IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE

CASE NO: 22698/2009

In the matter between:

STRUCTURED MEZZANINE INVESTMENTS (PTY) LIMITED (Registration No: 2007/006512/07)	Applicant
and	
BESTVEST 153 (PTY) LTD (Registration No: 2006/006029/07)	First Respondent
ADAM ESSA (Identity No: 641203 5226 084)	Second Respondent
SHAIK COE (Identity No: 650419 5199 083)	Third Respondent
COESSA HOLDINGS (PTY) LTD (Registration No: 2002/024551/07)	Fourth Respondent

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JUDGMENT AS CORRECTED IN TERMS OF RULE 42(1)(b) AND DELIVERED ON THURSDAY 31 JANUARY 2013

GAMBLE, J:

INTRODUCTION

[1] On 12 June 2012 judgment was handed down in an application for the liquidation of the First Respondent herein, Bestvest 153 (Pty) Ltd ("Bestvest") by Nedbank Limited, and a counter-application by the directors of Bestvest for the company to be placed under business rescue. That judgment has now been reported: See 2012 (5) SA 497 (WCC).

[2] The material facts and circumstances relevant to those cases (many of which are applicable in this matter) are set out in the reported judgment and will not be repeated herein. In paragraphs 11 to 13 of the Bestvest judgment reference is made to the so-called "*SMI payment application*" in which the Applicant herein ("SMI") sought (under case no. 22698/09) payment to it of the sum of R8 317 827,04, together with interest at the rate of 1,5% per week calculated daily from 11 July 2009 to date of payment.

[3] In the Bestvest judgment I indicated that the judgment in the payment application would be delivered in due course. That judgment now follows.

[4] In arguing the payment application Mr. Pretorius, for SMI, focused on the liability of Messrs. Essa and Coe and Coessa (Pty) Ltd ("Coessa") to SMI under a written deed of suretyship given by them to SMI in July 2008 for the obligations of Bestvest to SMI. Since Bestvest has now being finally wound up its liability to SMI is to be determined as part of the winding-up process. That state of affairs does not affect the liability of the three sureties as co-principal debtors with Bestvest to SMI.

THE SURETYSHIP

[5] On 1 July 2008 Essa, Coe and Coessa executed a deed of suretyship in favour of SMI. The document in question is a detailed one running to ten pages. It is signed by Essa and Coe in their personal capacities and by Essa on behalf of Coessa.

[6] Execution of the deed of suretyship is foreshadowed in clause 3.1.2 of the mezzanine finance loan granted by SMI to Bestvest, and in clause 4.1 of that loan, signature of the suretyship was agreed as a suspensive condition for the loan. The mezzanine loan agreement was also signed on 1 July 2008 by Essa on behalf of Bestvest. It is common cause that the mezzanine loan was repayable by 11 July 2009, and it is further not in dispute that Bestvest failed to fulfill its obligations to SMI in this regard.

THE ISSUES

[7] The execution of the suretyships *per se* was not disputed, nor were any of the terms thereof placed in issue. Rather, Mr. Möller for the sureties, resisted judgment against his clients on a number of limited, collateral issues. These can loosely be classified as follows:

7.1 The existence of a factual dispute in regard to the extent of Bestvest's indebtedness to SMI. It was alleged that in the light of the fact that this dispute cannot be resolved on the papers, that SMI cannot succeed. There was no request that

the disputed facts be referred to oral evidence. Rather, it was said that the payment application should fail.

7.2 Next, there was resort to the provisions of the National Credit Act, No. 34 of 2005 ("the NCA"), which it was alleged was applicable to the suretyship and had not been complied with prior to the institution of this application.

7.3 Finally, Bestvest claimed that SMI had breached the mezzanine agreement by failing to advance funds to Bestvest when same were due, thereby effectively torpedoing the development.

DISPUTE OF FACT REGARDING THE QUANTUM OF SMI'S CLAIM?

[8] Mr. Möller argued with some apparent conviction that there was a genuine dispute about the extent of the loan granted by SMI to Bestvest. In the founding affidavit of the payment application Mr. Du Plessis, a director of SMI, gives the following details of advances made to Bestvest under the mezzanine loan:

8.1	11 July 2008	-	R2 809 944,00
8.2	21 August 2008	-	R1 262 596,33
8.3	7 October 2008	-	R 881 779,61
8.4	24 October 2008	-	R 153 160,01
8.5	11 November 2008	-	R 98 515,02
			R5 205 994,97

[9] In the answering affidavit Coe says that SMI only advanced the sum of R5 080 594,93 to Bestvest and refers to certain payment certificates and confirmation documents furnished by Investec Bank in respect of electronic funds transfers to Bestvest, all of which are annexed to his affidavit in support of the allegation. The effect of this amount of R2 684 544,00 in respect of the amount referred to in sub-para 8.1 above is admitted. The shortfall is the amount of R125 400,04.

[10] In the replying affidavit Du Plessis repeated the allegations made in the founding affidavit and SMI persisted in its contention that the sum of R5 205 994,97 had been advanced to SMI. Du Plessis also confirmed (in a certificate issued in terms of clause 14.2 of the deed of suretyship) that the sum of R8 317 827,04 was due to it by Bestvest as at 11 July 2009. As I have said, this is the amount claimed in the notice of motion in the payment application. The difference between the amount reflected in the certificate and the amount advanced to Bestvest (as per para 8.1 to 8.5 above) was obviously interest, suggested Mr. Pretorius in argument.

[11] Counsel's assertion is no doubt the most likely one in light of the fact that the parties had agreed that the capital would carry interest at the rate of 1,25% per week (i.e. 65% per annum) with effect from 11 July 2008. Indeed, in paragraph 44 of the answering affidavit Coe disputes the accuracy of the certificate in the following terms:

> *"The Applicant [SMI] does not show how the interest claimed in the certificate has been calculated. The allegations in this paragraph are accordingly denied in toto."*

[12] The calculation of interest in respect of the mezzanine loan is not a straight forward exercise. Since the capital was being advanced in tranches, each amount so advanced would attract interest at the agreed weekly rate from the date of each advance. It is not a question of simply taking the capital and calculating interest thereon for a period of 52 weeks.

[13] As the parties agreed, the certificate attached by Du Plessis would constitute *prima facie* proof of the indebtedness of Bestvest to SMI. One would ordinarily be entitled to assume that aparty furnishing such a certificate had either made the calculation personally, or perhaps requested an employee of the money lending company to do so.

[14] Theproblem in the present case, however, is that whatever calculation Du Plessis caused to be made in respect of the interest component of the debt due by Bestvest, it was clearly based on the capital sum which he claimed had been advanced (R5 205 994,97), whereas Coe claimed that only R5 080 594,93 had been advanced.

[15] The documents attached by Coe to the answering affidavit clearly support his contention as to the sum of the various tranches making up the total capital advanced. In argument Mr. Pretorius then sought to explain the difference of R125 400,04 with reference to certain agreed additional charges that were payable under the mezzanine loan. These included:

15.1 legal costs in the sum of R10 000,00 plus VAT incurred in the registration of the agreement (clause 11.1);

15.2 bond registration costs in respect of the mortgage bond which was to secure the loan (clause 11.2);

15.3 an administration fee of 1% plus VAT of the loan amount in connection with the negotiation and preparation of the loan (clause 11.3); and

15.4 a project management fee payable in respect of SMI's quantity surveyor on the project in the sum of R45 000,00 plus VAT (clause 11.4).

[16] Mr. Pretorius then set about demonstrating the total of these individual items by way of simple arithmetic calculation. The sum of para's 15.1 above (R11 400,00), 15.3 (R74 100,00) and 15.4 (R51 300,00) was said to be R136 800,00. No figure was suggested for the bond registration costs (para 15.2 above) but Mr. Pretorius argued that on the other three figures alone the difference between SMI's allegation and Bestvest admission (R125 400,04) had been established. The Court was therefore invited to accept Du Plessis's allegations as regards the amount of the loan as being correct.

[17] I regret to say that the matter is not as simple as all that. The method of calculation of the weekly interest payable on the mezzanine loan is a complex one, with individual calculations required to be made on each advance, disbursement or other payment made by SMI.

[18] Insofar as Du Plessis's certificate only constitute *prima facie* proof of Bestvest's indebtedness to SMI, I am satisfied that the sureties have set out sufficient evidence to challenge the conclusiveness thereof. However, all that this does is to place the amount R125 400,04 of SMI's claim in issue. The balance is common cause by virtue of the admissions contained in Coe's affidavit.

[19] At the conclusion of his argument in reply Mr. Pretorius, wisely in my view, sought judgment only in respect of the undisputed capital sum together with interest to be calculated in accordance with the agreed formula. A draft order (with explanatory notes) was subsequently furnished to the Court. This approach removes the disputed evidence regarding the quantum from the equation and resolves the problem as to how that dispute is to be approached.

THE NCA ARGUMENT

[20] Mr. Möller argued that the NCA was applicable to the suretyships and since SMI was not registered as a credit provider under that Act, he contended that Section 40(1) read with Section 89(2)(d) of the NCA rendered the suretyships unenforceable.

[21] Mr. Pretorius pointed out that in the Respondents' heads of argument Mr. Möller had conceded that the NCA was not applicable to the mezzanine agreement. This was ultimately confirmed by Mr. Möller in argument. The issue then was a fairly crisp point – can an accessorial obligation under a suretyshhip be subject to the NCA when the principal obligation under the main agreement is not?

[22] I point out that in respect of the mezzanine loan in question, it was common cause that the loan was not subject to the NCA because the principal debtor (Bestvest) was a juristic person whose annual turnover, or asset value, at the time of conclusion of the loan exceeded R1m. Further, it was accepted that the mezzanine loan constituted a *"large agreement"* as contemplated in Section 4(1)(b) of the NCA.

[23] The point was dealt with in some detailby Satchwell J inCarl Beck Estates[1]. The nub of the learned Judge's reasoning is to be found in para 21 of oher judgment.[2]

> *"[21] The second respondent signed as surety and co-principal debtor. The right enforceable by applicant against second respondent arises from the contract of suretyship. The contract between applicant and second respondent is separate and distinct from the bond agreement between applicant and first respondent, although it is accessory to it. The second respondent is not a consumer and did not receive credit. He is a guarantor of a consumer's contractual*

[1] Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another 2009 (3) SA 384 (T) 2009 (3) SA 384 (T)
[2] P390H

relationship with the applicant remains ancillary to the main agreement between the applicant and the first respondent.

[22] The authorities on this point are clear. A surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship. Signing as surety and co-principal debtor does not render a surety liable in any capacity other than a surety who has renounced the benefits of excussion and division (Maasdorp v Graaff-Reinet Board of Executors(1906-1909) 3 Buch AC 482 at 490; Du Plessis v Estate Teich Brothers 1914 CPD 48 at 50; Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) at 471). As De Villiers CJ stated, 'the use of the words' 'co-principal debtor' does not transform the contract into any other than suretyship (Maasdorp's case supra at p490).

[23] Second respondent could not be and was not sued in his capacity as co-principal debtor, since his liability to the bank remains that of surety who has renounced certain benefits. This position is correctly referred to by the applicant in its summons.

[24] In the result, the second respondent is sued as a guarantor to the obligations of the first respondent in terms of a credit transaction to which the NCA does not apply."

[24] Carl Beck Estates was followed in Nedbank Limited v Wizard Holdings (Pty) Ltd[3]. In this Division Yekiso J came to a similar conclusion in another matter

[3]2010 (5) SA 523 (GSJ) See also Slip Knot Investments 777 (Pty) Ltd v Project Law Prop (Pty) Ltd [2011]

involving SMI [4] without reference to Carl Beck Estates. In Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd[5] the Supreme Court of Appeal did not question the common cause proposition by the parties in that case that –

> *"..because the NCA did not apply to the loan agreements by virtue of s4(2)(c) and s8(5), it did not apply to the respondents' accessory obligations (guarantees) under those agreements either."*

[25] In Project Law Prop[6] Willis J remarked as follows in regard to a similar matter involving mezzanine finance[7]:

> *"..(It) is trite that sureties are promissores subsidiarii, that their obligations are accessory to that of the principal debtor. In that judgment [8] I observed that this entails, inter alia, that a surety has the same defences in rem as the principal debtor. I repeat my summary that, in plain English, the Latin expressions in this paragraph mean that sureties have the same substantive defences as are available to the principal debtor, no more and no less. Accordingly, I agree with Satchwell J."*

[26] In the Davids matter before Yekiso J (a case in which Mr. Pretorius also appeared for SMI in an unopposed application for payment under similar suretyships)

ZAGPJHC 21 (1 April 2011)

[4] Structured Mezzanine Investments v Davids and Others 2010 (6) SA 622 (WCC)

[5] 2011 (1) SA 575 (SCA)

[6] (See para 10)

[7] Mr. Pretorius informed the Court from the Bar that Slip Knot was a sister company of SMI.

[8] The learned Judge was referring to his earlier decision in Stocker and Another v The Workforce Group (Pty) Ltd [2010] ZAGPJHC 111 (17 November 2010)

the learned Judge approached the issue as follows in regard to the applicability of the NCA[9]:

> *"[15] The respondents, by virtue of the suretyship agreements signed by each of them, are guarantors to the loan granted by Zapton by the applicant. Since the provisions of the National Credit Act do not apply to the principal debtor, Zapton, equally, such provisions do not apply to the respondents, as guarantors, by virtue of the provisions of s4(2)(c) of the National Credit Act, which provides:*
>
> > *'(c) This Act applies to the credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.'*
>
> *[16] The suretyship agreements signed by each of the respondents constitute a credit guarantee as contemplated in s8(5) of the National Credit Act, which provides:*
>
> > *'(5) An agreement, irrespective of its form but not including an agreement contemplated in sub-section (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy on demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.'*

[9]See p628

> *Thus, since the provisions of the National Credit Act do not apply to the principal debtor, Zapton, such provisions, equally do not apply to the respondents. This is so because of the principal debtor, in the instance of this matter, being a juristic person, as contemplated in the definition of the terms "juristic person" in s1, and the loan agreement in question being a large loan agreement, as contemplated in s9(4) of the National Credit Act. Clearly, therefore, the provisions relating to the prescribed maximum interest rates, as provided for in the National Credit Act,do not apply to Zapton and the respondents."*

[27] Mr. Möller appeared quite unteterred by this welter of authority, and advanced an argument to the following effect. A credit guarantee as contemplated in section 8(5) of the NCA does not encompass a suretyship. This was said to be, firstly, because the legislature did not intend to include such a well-known instrument in modern commercial life as a suretyship under the definition of "*credit guarantee*". Given that the execution of a deed of suretyship is statutorily prescribed by the General Law Amendment Act 50 of 1956, it was argued that such exclusion from the definition of a "*credit guarantee*" was intentional and designed to afford NCA protection to sureties. The reason for this, so the argument went, is because in terms of sections 4(2)(c), the NCA is only applicable to credit guarantees in circumstances where they are issued under credit facilities or credit transcations, which in turn are subject to the NCA.

[28] Mr. Möller argued that a surety is not liable to the creditor in the same manner as a guarantor is, and referred to, *inter alia*, the 5th edition of Caney[10] and a journal article by Professor Lubbe[11] as support for the contention that the undertaking by a surety is accessorial to a principal contract and in giving such an undertaking the surety does not disturb the liability of the principal debtor under the main agreement. It was said further that the undertaking by a surety is that the obligation by the principal debtor will be discharged, and in the event that it is not discharged, the creditor will be indemnified.

[29] Counsel then sought to construe a credit guarantee as a different type of contract in which the primary obligation to pay the debt of another is undertaken by the credit guarantor to effect payment on demand by the creditor and not upon breach by the debtor.

[30] On 23 May 2012 Binns-Ward J delivered a thoroughly reasoned judgment in response to the very same argument advanced before him by Mr. Möller. That matter involved suretyships executed by, *inter alia*, Messrs. Essa and Coe in favour of Standard Bank for the indebtedness of Xaler Construction Company (Pty) Limited – one of the companies involved in the construction of the development to which this matter relates.[12]

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[10] Caney's The Law of Suretyship (5th ed)

[11] G.F. Lubbe, Die Onderskeid tussen Borgtog en Ander Vorme van Persoonlike Sekerheidstelling (1984) 47 THRHR 383 at 385-6

[12] See Standard Bank of SA Ltd v Adam Essa and 2 Others, case no. 18994/2009 delivered in the Western Cape High Court on 23 May 2012.

[31] Argument in this matter concluded on 11 April 2012, judgment in the winding-up was delivered on 12 June 2012 and counsel for all three parties appeared before me again in August 2012 when an application for leave to appeal in the Bestvest liquidation was heard and refused. And yet, Mr. Möller did not alert the Court at any stage to the fact that the same point fell to be determined in the Xaler matter, nor did counsel subsequently inform this Court of the judgment of Binns-Ward J in the Standard Bankmatter, or the dismissal of an application for leave to appeal delivered by Binns-Ward J on 14 June 2012. Mr. Möller's failure to do what was reasonably expected of him is no doubt attributable to the fact that Binns-Ward J did not uphold the surety's argument in that matter. Nevertheless he was duty-bound to inform this Court thereof and his failure to do so is deprecated.

[32] I find the reasoning of Binns-Ward J in the Standard Bank matter persuasive [13]. The following passages in his judgment provide a useful summary for his rejection of Mr. Möller's argument:

> *"[16] Despite the fact that it has been accepted in numerous judgments – including at least one of the Supreme Court of Appeal – that contracts of suretyship to which the NCA doesapply qualify as 'credit guarantees' within the meaning of s8(5) of the NCA, counsel for the defendants maintained doggedly that they were not. He did this in order to avoid the consequences of s4(1) read with s9(4) of the Act, alternatively, of s4(2)(c) thereof. But needing for the*

[13] See in particular paras 13-17 of the judgment.

purpose of his argument to keep the suretyships as credit agreements within the scope of the Act, he therefore sought to bring them within the categories of credit facilities or credit transactions in terms of s8(3) or 8(4)f of the Act. There is no merit in these arguments.

[17]…As pointed out by counsel for the plaintiff, apart from any other consideration there is nothing about the nature of suretyship in general, or the deeds of suretyship executed by the defendants in particular, which provides for a ***deferment*** *in respect of the sureties' obligation to pay as is required by s8(3)(a)(ii)(aa) or s8(4)(f) of the Act, and which thus has to be manifest as a term of the agreements, if the defendants' counsel's argument were to hold good. Accordingly, even if one were to assume – against the weight of authority – in favour of the defendants' counsel's argument that the contract of suretyship does not in any circumstances qualify for categorization as a 'credit guarantee' in terms of s8(5) of the NCA, the result would be that as it also did not qualify as a 'credit facility' or a 'credit transaction', a contract of suretyship would not fall within the ambit of the Act as a credit agreement under any circumstances. The result on that approach – to which I should make it clear I am unable to subscribe – would fatally undermine the achievement by defendants' counsel of his ultimate objective, which was to seek to demonstrate that the suretyship agreements entered into by the defendants were void for non-compliance by the plaintiff with the requirements of s92(2) of the NCA. Section 92(2) is of application only to contracts which fall within the ambit of the Act."*

[33] In light of the various authorities to which I have referred above, and which I embrace, I am satisfied that there is no merit in the argument on the NCA point advanced in this matter by the sureties.

SMI'S ALLEGED BREACH OF THE MEZZANINE LOAN

[34] The sureties alleged that SMI had failed to fulfill its obligations under the mezzanine loan by refusing to advance to Bestvest the full amount thereof. This failure, it was said, constituted a breach of that loan and it was contended that the sureties were therefore not liable to SMI.

[35] It is common cause that SMI did not advance the full amount of the loan (R6.5m) to, or on behalf of, Bestvest. SMI alleges, as I have shown above, that the total of the advance was R5 205 994,97, while the sureties say that it is only R5 080 594,93. The difference of R125 400,04 is of no consequence on this leg of the Respondents' argument, which is based on a legal issue arising from certain of the provisions of the mezzanine agreement.

[36] Clause 5 of the agreement relates to the amounts to be advanced by SMI. The material sub-paragraphs read as follows:

> *"5.1 The loan amount is to be advanced as set out hereunder:*
>
> *5.1.1 the amounts due by the Borrower as set out in clause 11 of this Agreement are to be paid by SMI for and on*

behalf of the Borrower on the signature date. It being acknowledged by the Borrower that the amounts as set out in clause 11 are paid by SMI for and on behalf of the Borrower and at the Borrower's special instance and request;

5.1.2 *the balance of the loan amount (being the loan amount less the payments in terms of 5.1.1) or a portion thereof, may be advanced by SMI to the Borrower prior to the payment date, provided that in respect of any advance as contemplated in clause 5.1.2, the Borrower furnishes SMI with written notification, acceptable to SMI, which written notification shall deal with/contain at least the following:*

- *a breakdown in respect of the amount being requested;*
- *the purpose for which the amount is requested;*
- *the date by when same is required;*
- *confirmation that all pre-disbursement conditions as required by SMI and as contained in the approval of the development bond by Imperial Bank (dated 7 March 2008*

and annexed hereto, marked "B") have been met (including pre-sales requirements of not less than a net amount of R22m); and

- *any other information which SMI may require.*

5.2 It is agreed that the determination of as to whether the notification referred to in 5.1.2 is acceptable shall be a subjective decision, and shall be made solely by SMI, and maybe subject to certain amendments being made to the agreement at the instance of SMI. Such decision shall not be capable of being challenged.

5.3 For the avoidance of any doubt it is specifically recorded that should SMI not be satisfied with the information as provided in 5.1.2 or should the agreement not be amended in accordance with SMI's requirements, then in such event there shall be no obligation on SMI to advance the loan amount, or any part thereof."

[37] In the answering affidavit Coe makes the following generalized allegations in relation to SMI's breach:

"[26] Insofar as the Applicant may seek to rely on its sole discretion (as set out in clause 5.2 of the loan agreement),

to justify the refusal of its payment; it is respectfully submitted that the Applicant is not entitled to express such an election within impunity given the facts and circumstances whereunder the agreement had been concluded, upon a proper interpretation of the agreement.

[27] When a contract provides for the exercise of a unilateral discretion in order to determine the performance of an obligation by or against a party, such discretion must be exercised arbitrio bono viri.

[28] I submit that having regard to the context of the agreement and the knowledge of the Applicant and the First Respondent upon the conclusion thereof, the Applicant is in law not entitled to act unreasonably and/or with wanton disregard for the interests of the First Respondent.

[29] I respectfully submit that the discretion exercised by the Applicant, if that is its approach, constitutes a breach of the agreement in the sense that the Applicant acted unreasonably. By reason of the aforegoing, the exercise of the discretion by the Applicant in terms of clause 5 constitutes a breach of the legal duty to act reasonably with the judgment of a good man.

[30] In any event further, the decision to withhold the balance of the loan constituted a material breach that had (sic) resulted in the First Respondent suffering damages in an amount that is escalating on a daily basis.

30.1 As set out herein above, the crucial phase for the development of this project was during July 2008 to July 2009, during which the level of pre-sales had to be achieved in order to facilitate the Imperial Bank funding as more fully set out herein above.

30.2 The total project value amounts to R50m upon its completion and a conservative estimate of profit arising from this would be an amount of not less than R10m.

30.3 Applicant's breaches have resulted in a failure of the project to date, the liquidation of a construction company, Xaler Construction (Pty) Ltd (in liquidation), huge delays with regard to the progress of building work on the site and more significantly, a reduction in sales and/or pre-sales being achieved by the First Respondent.

30.4 In consequence and for the reasons set out herein elsewhere, the Applicant is liable to the First Respondent in damages as a result of the loss of profits suffered by the First Respondent consequent to (sic) the Applicant's breaches aforesaid."

[38] It is significant to note two things. Firstly, that no substance is given to the bald allegation made by Coe that SMI acted unreasonably in the exercise of the discretion it enjoyed under the agreement. Secondly, the claim that SMI's breach had resulted in Bestvest suffering damages which were escalating daily never went further than that. No counter-claim (or separate action) for damages was ever lodged by Bestvest or the sureties.

[39] In the replying affidavit SMI explained the manner in which it had exercised its contractual discretion under the mezzanine loan and claimed that, in light thereof, it had not behaved unreasonably.

[40] The right of a contracting party to determine prestation under an agreement is not entirely without judicial controversy. Mr. Pretorius referred the Court to the judgment of Van Heerden DCJ in the NBS Boland Bank case [14] in which the learned

[14] NBS Boland Bank Ltd v 1 Berg River Drive CC;Deeb and Another v ABSA Bank Limited; Friedman v Standard Bank of S.A Limited1999 (4) SA 928 (SCA)

Judge made certain observations in a series of cases where there had been an attack on the rights of banks to unilaterally vary interest rates in mortgage loan agreements.

[41] The learned Judge of Appeal, having conducted an extensive review of the common law, foreign law and the relevant South African case law came to the following conclusion [15]:

> *"[24] In sum I am of the view that, save, perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable. Second, as has been said above, there is an additional reason for holding that the clause under discussion is valid. Of course, in some cases providing for discretional determinations there may be no enforceable contract until the determination is made. But when made an unconditional contract comes into being.*
>
> *[25] All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual*

[15] P936I

discretionary power was clearly intended to be completely unfettered, an exercise of such discretion must be made arbitrio bono viri (cf Dharumpal Transport (Pty) Ltd v Dharumpal1956 (1) SA 700 (A) at 707A-B; Moe Bros v White1925 AD 71 at 77;Holmes v Goodall and Williams Limited1936 CPD 35 at 40; Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd 1976 (3) SA 583 (C) at 591 G-H; and Remini v Basson 1993 (3) SA 204 (N) at 210I-J)….

[26] Reference may also be made to D17.2.77, where it is said that where one party has to do work to the satisfaction of the other party, the latter must exercise his discretion arbitrium bono vire.

[27] The discretionary powers vested in the mortgagees by the relevant deeds must therefore be subject to this inherent limitation. The attack made on behalf of the mortgagors concerned effectively assumes that there is no such limitation. It is an erroneous assumption."

[42] No explanation is given in the founding affidavit by Du Plessis as to why SMI only advanced about 80% of the agreed amount of the loan to Bestvest. The only

breach relied upon by SMI at that stage was that Bestvest had failed to repay its indebtedness as at 9 July 2009.

[43] When the sureties raised (in their answering affidavit) the issue of the failure to advance the full amount of the loan as a contractual breach on the part of SMI which exempted Bestvest from liability under the mezzanine loan, SMI denied (in its reply) any such breach. It then set out its version of events in that affidavit.

[44] SMI referred to various clauses in the mezzanine loan which it said were relevant to its decision not to advance further funding – a decision which it described as reasonable in the circumstances and as being based on sound commercial considerations:

44.1 Firstly, SMI pointed out that the mezzanine loan was concluded on the basis that Bestvest complied fully with the requirements of Imperial Bank Limited (the forerunner to Nedbank) incorporated in its mortgage loan. However, it said, Bestvest failed to comply with the requirements of the Imperial loan and was obliged to renegotiate the terms thereof with Imperial.

44.2 Then, said SMI, it called a meeting with Bestvest in February 2009 as a consequence of its concern about Bestvest's inability to repay the loan with Imperial. At that meeting it

was agreed that SMI would consider advancing further sums to Bestvest on the fulfillment of certain further conditions, which included approval from Imperial.

[45] Mr. Pretorius argued that, in the result, SMI exercised its discretion not to make further advances to Bestvest *arbitrio bonos viri.* The proposition was described thus by Du Plessis in the reply:

> *"17.10In considering any further advances to the first respondent, the applicant accordingly had to have regard to the viability of the development especially in light of the circumstances mentioned above, the ability of the first respondent and the prospects of the development being finalized within the scheduled time or at all as well as (sic) effect of the first respondent's failure to comply with the initial requirements set by IBL and the subsequent unilateral renegotiations and consequent amendments to such requirements. One such effect being that the applicant's loan would not be repaid by the first respondent upon the release by IBL of its facility, as initially agreed, but only once the development was finalized and accordingly causing the applicant to be forced to be reliant upon the successful completion of the development, the chances of which at the time seemed rather bleak."*

[46] It was further pointed out in the reply that, whatever the manner of the exercise of its discretion may have been, at the time that SMI exercised its discretion not

to advance any further monies to Bestvest, the latter was already in breach of the provisions of the mezzanine loan.

[47] Upon consideration of all the material facts, I am not persuaded that there was anything untoward in SMI's failure to advance a further approximately R1.5m to Bestvest. At that stage (February-March 2009) the development was in very serious trouble. Not only had the principal building contractor on the job (Xaler) been liquidated, Bestvest could not meet its obligations to Imperial under the main loan agreement and as a consequence thereof had to renegotiate the terms of its indebtedness to Imperial. It evidently did so without taking SMI into its confidence.

[48] In my view, the refusal by SMI to advance more money to Bestvest at that stage of its corporate demise was a prudent decision and one which responsible corporate executives would have taken. To do otherwise would have been to throw good money after bad.

[49] In the circumstances I am of the view that it has not been shown that SMI exercised its discretion unreasonably thereby breaching the agreement. Having regard to the aforegoing there is therefore no basis to refuse SMI relief against the sureties in terms of their deed of suretyship executed on 1 July 2008.

WASTED COSTS

[50] SMI's application for payment was postponed on a number of occasions and on each such occasion costs were reserved for later determination. On each of those occasions the postponement was attributable to the non-availability of a Judge to

hear the matter. This is, of course, regrettable but the wasted costs caused by such postponements were clearly not attributable to SMI. In my view it would be fair to all concerned that such costs be regarded as costs in the cause.

[51] **Accordingly it is ordered that**:

Judgment is granted in favour of the Applicant against the Second, Third and Fourth Respondents, jointly and severally, the one paying the other to be absolved, for:

1. payment of the sum of R2 684 543,96;

2. interest on the amount of R2 684 543,96 at the rate of 1.25% per week, calculated from 11 July 2008 to 10 July 2009;

3. payment of the sum of R1 262 596,33;

4. interest on the amount of R1 262 596,33 at the rate of 1.25% per week, calculated from 21 August 2008 to 10 July 2009;

5. payment of the sum of R881 779,61;

6. interest on the amount of R881 779,61 at the rate of 1.25% per week, calculated from 7 October 2008 to 10 July 2009;

7. payment of the sum of R153 160,00;

8. interest on the amount of R153 160,00 at the rate of 1.25% per week, calculated from 24 October 2008 to 10 July 2009;

9. payment of the sum of R98 515,03;

10. interest on the amount of R98 515,03 at the rate of 1.25% per week, calculated from 11 November 2008 to 10 July 2009;

11. interest on the total of the individual amounts calculated in para's 1 to 10 above ("the total") at the rate of 1.5% per week, calculated from 11 July 2009 to 1 November 2009, limited to a total amount of R10 161 189,86;

12. interest on the total at the rate of 1.5% per week, calculated from 2 November 2009 to date of this judgment, limited to a total amount of R10 411 989,94;

13. interest on the total at the rate of 1.5% per week, calculated from date of judgment to date of final payment, limited to a total amount of R10 161 189,86;

14. costs of this application on the scale as between attorney and own client, including the wasted costs occasioned by the postponements of

the application on 16 May 2011, 12 August 2011, 19 October 2011 and 27 February 2012.

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P.A.L. GAMBLE

JUDGE	**:**	P.A.L. GAMBLE
FOR APPLICANT	**:**	Adv. J.F. Pretorius
INSTRUCTED BY	**:**	Sim Botsi Attorneys
FOR 1ST to 4TH RESPONDENTS	**:**	Adv. A.P. Möller
INSTRUCTED BY	**:**	M.L. Littleford and Associates
DATES OF HEARINGS	**:**	**10 April 2012; 23 April 2012 and 14 May 2012**
DATE OF JUDGMENT	**:**	**10 December 2012**
DATE OF CORRECTED JUDGMENT IN TERMS OF RULE 42(1)(b) DELIVERED ON	**:**	**31 January 2013**