page 66 of plaintiff's particulars of claim

defendant had changed the nature of its business without plaintiff's prior written consent. I shall not concern myself with this second ground relied upon by the plaintiff as it is not relevant for the purposes of the overdraft claim. Consequent to the material deterioration, plaintiff suspended the overdraft facility and issued notices[5] calling upon first defendant to pay the full amount outstanding within a period of ten (10) business days.

Medium Term Loan

11. Arising from the sale of the Spar retail business and the first defendant's ceasing to carry on business or its change of the nature of its business, without first seeking plaintiff's written consent, plaintiff concluded that the first defendant had breached the material terms of the Medium Term Loan Agreement. Plaintiff issued a notice calling upon first defendant to pay the outstanding balance within a period of 10 business days..
12. Further notices were issued to the second and third defendants seeking satisfaction of the debt. No payment was made leading to summons and the present application.
13. The following are common cause:

    a. First defendant is bound by the terms of both overdraft facility and the medium term loan agreements;

    b. First defendant is indebted to the Plaintiff in respect of the overdraft facility and medium term loan;

    c. First defendant sold its Spar retail business (Spar) in December 2016 and ceased carrying on business as such, a mere three months after signing the overdraft facility agreement;

    d. First defendant's business account, from which the overdraft was accessed, had not been operated for months after the sale of Spar business; and

    e. second and third defendants are bound by the terms of the individual

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[4] Page 80 of the plaintiff's particulars of claim

suretyship agreements. For convenience, I use defendants when referring to first defendant and where necessary I specify which defendant.

Affidavit Resisting Summary Judgement

14. In its affidavit resisting summary judgement, first defendant raised the following defences:

    i. Point *in limine:* The deponent to the plaintiff's affidavit lacks personal knowledge of the facts.

    ii. Overcharge on fees: In respect of the Overdraft Claim, first defendant avers that it had been overcharged in respect of cash deposit fees.

    iii. Overcharge on interest: As regard the Medium Term Loan, first defendant claims it had obtained an oral undertaking from Coetzee to reduce the interest rate charged on this loan.

    iv. No breach: First defendant denies that there has been material deterioration in its financial position and consequently, the breach. It claims that it has some assets from which it generates business. Lastly, first defendant claims that it has never defaulted on any of its obligations with the plaintiff in respect of either agreement.

    v. Knowledge on the part of the plaintiff and 'implied written consent'; and

    vi. Estoppel

Point *in limine*

15. The first defendant submits that the deponent is not a person who could swear positively to the facts as envisaged in Rule 32 (2) of the rules. They submit that at all material times they dealt with Chris Coetzee and due to

[5] Page 25 paragraph 15 and 16, particulars of claim

the peculiar nature of this case, Coetzee would have been the correct person to depose to the affidavit. They further add that the deponent, Ms Govender, has no personal knowledge *' of the conversations, agreements and imparting of information by the Defendants,.....'* Purely on this ground alone, defendants submit that the summary judgement application must be dismissed with costs.

16. It appeared during counsel's address that this was the high water mark of the first defendant's case. In all circumstances, it would be incorrect then to deal with it tangentially. As a start, the Plaintiff's application is supported by Ms Kasiri Govender, (Govender) and it reads:

> '3. By virtue of my position as a Manager of the Plaintiff I have access to and under my control all the Plaintiff's records, accounts and other documents relevant to the claim forming the subject matter of the action instituted against the Defendants under the above case number. 4. In the ordinary course of my duties as Manager of the Plaintiff and having regard to the Plaintiff's records, accounts and other relevant documents in my possession, and to which I have access to, I acquired direct knowledge of the Defendants' financial standing with the Plaintiff and I can swear positively to the facts and alleged and the amounts claimed in the Plaintiff's particulars of claim. 5. I hereby verify that the Defendants are indebted to the Plaintiff in the amounts set out in the Plaintiff's particulars of claim together with the interest thereon and costs as claimed on the grounds as set out in the Plaintiff's particulars of claim. 6. I refer to the averments in the Plaintiff's particulars of claim and hereby verify and confirm the correctness thereof and the causes of action as well as the amounts and relief claimed. 7. In my opinion the Defendants do not have a bona fide defence to the action and a notice of intention to defend as been delivered solely for the purposes of delay.'

The applicable law

17. In *Firstrand Bank Ltd v Trustees* for the time being Huganel Trust[6] the court reasoned as follows:

> '2. As Corbett JA emphasised in Maharaj, excessive formalism should be eschewed. Hence the substance of the dispute together with the purpose of summary judgment needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary form of relief should be justified.
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> 3. While a measure of commercial pragmatism needs to be taken into account, in that many of these summary judgment applications are brought by large corporations and, accordingly, it may well be that first hand knowledge of every fact cannot and should not be required, each a case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point. For example, in Maharaj's case, Corbett JA found that it was a borderline case but one which fell on the right side of the border in so far as the plaintiff/applicant was concerned. On an evaluation of both the claim and the defence, it could be concluded with justification that the deponent had sufficient knowledge to depose to the affidavit which formed the basis of the factual matrix to sustain an application for summary judgment.... .....'.

In *Gillian Rees v Investec Bank*[7] , it was said:

> '[10] In Barclays National Bank Ltd v Love[8] (quoted with approval in Maharaj at 4248-0) the following is said: 'We are concerned here with an affidavit made by the manager of the very branch of the bank at which

[6] and Others (17121/2011) [2011] ZAWCHC 487; 2012 (3) SA 167 DNCC); (2012] 2 All SA 422 DNCC) (15 November 2011)
[7] Limited (330/13) [2014] ZASCA 38 (28 March 2014)

overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledger or statements of account; indeed, if that. were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment'.

18. I interpose that the deponent's office in this case not only suggests strongly that she would in the ordinary course of her duties acquire personal knowledge of the defendant's financial standing at the bank, she had been copied in the letters sent by the plaintiffs attorneys demanding the outstanding amounts from the defendants. In his response on behalf of all three defendants, second defendant too copied her[9]. She further prepared the certificates of balance annexed to the plaintiffs particulars evidencing the amounts due by first, second and third defendants to the plaintiff[10].

19. More recently, in Stamford Sales & Distribution v Metraclark[11]' where the court was concerned with a claim arising from a cession, it noted:

'[11] The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to justify the grant of summary judgment. Those high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this

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[8] 4 Barclays National Bank Ltd v Love1975 (2) SA at 514 (D) at 516H-517A.
[9] Annexure C4, page78
[10] Annexure D, page 78, Annexure F, page 97
[11] (676/2 01 3) [2014] ZASCA 79 (29 May 2014)

court in Maharaj."

Does Govender have personal knowledge then?

20. Applying the principles drawn from the cases referred to in the preceding paragraphs and factoring in Govender's position and role with the plaintiff as articulated in the affidavit, her active participation in preparing the certificates leading up to litigation and her being privy to the crucial correspondence calling upon the defendants to pay, I am satisfied on the basis of the documents before court that Govender is well placed to depose to the affidavit. Bearing in mind that the deponent need not have been privy to each and every conversation and interaction between the plaintiff and the defendants, the defence raised by the defendants that she has no knowledge *' of the conversations, agreements and imparting of information by the Defendants .. .'* cannot be elevated to a requirement. To do so would go counter to the principles espoused in the decisions already mentioned, in particular those of the SCA, which this court, in any event, cannot do.

21. Having cleared the point *in limine,* it remains for this court to consider the remainder of the defences. I do have to state upfront that upon perusing the remainder of the defences, it was difficult to discern a sustainable and triable defence. The supporting documents which consist of several e-mails, agreements between the second defendant and third parties, and the several excel spreadsheet pages regrettably, did not cure this problem for the defendants.

Claim A: Overdraft Facility. ***Overcharge in respect of cash deposit fees***

22. The defendants deny the amount claimed by the plaintiff in respect of the overdraft. They claim that the plaintiff overcharged the first defendant on cash deposit fees. To this end, defendants provided a single page document marked TRA ONE, being an excel spreadsheet with six columns and TRA TWO, an email, which I will come to shortly. In the excel page,

the defendants list deposits from 1 January 2013 to January 2015, they add a column for fees charged, a further column for the 'Correct Fee' and finally, in the last column, they show what they claim is owed. At the bottom of the spreadsheet, the defendants provide an amount of R358 535 as the amount owed which they seek to deduct from the amount claimed by the plaintiff. TRA TWO is an e- mail dated 22 January 2016 directed to Coetzee by second defendant. He refers the court to line 5 which reads, ***' My cash deposit fees are outstanding after 100s of mails'.*** (emphasis is mine). How this e-mail and the excel spreadsheet entitle first defendant to a claim against the plaintiff is deliberately not explained and so is the basis for the alleged 'correct fee'. The e-mail lists a number of items which second defendant raised then with Coetzee. Its opening line reads: *'Please understand this mail, I don't have* a *problem with you personally, but I do have a HUGE problem with the way I* am *being treated at standard bank.'* The e-mail has no direct bearing to the matter at hand. It also predates the overdraft agreement. While perusing this spreadsheet, one wondered, if the first defendant had a genuine claim against the plaintiff, why would it wait for more than three years - if one has regard to the dates of the first and last deposits- or until plaintiff issues a summons. Counsel for the plaintiff attacked the defence as vague and sketchy and further submitted that if there was a claim, it would have prescribed before the plaintiff's summons. It follows that this is not a valid or *bona fide* defence against plaintiff's overdraft claim.

Claim B: Medium Term Loan: ***Overcharged on interest***

23. The defendants deny the amount claimed by the plaintiff. They claim that the medium term loan was entered into on 23 March 2015 for a restructuring exercise that the first defendant was involved in. They refer the court to a transaction involving an entity known as Sphynx Trading CC and the second defendant and state that the medium term loan was entered into to finance the Sphynx transaction in part. They state that on the day of signing the loan, Coetzee undertook that the interest *' would be*

reduced to prime interest rate the moment the Sphynx Trading CC *transaction and* a *transaction in terms wherein one of the group PT companies bought Cormet Caravans and an income start flowing from these transactions.'* In furtherance of this defence, the defendants direct this court to annexures TRA TWO AND TRA THREE. TRA TWO is the e-mail referred to in paragraph 26 of this judgement and TRA THREE is made up of four pages of excel spreadsheet calculations. Defendants refer the court to line 2 of the e-mail in which the following appears:

> *'We signed the restructure agreement at 14% 'interest, Gina and you committed verbally that this would be rectified after Sphynx and Comet takeover, She said at that stage we can't look at future income, once the income is there we will sort it out. The income has been there since 2015,* 9 *months ago and nothing is sorted out' .*

24. TRA THREE as I have mentioned is the four pages of excel calculations out of which the defendants produce an amount of R806 366 which they claim is the amount by which they were overcharged on interest. It is clear that defendants rely on the five lines set out in paragraph 27 of this judgment as their basis for the claim against the plaintiff. In response, plaintiff's counsel argued that this defence cannot be sustained at trial given the non variation clause carried by the Medium Term Loan adding that the alleged agreement to reduce interest rate flies in the face of such clause. Clause 18.10 reads:

25. 'this agreement constitutes the entire agreement between the parties.... ... except for the changes referred to in clauses 9.4 and 9.5 any agreed changes will be made in writing, signed by both you and us or if the changes are recorded telephonically, we will provide you with written confirmation of the change. We will deliver you a document reflecting the agreed amendment, no later than twenty business days after the date of the agreed change to this agreement.'

26. Counsel for the plaintiff referred this court to Brisley v Drotsky[12] the

[12] 2002 (4) SA 1 (SCA) at par [13]

essence of which is succinctly quoted in ABSA Bank Ltd v Malherbe[13] Quite simply, the non variation clause would be of no value to the creditor, the plaintiff in this case, if defences such as the one raised by the defendants were to be permitted. I find this extract from HNR Properties CC and Another[14] apposite (the agreement involved was one of suretyship and the court was concerned with, *inter alia,* whether an alleged oral or implied release from the suretyship is permissible):

> 'The object of a clause such as the one under consideration is fairly obvious. It protects the creditor. It enables the creditor to determine its rights with reference to the documents in its possession. The creditor does not have to rely on the memory of employees or ex-employees. It protects the creditor against spurious defences and unnecessary litigation.' 'I would add that the need for a provision such as clause 15 is all the greater where the creditor, as in the present case, is a large organisation comprising different divisions and employing a large number of people.'

27. The defence raised by the defendants is not sustainable.

No breach

28. The defendants claim they did not breach the agreement. In support they state that:
    i. They have never defaulted on both agreements;
    ii. They deny that the sale of first defendant's Spar constitutes a material deterioration.; and
    iii. They state that first defendant has assets that it uses to generate income.

29. I deal with the three defences in turn. The first statement is recorded solely to be dismissed. It is irrelevant and amounts to nothing more than a plea

[13] (5077 /2012) (2013] ZAFSHC 78 (16 May 2013) para 28
[14] v Standard Bank of SA Ltd 2004 (4) SA 471 (SCA),at para 15

ad misericordiam[15].

30. On the question of assets that the first defendant has, counsel for the plaintiff called upon this court to dismiss this defence pointing that first defendant has made no attempt to provide any detail to substantiate this claim. One cannot see the difficulty in establishing assets as this is part of the regime of preparing audited financial statements of many large businesses. As such, first defendant should be under no constraint in providing the plaintiff with a set of audited statements to demonstrate the claimed assets. The undisputed facts are:

    i. A mere three months after signing the overdraft agreement, first defendant sold the Spar. The circumstances under which first defendant came to sell its business have not been placed before this court. I add that first defendant is yet to provide evidence that it complied with the terms of the medium term agreement in disposing off the Spar.

    ii. Plaintiffs counsel argued that the Spar was the first defendant's major asset and that the plaintiff was justified in the circumstances in its conclusion that first defendant's financial position had materially deteriorated.

gg) Apart from the claim, first defendan,tin the face of the call made to it, has not seized the opportunity to provide evidence to show that the plaintiffs conclusions are unjustfiied. The sentimentsexpressed in *Joob Joob v Stocks*[16] are helpful in the circumstances of this case:

31. 'In John Wallingford v The Directors & c. of The Mutual Society (1880) 5 AC 685 (HL) at 699- 700, Lord Hatherley referred to the objects of the new English procedure as follows:

    'I apprehend that from the first the objects of these short methods of

[15] Jili v Firstrand Bank Ltd (763/13) (2014] ZASCA 183 (26 November 2014) paragraph 7

> procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an is ue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.'

All three defences must necessarily fail.

Implied written consent

32. To substantiate the 'implied written consent', defendants refer the court to a series of e-mail exchanges marked TRA FOUR. The first is an e-mail of 11 October 2016 from second defendant to Coetzee titled Updated Valuation: P Kyriacou. The body of the e-mail asks Coetzee to confirm. There is no response from Coetzee. Second defendant sends a follow up email to Coetzee in the afternoon of the same day in which he notes: 'Here are the assets for the asset finance. Forced sale value is fine R11m.' There is further reference to an OD. On 28 November 2016, there is a second trail titled, 'Doornpoort Transactions'. In the first e-mail second defendant records something about machines that are not banking and asks Coetzee to advise. On the same day, Coetzee responds stating they

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[16] (161/08) [2009] ZASCA 23 (27 March 2009), paragraph 30

are investigation the matter. The third and last email in TRA FOUR is dated 3 February 2018[17]. The e-mail comes from Coetzee and is directed to a colleague within the bank. It reads:

> *'Hi William My client Paul K... has acquired the shares in Jurgens Cl situated in* G- *Rankuwa and has offered us an opportunity to quote on the short term insurance. The business is substantial and has a stock value of R250m to give you and idea. Please provide available dates to meet with the client so that I can arrange* a *meeting.'*

33. The last e-mail is nothing more than a business lead between colleagues. I state that the e-mail refers second defendant to the colleague and it refers to his acquisition of some stake. All three emails do not in any way deal or refer to the fact that the first defendant sold its Spar in December 2016, nor do these e-mails establish any 'implied written consent' on the part of the plaintiff as first defendant claims. The Medium Term Loan Agreement calls for written consent prior to first defendant changing the nature of its business or ceasing to trade. These documents establish no defence for the first defendant.

Estoppel

34. First defendant contends that based on the email correspondence namely, annexures TRA TWO, FOUR, and SEVEN it is clear that the plaintiff through Coetzee was fully aware of the changes in the business of the first defendant. Then first defendant goes on to state that in the event the email correspondence, referred to throughout this judgement, cannot be construed to evidence 'at least written consent' to the changes in the first defendant's business for the purposes of the medium term loan, then respectfully, the plaintiff is estopped from alleging that it did not consent to the change in the nature of the first defendant's business. In amplification,

[17] page 180 of the bundle of documents

first defendant states for the first time that it utilized the proceeds from the Spar to finance a trans- action it refers to as Jurgens Cl, and it claims that the plaintiff was fully aware. First defendant further notes that since the latter part of 2017 plaintiff was aware of first defendant's intention to open the Campworld store in Nelspruit which did not materialize as plaintiff had blocked first defendant's overdraft account.

35. Having dealt with all the correspondence covered under TRA ONE, TWO, and FOUR and dismissed as irrelevant to the current dispute and not capable of supporting any of the defences raised by first defendant, the only e-mail I have not covered is TRA SEVEN. TRA SEVEN comprises three emails, the first is dated 20 October 2017 from Coetzee to second defendant, the second, 21 October 2017, from second defendant to Coetzee, and the final one, 16 January 2018 from second defendant to Coetzee. The first email reads:

> *'Hi Paul, As mentioned we are unable to process the application until the Travel- col outstanding debt has been repaid. You mentioned that you are in the process of buying a new business which will trade under TravelCol. Please provide details.'*

In the second e-mail second defendant replies:

> 'Hi Chris, Nelspruit Campworld will start trading in Travelcol. We are aiming for 1 November 2017'.

> The final email from second defendant to Coetzee reads: 'We wanted to start on the Travelcol account but I see its (sic) blocked?'

36. With these e-mails first defendant seeks to establish a position that plaintiff had rep- resented that it approved of the sale of the Spar and or first defendant's change of the nature of its business; and, that plaintiff would

not rely thereon to claim the full outstanding balance. One need only have reference to the dates of these e-mails and the defence fails. The Spar was sold in December 2016 and these emails are exchanged almost a year later.

37. The tone of the e-mail from Coetzee makes it quite clear that the plaintiff is anxiously calling upon first defendant to pay full the monies owed under the facility. This e-mail from Coetzee of 20 October is not capable of being construed in any other manner, much less a construction that amounts to an 'implied written consent' or prior knowledge or a position or conduct that plaintiff would not rely on it for breach. Nonetheless and for good measure, the position as regards estoppel by conduct is provided in this dictum in Absa Bank ltd v Knysna Auto Services CC[18], where the SCA noted:

> '[18] As regards estoppel by conduct, in Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter.... .. .it was held that: 'Our law is that a person may be bound by a representation constituted by conduct if the representer should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so. . . Nevertheless if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chose to rely on one of the possible meanings without making further enquiries to clarify the position.' (citation excluded)

38. Counsel for the plaintiff submitted that this defence should fail for two reasons. They are: First, referring to Coetzee's email in which he unambiguously indicates that the first defendant's debt with the plaintiff had to be repaid, counsel submitted that this e-mail can never be reasonably construed as prior written consent to the sale of the Spar or the change in the first defendant's business. Second, he submit- ted that the defendant seeks to establish that it failed to act to its detriment by not at-

[18] **(266/15) [2016] ZASCA 93 (1 June 2016)**

> tempting to change or re-arrange its bank affairs, yet this is exactly what first defend- ant attempted to do with the Campworld transaction, which failed because by then, the plaintiff had blocked its account for want of payment of all monies outstanding.

Counsel submitted that first defendant has failed to establish the requirements to succeed with a defence of estoppel. Counsel further referred to HNR Properties CC and Another v Standard Bank[19] where the court pronounced:

> 'It is therefore not permissible to import into the writing, whether by reference to back- ground or surrounding circumstances or any other source, an intention to release which is otherwise not ascertainable from the actual language of the document relied upon. If the position were otherwise the very object of the requirement of writing would be frustrated.'

39. The defence of estoppel fails.
40. The first defendant alleges that since October 2016 the plaintiff was aware of the sale and, since 2017 the plaintiff was aware of first defendant's intention to open up the Campworld Store in Nelspruit, which did not materialize as the first defendant's account was blocked by the plaintiff. Only now, 17 months after the sale of the Spar does the plaintiff raise the alleged breach of contract. These statements were met with a riposte from the Plaintiff's counsel. In the first instance, counsel referred to Clause 14.9 of the Overdraft agreement, which states:

> > 'Any concessions we may give you will not be seen as a waiver of any of our rights under this Overdraft Agreement or in a any way affect any of our rights against you.'

41. Counsel further referred to Clause 18.8 of the Medium Term Loan:

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[19] A

'To the maximum extent permitted by law, any special consideration we may give you will not be seen as a waiver of any of our rights under this Agreement or in any way affect any of our rights against you.'

42. He concluded that the knowledge of the sale of the Spar does not imply any form of waiver. That is indeed the correct position our law, regard being heard to *inter alia,* NHR above.

Liability of second and third defendants

43. One last issue remains and that is the liability of the second and third defendants. Second and third defendants are bound by the individual suretyship agreements which, as I mentioned earlier, have not been denied. The two are bound by the liquid documents as per annexes D and F[20]. Thus, second and third defendants are liable to the plaintiff as aforementioned[21].

44. Regarding the issue of costs, first and third defendants are liable for costs on the scale as between attorney and own client in terms of:
Clauses 10.2 of the Medium Term Loan Agreement[22]; and

Clause 1.1.3 of the mortgage bond[23].

CONCLUSION

45. In all the circumstances the defendants have made out no defence to the plaintiff's claims. They have set out no facts upon which I could exercise a discretion in their favour. On all the information before the Court, the plaintiff is entitled to its summary judgment. It is ordered that summary judgment in favour of the applicant/ plaintiff be granted against the defendants jointly and severally, the one paying the other to be absolved, as follows:

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[20] pages 79 and 97 of the particulars of claim
[21] paragraph 4 page 3 of this judgement
[22] page 94

a. Payment of the amount of R1 555 667.07 (One million Five Hundred and Fifty Five Thousand Six Hundred and Sixty Seven Rand and Seven Cents).

b. Payment of interest on the amount of R1 555 667.07 from 26 March 2018 to date of full payment, both days inclusive at the prime rate from time to time, being 10% (Ten Point Zero Zero Percent) at 28 March 2018, plus a margin of 8.35% (Eight Point Three Five Percent) ie, 18.35 (Eighteen Point Three Five Percent) per annum, which interest is calculated daily and compounded in arrears.

c. Payment of the amount of R 3 048 970.39 (Three Million Forty Eight Thousand Nine Hundred and Seventy Rand and Thirty Nice Cents).

d. Payment of interest on the amount' of R3 048 970.39 from 26 March 2018 to date of payment, both days inclusive at the prime rate from time to time, being 10% (Ten Point Zero Zero Percent) at 26 March 2018, plus a margin of 4.25% (Four Point Two Five) ie, 14.25 (Fourteen Point Two Five Percent) per annum, which interest is calculated daily and compounded monthly in arrears.

e. Payment of costs by the first and third defendants on a scale as between attorney own client, which costs include the employment of two counsel.

f. As against second defendant, costs of suit, including the costs attendant to the employment of two counsel.

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NN BAM

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

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APPEARANCES

DATE OF HEARING:	**:2 May 2019**
DATE OF JUDGMENT:	**:29 May 2019**
PLAINTIFF'S COUNSEL:	**:Adv S SYMON SC** **:Adv E FURSTENBURG**
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DEFENDANTS' COUNSEL:	**:Adv AJ LOUW SC**
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