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REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20495/2015

Before the Hon. Mr Justice Bozalek

Hearing: 20 April 2016
Judgment Delivered: 19 August 2016

In the matter between:

ABSA BANK LTD **Plaintiff**
(Reg No: 1986/004794/06)

and

EXPECTRA 423 (PTY) LTD **1st Defendant**

PIETER LOUIS LE ROUX N.O. AND
JOLENE LOUCHE LE ROUX N.O. **2nd Defendant**
(in their capacity as Trustees of DIE LE ROUX FAMILIETRUST)

PIETER LOUIS LE ROUX **3rd Defendant**
(IDENTITY NUMBER: [6.....])

JUDGMENT

BOZALEK J

[1] This is an opposed application for summary judgment together with an application by the defendants for leave to file a supplementary opposing affidavit but

only after the plaintiff has complied with a notice in terms of Rule 35(12) of the Uniform Rules of Court to produce certain documents referred to in the affidavit supporting the application for summary judgment. The applications raise, again, the question of whether the early discovery procedures provided for in Rule 35(12) (and 14) apply to summary judgment applications.

BACKGROUND

[2] The plaintiff bank instituted action against the three defendants herein by way of a combined summons. It sought judgment against them jointly and severally for payment of the nominal amount of R7.2mil but limited to R6.5mil in respect of second and third defendants plus interest thereon and costs. The defendants were sued in their capacity as sureties for and co-principal debtors with a certain West Dunes Properties 176 (Pty) Ltd ('West Dunes' or 'the principal debtor'). First defendant is a limited liability company whilst the second defendant is Mr Pieter le Roux ('Le Roux') and Ms Jolene le Roux in their capacity as trustees for the time being of the Le Roux Family Trust. The third defendant is Le Roux in his personal capacity.

[3] The particulars aver that the defendants signed deeds of suretyship on 1 March 2010 and copies thereof are annexed thereto. Further allegations in the particulars of claim are that the suretyships were in turn based on a written *'term loan agreement'* under which the plaintiff lent and advanced the capital amount of R6.5mil to West Dunes repayable, together with interest, over ten years in monthly instalments commencing in July 2010. It is further alleged that the principal debtor failed to pay regular instalments and as at May 2015 the outstanding balance on the loan was some R7.2mil. A certificate issued by a manager of the plaintiff in this amount was likewise annexed to the particulars. Various other documents, including the term loan agreement, were also annexed.

[4] The plaintiff did not seek summary judgment against the first defendant. The application against the second and third defendants ('the defendants') was initially postponed for a month but three days before the hearing the defendants filed a notice in terms of Rule 35(12) followed shortly thereafter by what they termed a *'provisional affidavit resisting summary judgment'*. The body of the affidavit is, nonetheless, ten pages long. In the Rule 35(12) notice the defendants call upon the plaintiff to produce for their inspection various documents referred to in the affidavit supporting the plaintiff's application for summary judgment, more particularly, unspecified files and certain information *'as captured on plaintiff's computer system'*. The notice is a response to an affidavit by a Mr B Montshiwa ('Montshiwa') who is employed by the plaintiff as a manager at its *'Business Bank, Wholesale Credit Restructuring and Advisory Services'*. Montshiwa testified that insofar as some of the facts relating to the claim were not within his personal knowledge, he had *'acquainted (himself) of those facts by perusing plaintiff's files in (his) possession and under (his) control, as well as by referring to information as captured on plaintiff's computer system'*.

[5] The defendants also applied for leave to file a *'supplementary answering affidavit'* as well as an extension of the time period set in Rule 32(3)(b) for the filing of such affidavit to a date *'not more than ten days'* after the plaintiff had produced the documents and information sought by the defendants. In the same application they seek postponement of this summary judgment application sine die pending the fulfilment of these various steps.

[6] There are accordingly, apart from the summary judgment application itself, two separate but interrelated applications before the Court being the application for leave to supplement coupled with an extension of time, as well as for the postponement of the summary judgment application.

THE ISSUES

[7] In their provisional opposing affidavit the defendants raise three distinct issues, namely, that Montshiwa has no personal knowledge of the facts of the matter; that they require a response to their notice in terms of Rule 35(12) before they are in a position to deal with the summary judgment application and, in regard to the merits, that the plaintiff's alleged delay in taking action against the principal debtor was such that they ought to be released from their suretyship obligations to the plaintiff.

THE ROLE OF A RULE 35(12) NOTICE

[8] I shall deal firstly with the question whether the defendants are entitled to invoke the provisions of Rule 35(12) in these proceedings. The sub-rule provides as follows:

> *'Any party to any proceedings may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or the transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceedings provided that any other party may use such document or tape recording.'*

[9] On behalf of the defendants Mr Newton emphasised the wide terms of the sub-rule, particularly the phrase *'any proceedings'.* He further highlighted the commentary in Erasmus' Superior Court Practice[1] which, without qualification, states that '(*t)he entitlement to see a document or tape recording arises as soon as reference is made thereto a pleading or affidavit and a party cannot ordinarily be told to draft and file his or*

[1] DE Van Loggerenberg Erasmus Superior Court Practice 2 ed vol 2 (2015) D1-478

her own pleadings or affidavits before he or she will be given an opportunity to inspect and copy, or transcribe, a document … referred to in his or her adversary's pleadings or affidavits'. Counsel also invoked the case of *Protea Assurance Co Ltd and another v Waverley Agencies CC and Others*[2] and *Unilever PLC and another v Polagric (Pty) Ltd*[3] as authority for his argument.

[10] Those cases, however, were not concerned with summary judgment proceedings and neither is direct authority for the proposition that Rule 35(12) and/or (14) may be invoked by a defendant in summary judgment proceedings. The only judgment dealing with that situation to which I was referred was *Business Partners Ltd v Trustees, Riaan Botes Family Trust, and Another*[4]. Paradoxically, this judgment was relied on by both parties in the present matter.

[11] In *Business Partners,* the defendant in a summary judgment application delivered a Rule 35(12) notice without filing an opposing affidavit. Schippers J held that an application for summary judgment could not be deferred by the delivery of a notice in terms of Rule 35(12) and (14) and that to hold otherwise would ignore both the summary judgment procedure and its purpose. Secondly, it would misconstrue the provisions and purpose of Rules 35(12) and (14). In reaching this conclusion the learned judge set out at some length the procedure involved in an application for summary judgment and its rationale. He pointed out that where any defence raised is based on facts in the sense that material facts alleged by the plaintiff in its summons are disputed or new facts are alleged constituting a defence, all that the court enquires into is:

> *'a. whether the defendant has disclosed the nature and grounds of his defence and the material facts upon which it is founded and,*

[2] 1994 (3) SA 247 (C)
[3] 2001 (2) SA 329 (C)
[4] 2013 (5) SA 514 (WCC)

b. whether on the facts so disclosed the defendant appears to have a defence which is both bona fide and good in law to either the whole or part of the claim[5]*.'*

[12] He noted, furthermore, that if the defendant furnishes security or satisfies the Court that he has a bona fide defence which is good in law, the Court is bound to give leave to defend and the action proceeds in the ordinary way. If the defendant fails to furnish security or satisfy the Court in this way, then it retains a discretion whether or not to grant summary judgment. Schippers J also analysed the interplay between Rule 32, governing summary judgment applications, and Rule 35 which provides for the discovery, inspection and production of documents. He found the fact that Rule 35 does not feature at all in the summary judgment procedure was hardly surprising since the very purpose of that procedure is to dispose of a clear case without putting the plaintiff to the expense of a trial. Furthermore Rule 32(3)(b), which requires the defendant to establish a bona fide defence which is good in law, by no means sets a high threshold in this regard. Schippers J concluded that *'it could never have been the intention of the drafters of the rules that a defendant should first be allowed to invoke rule 35(12) or (14) - and to delay summary judgment proceedings even further where there has been no compliance with those rules - to the prejudice of the plaintiff*'. I agree with these conclusions wholeheartedly[6].

[13] Puzzlingly, however, the learned judge stated, in para [11] that: *'(i)t is of course open to the defendants to invoke Rule 35(12) and (14)'* and it is on the strength of that remark that the defendants base their application to supplement their opposing affidavit only after the documents they seek from the plaintiff have been received. The remark made by Schippers J must, however, be seen in context since he immediately goes on to say

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[5] *Business Partners n 4 para 8*
[6] Ibid para 9

> *'[11] …. However, if they had difficulty in dealing with the pleadings because they require documents in order to determine what the plaintiff's case was, this should have been stated in affidavits opposing summary judgment as justification for their inability to deliver an affidavit disclosing the nature and grounds of the defence and the material facts upon which it was based. But what the defendants cannot do is circumvent the provisions of rule 32(3)(b) by delivery of the notice, in order to obtain documents which might support a bona fide defence or to defer summary judgment proceedings, as was submitted by Mr Newton on their behalf.*
>
> *[12] For the above reasons I have come to the conclusion that an application for summary judgment cannot be deferred by delivery of a notice in terms of rules 35(12) and (14) of the Rules of Court, without more.'*

[14] In my view, seen in its context, the learned judge's dictum to the effect that a defendant may invoke Rule 35(12) and (14) means at most that a defendant may, for what it is worth, issue a notice in terms of Rule 35(12) and (14) but these cannot defer an application for summary judgment on the basis that no reply has been forthcoming. Should the plaintiff not produce any document or tape so sought, a defendant can, at best, aver in its opposing affidavit that in its evaluation of the nature and grounds of its defence and the material facts upon which it is based, the Court must take into account that the defendant has not been able to gain access to such documentation.

[15] In the event that I am incorrect in my interpretation of the relevant part of the judgment in *Business Partners* and the learned judge was indeed stating or implying that the provisions of Rule 35(12) and (14) can somehow be utilised to defer an application for summary judgment until such time as appropriate response is received from a plaintiff, then I am in respectful disagreement therewith. In my view, for all the reasons which Schippers J sets out, invoking the provisions of Rule 35(12) and (14) is incompatible with the purpose and nature of summary judgment proceedings. If it were the intention of the rule maker that early discovery could, in this sense, be obtained, it would go a long way to stultify the procedure created by Rule 32 which has effectively

been used by the courts over a long a period of time[7]. Defendants' intent upon delaying summary judgment could make use of the provisions of Rule 35(12) and (14) to obtain extended delays in summary judgment applications by tying up the plaintiff in contested interlocutory applications.

[16] For these reasons I consider that the applications for the postponement of the summary judgment application, for an order that the plaintiff be directed to furnish a reply to the defendants' notice in terms of Rule 35(12) and for leave for the defendants to thereafter file a supplementary opposing affidavit are without merit and must be dismissed.

PERSONAL KNOWLEDGE

[17] I turn now to the defendants' averment that the deponent to the plaintiff's affidavit in support of the application for summary judgment has no personal knowledge of the facts of the matter. Mr Newton's submission was that, in the absence of a response from the plaintiff to the defendants' notice in terms of Rule 35(12), following the wording of the sub-rule and without leave of the Court having been sought, the plaintiff was disqualified from using the relevant documents. He argued further that if the plaintiff was so disqualified from using the documents and records referred to in Montshiwa's affidavit, then the latter was precluded from relying thereon to acquaint himself with the facts which were not in his personal knowledge in order to place himself in a position to swear positively to the facts verifying the plaintiff's cause of action in the summons.

[18] Of course this argument rests squarely on the assumption that Rule 35(12) is applicable in summary judgment proceedings which, as has been explained above, is not the case. This argument therefore has no merit.

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[7] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Joint Venture* 2009 (5) SA 1 (SCA) Para [32]

[19] For the sake of completeness also I deal with what the defendants put up in their opposing affidavit on this issue, notwithstanding that it was not pressed in argument. In short the defendants disputed that Montshiwa had any personal knowledge of the facts in this matter and contended that his personal knowledge was based solely upon the plaintiff's files and the contents of its computer system.

[20] Montshiwa testified that the account(s) referred to in the particulars of claim were directly under his control. To the extent that some of the facts were not within his personal knowledge he stated that he had acquainted himself with them by perusing the plaintiff's files in his possession and under his control as well as by referring to information as captured on the plaintiff's computer system.

[21] The cause of action relied upon by the plaintiff in this matter is similar in all material respects to that in *Rees and Another v Investec Bank*[8], namely, a bank suing a surety for the repayment of loans made to a principal debtor. The defendants in *Rees* disputed that the deponent to the affidavit in support of the summary judgment application, a recoveries officer who had had regard to the applicant's records, accounts and other relevant documents in her possession and under her control, had the necessary personal knowledge of the defendants' financial standing and could verify the cause of action; furthermore, that the defendants were indebted to the applicant in the amounts claimed. In short, it was contended, she was not able to *'swear positively to the facts'* as envisaged in Rule 32(2). The court conducted a full review of the law in this regard, in the process approving the judgment in *Maharaj*[9].

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[8] *2014 (4) SA 220 (SCA)*
[9] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) ; Rees n 7 para 10

[22] In *Maharaj* Corbett JA, on behalf of the court, stated:

> *'That the mere assertion by a deponent that he can swear positively to the facts' is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. In my view, this was a salutary practice... While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32, that, in substance the plaintiff should do what is required of him by the Rule... Where the affidavit fails to measure up to these requirements, the defect, may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court… The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it…*[10]'

[23] In *Barclays National Bank Ltd v Love*[11], which was quoted with approval in *Maharaj*, the following is said:

> *'We are concerned here with an affidavit made by the manager of the very branch of the bank at which 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 into the bank's ledgers or statements of account; indeed if that were the degree of personal knowledge required it is difficult to conceive the circumstances in which a bank would ever obtain summary judgment'.*

[24] This latter statement was reinforced in *Shackleton*[12] in para [13] by the following dictum:

> *'…[F]irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and that where the applicant is a corporate entity, the deponent may well legitimately rely on records in a company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts'.*

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[10] *Maharaj* n 8 at 423D-H
[11] *1975 (2) SA 514 (D) at 516H. See also Maharaj n 8 at 424B-D and Rees n 7 para 11*
[12] *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 (CC) and Another* 2010 (5) SA 112 (KZP)

[25] In the present matter, as in *Rees,* comprehensive particulars of claim were annexed to the combined summons setting out the cause of action, supported by the written loan agreement concluded with the principal debtor, the suretyship agreements and other relevant documentation. The suretyships provide for a certificate of balance to be issued by an official of the applicant, which certificate was furnished.

[26] It is against this background that Montshiwa's affidavit must be viewed. It was not disputed by the defendants that in the discharge of his duties Montshiwa would have had access to the documents in question and that upon a perusal of those documents he would have acquired the necessary knowledge of the facts to which he deposed in his affidavit on behalf of the plaintiff. An email from Le Roux to Montshiwa on 21 August 2015 in which he raises his concern that Absa was not taking action against the principal debtor with sufficient expeditiousness bears out that Montshiwa was dealing with the matter. As was stated in *Rees:*

> *'At the end of the day, whether or not to grant summary judgment is a fact based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of a financial institution or large corporation. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj.'*[13]

[27] A reading of the defendants' opposing affidavit reveals that little if anything contained in the lengthy particulars of claim was disputed by them. Instead their defence is based on new facts or omissions upon which they rely, namely, that the plaintiff failed to take action against the principal debtor thereby prejudicing them as sureties.

[28] In these circumstances and looking at the matter as a whole, I consider that the defendants' contention that Montshiwa's affidavit in support of summary judgment was

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[13] *Rees n 7 para 15*

insufficient to support the application, is without merit and cannot be sustained. I turn now to the merits of the defence raised by defendants in their opposing affidavit.

THE MERITS OF THE DEFENCE RAISED

[29] First some explanation of the relationship between the defendants and other interested parties is necessary. All defendants bound themselves to the plaintiff as sureties and co-principal debtor with West Dunes for the repayment of any sums of money which fell due inter alia arising from the loan to West Dunes. At material times the third defendant, Le Roux in his personal capacity, was a director and *'corporate controller'* of West Dunes which was the owner of certain immovable property, being a farm in the Paarl region, presumably acquired by virtue of the capital sum which it received from the plaintiff pursuant to the loan agreement.

[30] That loan was secured by a mortgage bond in favour of the plaintiff over the property which was also encumbered by another mortgage bond in favour of one Kaye.

[31] It would appear that the second defendant, one of whose two trustees was the third defendant, sold its shares in and claims against West Dunes to the Kleinevallei Kinder Trust, ('the Kinder Trust') and that a wedding business and a restaurant business were conducted from the farm. In terms of the sale of shares agreement, the Kinder Trust ultimately undertook to pay the indebtedness of West Dunes' to the plaintiff but failed to do so. These facts are drawn either from the defendants' opposing affidavit or from a founding affidavit filed by them in proceedings in which the defendants' attorney previously sued West Dunes, citing also the plaintiff and Kaye, for monies allegedly owing to him for services rendered to West Dunes. In that application the applicant's attorney sought to wind up West Dunes but ultimately withdrew the application on payment of the outstanding fees.

[32] Pursuant to various agreements the farm and the businesses thereon were run by a Mr W Basson and his son both of whom were apparently sequestrated during the course of 2015. The third defendant remained enmeshed in the affairs of West Dunes not simply by reason of him being cited in the liquidation application against West Dunes, but also because of further litigation embarked upon by himself and the second defendant against inter alia West Dunes in March 2015. In that application an order was successfully sought by the second defendant interdicting the Kinder Trust, the new owners of the farm from selling it pending the determination of a dispute arising from the original sale of shares agreement.

[33] That sale of shares agreement is incorporated in the voluminous papers filed by the defendants as annexures to their (preliminary) affidavit opposing summary judgment. It reveals that the purchase consideration for the sale of the shares was the difference between R11mil and the amount owing to the plaintiff under the loan agreement and was itself to be paid by way of shares in a company to be listed on the JSE. The agreement further provided that the purchaser was to procure cancellation instructions in respect of that mortgage bond.

[34] The defendants leave it unexplained how, notwithstanding the sophisticated agreement which they drew up to protect their rights arising out of the sale of the shares in West Dunes, the new owners of the property retained possession and use of the farm without discharging their obligations to the defendants, most notably their obligation to procure the cancellation of mortgage bond held by the plaintiff.

[35] The defence sought to be raised by the defendants is that the plaintiff was inactive and inordinately delayed in taking action against the principal debtor when it defaulted on its repayments thereby prejudicing the defendants to the extent that they should be released from their obligations as sureties. In support of this defence the third

defendant states that on an unspecified date subsequent to the sale of shares agreement in June 2014, he became aware that the proceeds of the sale of the shares in West Dunes, (the shares in another entity) were insufficient to effect payment of the outstanding amounts due by West Dunes to the plaintiff. An addendum was concluded in terms of which the purchaser of the shares, the Kinder Trust, would ensure that the liabilities of West Dunes to the plaintiff were settled. Notwithstanding this obligation the Kinder Trust failed to settle the indebtedness. The plaintiff was given notice of these financial difficulties through being cited in the liquidation application against West Dunes, and was thus aware that neither the second nor the third defendant had any further involvement in the affairs of West Dunes and that '*the business was dissipating funds'*.

[36] It would appear to be the defendants' case that upon receipt of this information, the plaintiff was under a duty to immediately take steps against West Dunes, foreclosing on the mortgage bond and thereby limiting the defendants' exposure as sureties. They express this in the following terms:

> *'In fact, the plaintiff knew… that I and the second defendant had no prospect of any right of recourse against West Dunes. Nevertheless, to our complete and utter prejudice plaintiff simply took no steps at all to enforce its rights against West Dunes'.*

[37] The defendants also rely in this regard on emails addressed to the plaintiff in April and August 2015. Two of those emails, however, say nothing more than that the defendants were sureties, that the Kinder Trust was supposed to settle West Dunes' liability, that this was not being done and that the defendants wish to be released as sureties. Only in the case of the final email (to Montshiwa) in late August 2015 was it suggested that action be taken by the plaintiff against West Dunes since its liability was increasing. None of the emails even mentioned that the defendants were allegedly

being prejudiced as sureties by any delay on the part of the plaintiff in enforcing its rights against West Dunes.

[38] The high-water mark of the defendants' case is the following statement:

> *'The plaintiff has delayed proceeding against West Dunes despite being aware of the facts and circumstances all along and that the plaintiff was aware or ought to have been aware of the prejudice that the plaintiff was placing on me and the second defendant as sureties and the prejudice is of such a nature, I respectively submit, and am advised that the second respondent and I should be released as sureties'.*

[39] In the alternative it was averred that the plaintiff had by its conduct *'altered the terms of its loans with West Dunes without my or the second defendant's consent as sureties'* and thus that they should be released as sureties. No detail is given as to the conduct or how the terms of the loan were allegedly altered. It is common course that in November 2015 the plaintiff commenced liquidation proceedings against West Dunes although the fate thereof does not appear from the summary judgment application.

[40] In resisting summary judgment the defendants rely on the case of *Absa Bank Ltd v Davidson*[14], specifically paras [14] and [19]. In that case it was held, however, that although a surety can be released if the prejudice is the result of a beach of some or other legal duty or obligation, there is no general so-called *'prejudice principle'* in our law that if a creditor should do anything in his dealings of principal debtor which has the effect of prejudicing a surety the latter is released. The general principle regarding delay on the part of the creditor is as stated in *Caney*[15]:

> *'The central rule is that where the creditor gives the debtor more time in which to pay before the debt falls due, and time is of the essence, that amounts to a material alteration and releases the surety.'*[16]

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[14] *2000 (1) SA 111 (SCA)*
[15] CF Forsythe and JP Pretorius Caney, The law of Suretyship in South Africa, 6th ed p 208
[16] Relying inter alia on *Estate Liebenberg v Standard Bank of South Africa Ltd* 1927 AD 502 at 507 – 8

However this rule only applies where an extension is given, before the debt falls due. If this extension is made after the principal debtor is in mora, the suretyship is not released.[17]

[41] The rationale for this approach was set out in *Estate Liebenberg* by Wessels JA when he stated:

> *'It must at once be conceded that by our law every extension of time is not considered to effect a novation. It seems quite clear that if the extension of time is given after the debt becomes payable and when the debtor is in mora, then a failure to sue the debtor, or even the actual granting to him of an extension of time, cannot be regarded as a novation, and therefore the surety is not discharged. The surety then has the remedy in his own hands: all he needs to do is to pay the principal creditor and then proceed against the principal debtor.'*[18]

[42] Thus even if one assumes that the defendants did suffer prejudice as a result of the plaintiff's inactivity in proceeding against the principal debtor, that prejudice can only be relied upon by them if it is the result of a breach of some or other legal duty or obligation owed by the creditor to them. However, the defendants do not rely upon the breach of any terms of the various underlying agreements. They state only that the plaintiff's conduct in allegedly delaying the enforcement of its rights against West Dunes, taken together with the *'surrounding circumstances',* justified their release from the suretyships. These circumstances include the fact that to the plaintiff's knowledge the principal debtor was under the control of insolvents, who were *'mismanaging'* the principal debtor (West Dunes) (or more accurately, the business which was conducted on the property); that West Dunes was in breach of its obligation to the defendants to pay the monthly instalments due on its mortgage bond account with the plaintiff, the fact that the defendants had requested the plaintiff to take action to enforce its rights against West Dunes and that at that time the plaintiff was aware that the defendants had no prospects of exercising their right of recourse against West Dunes.

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[17] See Caney n 15 at 208
[18] *Estate Liebenberg* n 16 at 507

[43] The high-water mark of the defendants' case is that if these circumstances were proved on trial it would establish that the plaintiff's conduct was so unreasonable that it could not be considered as falling within the terms of the loan agreement or the deeds of suretyship.

[44] In my view this conclusion is not sustainable in law and, even if the alleged delay and the *'circumstances' are* proved, they do not constitute a defence for at least two reasons. In the first place they seek to create an exception to the general rule that our law does not recognise an unbounded *'prejudice principle'* to the effect that, if a creditor should do anything in its dealings with the principal debtor which has the effect of prejudicing the surety, the surety is released. Secondly, not only do the defendants not found their putative defence on the breach of any specific provisions in the underlying agreements but various provisions therein expressly grant the plaintiff the right to conduct itself in the alleged dilatory manner which is criticised by the defendants. All three suretyship agreements provide as follows in clause 7:

> *'Diskresie van die Bank*
> *Ek/ons erken en stem hiermee toe dat die bank geregtig is om in eie diskresie sonder verwysing na my/ons en sonder benadeling van sy regte kragtens hierdie:*
>
> *7.1 Die aard, omvang en duur van enige fasiliteite voorskot aan die Skuldenaar te bepaal;*
>
> *7.2 …*
>
> *7.3 Enige reëling, kompromie, vergelyk of skikking te tref met of uitstel te verleen aan die Skuldenaar of enige borgewers;*
>
> *7.4 …'*

[45] For good measure in the term loan agreement concluded with the principal debtor the following clauses appear:

> *'Afstanddoening en wysiging*

14.1 Indien die BANK enige bepaling van die OOREENKOMS nie stiptelik afdwing of sy regte stiptelik uitoefen nie, beteken dit nie dat die BANK van enigeen van soedanige bepalings of regte afstand gedoen het nie;

14.2 Hierdie dokument bevat die volledige OORENKOMS tussen die partye in verband met die TERMYNLENING en hierdie dokument, insluitend hierdie klousele, mag nie gewysig, verander of gekanselleer word nie tensy dit op skrifgestel is en deur verteenwoordigers van die LENER en die BANK onderteken is'.

[46] As I have mentioned there is no indication from the defendants how the plaintiff altered the terms of its loan with West Dunes. On the defendants' own version when West Dunes defaulted on its obligations in terms of the loan agreement the plaintiff took action against it within a year in the form of an application for liquidation. The facts of this case, moreover, underline the specious nature of the defence raised by the defendants. The defendants were closely involved in the affairs of West Dunes for a considerable period of time. They appear to have been shareholders in West Dunes when it concluded the term loan agreement with the plaintiff which, presumably, used the proceeds of the loan to purchase the property in question. The term loan agreement was concluded in June 2010 and the suretyship agreements in March of that year. Indeed, a certificate from a firm of chartered accountants reveals that as at 18 March 2010 the second defendant was a 100% shareholder in West Dunes. On 1 March 2010 a resolution was taken by a meeting of directors of West Dunes empowering PL Le Roux and JL Le Roux, in their capacity as directors to arrange and negotiate a bank facility for the company with the plaintiff.

[47] On the defendants' own version the second defendant sold its shares in West Dunes to the Kinder Trust. It did so apparently without first procuring that West Dunes' obligations to the plaintiff were extinguished and in any event clearly without ensuring that the defendants were released as sureties for West Dunes' obligations and as co-principal debtors. There is no suggestion that this sale of shares took place with the

plaintiff's knowledge or approval. In the circumstances, for the defendants to criticise the plaintiff for not taking action against West Dunes expeditiously enough and to seek to rely on this as grounds for releasing them from their suretyship is without any justification or merit.

[48] The notion that the defendants were prejudiced by the plaintiff allegedly dragging its feet in enforcing its rights against West Dunes also does not bear scrutiny. Once they became aware that West Dunes was not meeting its obligations to the plaintiff there was nothing to stop the defendants from settling their obligations to the plaintiff as co-principal debtors and sureties and then immediately exercising their right of recourse against West Dunes. It is not without significance, moreover, that the defendants' attorney brought an application for the liquidation of West Dunes in February 2015 which was rapidly resolved when West Dunes made payment of the monies in the sum of R155 000 to the plaintiff.

[49] For these reasons I consider that the defendants have failed to establish a bona fide defence which is good in law.

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

1. The application for the postponement of the summary judgment application and for leave to file a supplementary opposing affidavit is dismissed with costs.

2. The summary judgment application is upheld as follows: There will be summary judgment against second and third defendant in the following terms:

   2.1 <u>As against Second Defendant:</u>

   2.1.1 Judgment in the amount of R6, 500 000.00 in respect of its liability as surety and limited co-principal debtor in respect of the principal

debt of R7, 212 285.41 owed by West Dunes Properties 176 (Pty) Ltd;

2.1.2 Interest (as claimed) on the amount of R7, 212 285.41 from 16 May 2015 to date of payment at the rate of 10.25% per annum, calculated on a daily balance and capitalised monthly;

2.1.3 Costs of suit on the scale as between attorney and own client.

2.2 <u>As against Third Defendant</u>

2.2.1 Judgment in the amount of R6, 500 000.00 in respect of his liability as surety and limited co-principal debtor in respect of the principal debt of R7, 212 285.41 owed by West Dunes Properties 176 (Pty) Ltd;

2.2.2 Interest (as claimed) on the amount of R7, 212 285.41 from 16 May 2015 to date of payment at the rate of 10.25% per annum, calculated on a daily balance and capitalised monthly;

2.2.3 Costs of suit on the scale as between attorney and own client.

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BOZALEK J

APPEARANCES

For the Plaintiff:	Mr FSG Sievers Ms C Brown Instructed by: Marais Muller Yekiso Inc
For the 2nd and 3rd Defendant:	Mr A Newton Instructed by: Assheton Smith Inc