Republic of South Africa

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

Case No: 6717/2016

Before: The Hon. Mr Justice Binns-Ward
Dates of hearing: 25 October 2016
Date of judgment: 28 October 2016

In the matter between:

MELVIN DAVID YARDLEY Applicant

and

ADRIAN CHARLES WATSON First Respondent
(ID Number …)
DONNA WATSON Second Respondent
(ID Number …)

JUDGMENT

BINNS-WARD J:

[1] On the extended return date of a provisional sequestration order, the applicant, Mr Yardley, applied for a final order. For that purpose he was required by s 12(1) of the Insolvency Act 24 of 1936 to satisfy the court that –

(a) he has a liquidated claim sounding in money against the first respondent (Mr Adrian Watson);

(b) the first respondent has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if the respondents' joint estate is sequestrated.

[2] The issue centrally in contention at this stage of the proceedings, as it was in the application for the provisional order, goes to the first of those requirements; namely, whether the first respondent (to whom the second respondent is married in community of property) is indebted to the applicant. Its determination turns on the proper construction of a deed of contract recording a loan by the applicant to Bedshelf Investments Number 3 CC ('Bedshelf').

[3] It is not in dispute that during 2012 the applicant lent Bedshelf an amount of £50 000. The amount was advanced in three tranches: £10 000 on 22 February 2012, £10 000 on 29 February 2012 and £30 000 on 3 July 2012. The transactions were formalised and integrated in a contract document entitled 'Loan Agreement by and between Bedshelf Investments Number 3 CC and Melvin David Yardley'. The deed of contract was drafted at the instance of the first respondent and executed by him on 6 July 2012. It was signed by the applicant, who lives in England, just over a fortnight later on 24 July 2012.

[4] Bedshelf, which was a close corporation at the time – it was converted to a company later in 2012 – carried on business in the import of books from the United Kingdom for sale in South Africa. The first respondent was its sole member, and after its conversion to a company he became, and still is, its sole shareholder and only director.

[5] The applicant and the first respondent had been close friends since their childhood and had kept up regular contact. There is some dispute as to precisely how the transactions came about; more particularly, whether the first respondent had sought the loan, as alleged by the applicant, or whether, as alleged by the first respondent, it had come about as a result of the applicant seeking a profitable venture into which to invest uncommitted funds that he had available. Nothing really turns on the dispute. It is common ground that Bedshelf was in need of working capital and that it was already heavily indebted to its bankers, who held security in the form of a number of mortgage bonds over the respondents' home in Somerset West. The loan was effected by way of the applicant making payment on Bedshelf's behalf directly to one of the close corporation's suppliers in the United Kingdom.

[6] The preamble to the deed of contract recorded that:

> **WHEREAS** Bedshelf requires working capital to import books.
> **AND WHEREAS** Yardley is willing to loan Bedshelf the sum of 50, 000 Pounds Sterling
> **AND WHEREAS** the respective parties wish to record the terms and conditions of this agreement in writing.

It confirmed Bedshelf's need for the money and the common intention of the parties that the terms and conditions of their contractual arrangement should be reduced to writing and recorded in the deed of agreement. Their intention that the deed should be the sole memorial of their agreement was underscored by the provisions of paragraph 2 of the 'Concluding Clause', which recorded that '*This document contains the entire agreement between the parties relating to these presents and no party shall be bound by any undertakings, representation, warranties, promises or the like not recorded herein*'.

[7] The preamble was followed by a 'Definitions' clause, which bears quoting in full:

DEFINITIONS

1. **Bedshelf –** shall mean Bedshelf Investments Number 3 CC, Registration No: 1997/006549/23.
2. **Yardley –** shall mean Melvin David Yardley, Date of Birth: …/56.
3. **Watson –** shall mean Adrian Charles Watson, Identity number: ….
4. **Auditor –** shall mean Watson Incorporated, Registration No: 2001/002354/21.
5. **Effective date –** shall mean 1 July 2012.
6. **The Loan Amount –** shall mean £50, 000 (Fifty thousand Pounds Sterling).
7. **The interest –** shall mean 8% per annum on the outstanding balance.
8. **Payment terms –** shall mean payable within 24 months of the effective date or within such shorter time period the latter being at the discretion of Bedshelf.

Seen in the context of the substantive provisions of the deed of agreement, the definitions clause in a sense encapsulated the essence of the agreement. It identified the relevant actors in the contractual arrangement (paragraphs 1- 4) and highlighted the essential terms of the loan (paragraphs 5-8).

[8] According to its tenor, the deed of contract was cast as if the loan were still to be advanced; whereas, as will be apparent from the context described thus far, it was in substantial measure a recordal or confirmation - certainly in respect of the advance

of the funds - of what had already happened. That much is apparent from the section of the deed that follows immediately after the 'Definitions' clause:

NOW THEREFORE IT IS AGREED AS FOLLOWS THAT:

1. That **Yardley** is hereby willing to lend to **Bedshelf** the **loan amount** on the **effective** date. The **loan amount** will be paid directly to the Supplier of **Bedshelf** in the United Kingdom as payment for pending shipment of stock to **Bedshelf.**
2. That the **loan amount** will be in the Pounds Sterling denomination.
3. That the full and final settlement of the **loan amount and interest** shall be repaid within 24 month from the **effective date** or within such shorter time period the latter being at the discretion of **Bedshelf**.
4. The **interest** shall be charged on the outstanding amount on a monthly basis. It is agreed that the interest will be paid at an agreed exchange rate of R13.00 to the Pound on the outstanding balance.
5. The **loan amount and interest** will be paid into the bank account/s designated by Yardley.
6. That **Watson** shall stand as surety and co-principal debtor with **Bedshelf** for the due fulfilment of all its obligations.
7. That **this agreement** shall commence on the **effective date** and shall remain in force until the full amount has been settled.
8. That a certificate issued by the **Auditor** shall be prima facie evidence of the amount of indebtedness of **Bedshelf** to **Yardley** at the date of the certificate.

I shall for convenience hereinafter refer to this clause as the 'substantive agreement clause'.

[9] The first respondent placed emphasis on the formulation of the deed as a loan agreement between the applicant and Bedshelf. He pointed to the fact that the document was signed only by the applicant and on behalf of Bedshelf. The deed provided for signatures by Bedshelf and Yardley. It is common ground that the signature appearing on the last page of the document above the name of Bedshelf is that of the first respondent. He averred that he had signed the document only in his representative capacity, and not personally. It is apparent, however, that the applicant appreciated when the document was executed that Bedshelf was the corporate vehicle through which the first respondent conducted the business and that no-one else had a proprietary interest in it. He was also aware that the business was being financed with money borrowed by Bedshelf from the bank against the security of the respondents' home. The first respondent was equally aware of the applicant's appreciation of that

factual context. There is no indication in the evidence that the applicant dealt with anyone else but the first respondent in respect of the affairs of Bedshelf.

[10] An averment similar to that of the first respondent's as described in the preceding paragraph was made in comparable circumstances by a signatory seeking to avoid a suretyship obligation in the case of *Steenkamp v Webster* 1955 (1) SA 524 (A). The claim in that matter was founded on a deed of contract which read as follows:

Ooreenkoms koop en verkoop en sessie

Ooreenkoms gemaak en aangegaan deur en tussen Stanley Webster hierna genoemd die verkoper aan die ene sy, en Hennenman Sand (Proprietary) Limited hierna genoemd die koper aan die andere sy.

Gemelde verkoper sedeer en maak hiermee oor aan en ten gunste van gemelde koper al sy reg, titel en belang in en ten opsigte van sekere huur-ooreenkoms aangegaan tussen Johannes Jacobus Fouche en verkoper gedateer die 9de Maart 1951 met betrekking tot die verwydering van sand van die resterende gedeelte van die plaas Brandhoek No. 60 distrik Bothaville tesame met alle andere regte en verpligtinge soos uiteengesit in gemelde ooreenkoms en op die volgende verdere voorwaardes:

1. As konsiderasie van hierdie oormaking en betaling van die materiaal en goed soos later uiteengesit in die skedule hieraan geheg sal die gemelde koper aan die verkoper betaal die som van ses duisend ponde (£6,000-0-0) betaalbaar £2,000-0-0 kontant, £2,000-0-0 op die 12de April 1953 en £2,000-0-0 op die 12de April 1954.
2. Hierdie sessie en oormaking sal van krag wees vanaf die 12de April 1952.
3. Mnr. M. D. C. Steenkamp in sy private hoedanigheid verbind homself hiermee as borg en mede-prinsipale skuldenaar teenoor die verkoper vir die betaling van die gemelde koopsom soos in klousule 1 uiteengesit.
4. Dit word goed verstaan deur die partye dat die materiaal, toerusting en goed soos uiteengesit in die skedule hieraan geheg deel uitmaak en ingesluit word in die som van £6,000 vermeld in klousule 1 van hierdie C ooreenkoms, en gemelde goed word dadelik gelewer aan die koper.

Aldus gedaan en geteken te Odendaalsrus op hede die 12de dag van April 1952.

As Getuies: - S. Webster

Verkoper

A. P. Hauptfleisch

J. C. Vermaak M. D. C. Steenkamp

D M. P. van Staden

vir Hennenman Sand
(Pty.) Ltd.'

.....

Steenkamp was sued by Webster pursuant to the suretyship undertaking provided in terms of clause 3 of the agreement.

[11] Centlivres CJ disposed of an argument advanced by Steenkamp's counsel in similar terms to that advanced by the first respondent in the current case as follows at pp 529-530:

> It was contended by Mr. *O'Hagan* who appeared on behalf of Steenkamp that according to the document sued on Steenkamp appended his signature in a representative capacity. In support of this contention counsel argued that the spacing between the four typed lines intended for signatures gave rise to an inference that the signatures of Steenkamp and van Staden were linked with the words 'vir Hennenman Sand (Pty.) Ltd.' (there being a smaller space between the lines containing those signatures than there was between those lines and the other two lines) and that the document must therefore be read as meaning that Steenkamp signed only in his capacity as representing the Company. I am unable to agree with this contention. It was not disputed that Steenkamp read the document before he appended his signature and he must therefore be taken to have been fully aware of clause 3 which stated that he bound himself in his private capacity as a surety and co-principal debtor for the payment of the purchase price of £6,000. The question at once arises why Steenkamp signed the document without either deleting clause 3 or making it clear by means of an appropriate endorsement at the foot of the document that he did not agree to the terms of that clause. He did neither and left a reader of the document under the impression that he had no objection to the terms of clause 3. More especially must he have left Webster under that impression, seeing that clause 3 was part and parcel of the transaction whereby he agreed to the Company purchasing his rights and seeing that the Company had already paid over the first instalment of the purchase price and had taken over the plant mentioned in the schedule to the agreement. It is a fair inference from the document sued on that clause 3 was an essential term of the arrangement whereby the Company was to take over the right, which Webster had, to remove sand from the farm mentioned in that document and Steenkamp when he signed that document must have known this. We have to take the document as it stands with the appended signature and when we find from the document itself that Steenkamp signed it without any reservation, it must be taken that he agreed to all its terms, even although his signature was also necessary in order to bind the Company. Williston on *Contracts* (revised edition vol. 1, sec. 35) states the principle to be applied as follows:

> 'Throughout the formation of contracts it is to be observed that not assent, but what the other party is justified as regarding as assent, is essential . . . This rule, though frequently harsh in application, rests upon the fundamental principle of the security of business transactions, and the integrity of contracts demands that it be rigidly enforced by the courts.'
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> Assent to a contract can, of course as *Williston* points out, be negatived by proof of fraud on the part of a party seeking to enforce a contract and the principle would not apply in an action to rectify a contract on the ground of mutual mistake. In the present case we are not concerned with either fraud or mistake. The principle laid down by *Williston* is similar to the rule of interpretation of contracts enunciated by my Brother Greenberg, in *Worman v Hughes and Others*, 1948 (3) SA 495 at p. 505 (AD), where he said that the rule
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> > 'is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract. As was said by Solomon, J. in *van Pletzen v Henning*, 1913 AD 82 at p. 99, 'the intention of the parties must be gathered from their language, not from what either of them may have had in mind.'

There is no allegation of fraud in the current matter (nor, for that matter, of duress, undue influence or mistake) and the first respondent has not sought to rectify the contract. Instead, as will be discussed more fully below, he has asserted that he is not privy to the agreement.

[12] It is clear that if paragraph 6 does constitute a suretyship undertaking, the written contract satisfied the requirements of s 6 of the General Law Amendment Act 50 of 1956.[1] Furthermore, the first respondent's counsel conceded, correctly in my view, that if paragraph 6 of the substantive agreement clause did in point of fact record a suretyship obligation by the first respondent, then, by unqualifiedly affixing his signature to the document, the first respondent would have bound himself to it. The respondent's counsel, however, embraced an observation that I had made during his opponent's address to the effect that clause 3 of the agreement in *Webster*'s case was of 'much clearer' import than paragraph 6 of the substantive agreement clause. He contended that paragraph 6 denoted nothing more than an indication that the first respondent would sometime in the future stand surety, not that he was, by his execution of the contract, actually doing so. In this respect counsel emphasised the effect of the word 'shall' as denoting something yet to happen. He stressed that the contract in the current case did not contain wording equivalent to that whereby it was

[1] The identity of the creditor, the principal debtor and the surety and also the nature of the principal obligation are set out in the deed. And it bears the first respondent's signature.

declared in clause 3 of the agreement in issue in *Webster*'s case that '*Steenkamp in sy private hoedanigheid verbind homself hiermee as borg …*'. While the distinctions to which counsel drew attention are indisputable, they nevertheless do not derogate from the principle illustrated by the judgment in *Webster*. Whether paragraph 6 constitutes a suretyship undertaking by the first respondent is a matter of construction.

[13] The approach to be adopted in respect of the construction of deeds of contract has been the subject of a veritable wealth of appeal court jurisprudence in recent years. A convenient overview of the most pertinent judgments is to be found in the discussion in *Novartis SA (Pty) Ltd v Maphil Trading (Pty)* Ltd 2016 (1) SA 518 (SCA) at paras. 24-35. The essence of it is that the provision in issue should be interpreted contextually. The consideration of all the contextual factors in the interpretative exercise must be an integrated one; the process of interpretation is not one that occurs in stages, but is essentially 'one unitary exercise'; see *Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), at para 12, with reference to *Rainy Sky S.A. and others v Kookmin Bank* [2012] 1 All ER 1137 (SC), at para 21.[2]

[14] The words used by the contracting parties are the point of departure, but their literal and grammatical import considered in isolation is not the be-all and end-all. They fall to be construed with regard to the apparent objects of the contract and its place in the relevant factual matrix, by which is meant the circumstances in which it was brought into being - which is something materially different from having regard to what the parties to it might purport to say that they mean. If matters of construction were to be determined with reference to the parties' contesting statements as to the nature of their allegedly common intention, rather than on the basis of the language they have used to express it, then the meaning of written contracts would be determined on the basis of findings as to the contracting parties' respective credibility, rather than the language by which they chose to express

[2] In *Rainy Sky* loc.cit., Lord Clarke held '*The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*'.

themselves. The determining factor is the latter, not the former. That, no doubt, is what judges have meant when they have described interpretation as being a matter of law and not one of fact and accordingly one for the court and not for the witnesses (*KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para 39), and held that the process of interpretation is objective, not subjective (*Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18). The parol evidence (or 'integration') rule remains part of our law.[3]

[15] Regard is also properly had in the process of contextual assessment to the subsequent conduct of the parties in relation to the contract. That is obviously an important consideration having regard to the essence of the exercise, which is the objective determination of the contracting parties' apparent common intention.

[16] Courts also bear in mind that draftsmanship is often inept. The clumsy or inapposite use of language by the drafter should not be allowed to detract from or obscure the discernible intended meaning. 'Sophisticated semantic analysis' should not be permitted to negate an evident practical object that was clearly sought to be achieved by the provision which is being construed; see e.g. *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) at para. [14].[4]

[17] The first respondent's counsel contended that a consideration of the contract document shows that there were only two parties to it and that the first respondent was not one of them. In this regard he referred to the cover page which records the nature of the contract as a loan agreement between the applicant and Bedshelf; he referred also to various paragraphs in the agreement that sensibly construed contemplate 'the parties' to be only the applicant and Bedshelf; he pointed out that *domicilia citandi et executandi* were chosen only by the applicant and Bedshelf (the

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[3] As noted in RH Christie and GB Bradfield, *Christie's The Law of Contract in South Africa*, 6th ed. at p.200, 'The Appellate Division first stated the rule in *Lowrey v Steedman* 1914 AD 532 543:

> '*The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may any of the contents of such document be contradicted, altered, added to or varied by oral evidence*'.

[4] In *Skilya Property* loc.cit., Conradie JA remarked '*Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by paragraph 1 of section IV. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by the incorporation provision*'.

latter at the first respondent's home address) and that the signature page provided for signatures only by the applicant and someone on behalf of Bedshelf.

[18] I have already disposed of the last-mentioned consideration with reference to *Webster*'s case supra. As to the remainder of the contention, whilst it is correct that some clauses of the agreement - as indeed might be expected having regard to the nature of the principal agreement recorded therein - have the characteristics highlighted by counsel, that is not uniformly the case. So, even the clause headed 'Notice and Domicilium', in which the *domicilia citandi et executandi* of the lender and borrower are recorded, contains an unnumbered final paragraph which reads grammatically only if more than two parties are implicated: '*Notwithstanding anything to the contrary contained in this agreement, a written notice or communication actually received by one of the parties from another* [not 'the other', which would apply if only two parties were concerned] *including by way of facsimile transmission shall be adequate written notice or communication to such party*'. Similarly, the exclusion of any right to rely on matters such as set-off or counterclaim, to avoid payment was expressed in paragraph 3 of the clause entitled 'General' in a manner that plainly applies to more than just two parties: ' *No* [not 'neither] *party shall have the right to defer, adjust or withhold any payment due to the others in terms of or arising out of this agreement or to obtain deferment of judgment for such amount or any execution of such judgment by reason of any set-off or counterclaim of whatsoever nature or howsoever arising*'. Paragraph 7 of the same clause, which is a non-waiver clause, speaks of any latitude, extension of time or other indulgence given or allowed '*by any party to any other party*', not 'by either party to the other party' as would have been appropriate if there had been only two parties to the transaction. Paragraph 1 of the clause headed 'Concluding Clause', which is a non-variation provision, excludes any variation of the agreement '*unless reduced to writing and signed by all* [not 'both'] *the parties to this agreement*'. Paragraph 3 of the same clause contains references to 'any party' and 'any other party', which also would be inappropriate language if only two parties had been privy to the contract.

[19] I therefore do not find the argument persuasive. It is inconsistent with the language of the deed.

[20] I am also not persuaded by the submission that the use of the word 'shall' in paragraph 6 of the substantive agreement clause denotes that the provision of a

suretyship by the first respondent would be a future event. The word 'shall' is capable of bearing a variety of meanings.[5] The one that is applicable in a given case depends on the context in which it used.

[21] There would be no point in the lender and borrower agreeing between themselves and in the absence of a third party that the latter should give a suretyship for the borrower's obligation unless that were to be a suspensive condition for the lender's obligation to extend the loan. The notion of paragraph 6 stating a suspensive condition is inconsistent with the language of the provision and the factual context of the execution of the deed. On the construction contended for on the first respondent's behalf paragraph 6 of the substantive agreement clause would be mere surplusage. It would have no binding effect between the applicant and Bedshelf; and the first respondent, in his personal capacity, would not be privy to it. The argument, based on inadmissible parol evidence by the first respondent, that the first respondent's had no present intention to bind himself as surety, but intended by the clause to signify that he might do so in future, subject to a number of unexpressed considerations including his wife's consent, is subversive of the argument, dealt with earlier, that the first respondent had not made himself party to the agreement. More to the point, the construction contended for by the argument is also utterly bereft of what Lord Clarke referred to as 'business common sense'.[6]

[22] In my judgment the employment of the word 'shall' in the provision is clearly demonstrative of its use in the second of the examples given in Oxford Dictionary of English, viz. 'expressing a strong assertion or intention'. It connoted, in positive or assertive terms, an undertaking by the first respondent to stand as surety for the debt incurred by Bedshelf.

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[5] The *Oxford Dictionary of English* (version 2.2.1 (178)) defines the word 'shall' as follows:

1 (in the first person) expressing the future tense: this time next week I shall be in Scotland | we shan't be gone long.

2 expressing a strong assertion or intention: they shall succeed | you shall not frighten me out of this.

3 expressing an instruction, command, or obligation: every employer shall take all practicable steps to ensure the safety of employees | you shall not steal.

4 used in questions indicating offers or suggestions: shall I send you the book? | shall we go?

[6] See note 2, above.

[23] I agree with the submission by the applicant's counsel that the first respondent's current contention that paragraph 6 of the substantive agreement clause did not constitute a binding suretyship undertaking is inconsistent with his subsequent conduct. Counsel relied in this respect on the content of an email directed to the applicant's attorney by the first respondent in April 2016, shortly before the institution of these proceedings. The email was written, so it says, after the first respondent had taken legal advice having been threatened with sequestration proceedings. The first respondent indicated that he would oppose such proceedings and then proceeded at some length about how the applicant might encounter difficulty in satisfying the requirements of proving advantage to creditors. He indicated that he would argue that there were better means of benefitting the general body of his creditors, and that he already had the support of two of his creditors who were willing to make affidavits. The lengthy email did not assert that the respondent had no personal liability to the applicant, as he now alleges. While this is a factor that weighs against the idea that the first respondent had no intention, when signing the agreement, to bind himself as surety, it is merely a factor, and by no means decisive. I should therefore make it clear that I would have reached the conclusion that I have on the construction of paragraph 6 without it on the basis explained earlier in this judgment.

[24] While on the subject of subsequent conduct, it is appropriate to also mention the submission advanced on the first respondent's behalf that the applicant's attorney's invitation to him to conclude a settlement agreement was inconsistent with any belief by the applicant or his attorney that paragraph 6 constituted a suretyship undertaking. The argument was advanced on the basis that the proposed settlement agreement had been tabled merely in order to obtain for the applicant security in the form of an acknowledgment of personal liability by the first and second respondents, which he must have appreciated the existing deed of agreement did not give him. The argument is not persuasive. The proposed settlement agreement did indeed incorporate an acknowledgement of liability, but the evident purpose of the draft contract was to secure an entitlement by the applicant to payment of his claim by the respondents' conveyancer from the unencumbered proceeds of the sale of their property as a first charge on those proceeds. The object of the proposed agreement

was thus not to establish the first respondent's personal liability, but to obtain some form of security in respect of payment of the debt.

[25] The first respondent's counsel addressed detailed argument on what they contended were material disputes of fact that stood in the way of applicant establishing personal liability on the part of the first respondent. However, it was in respect of evidence in the affidavits that is inadmissible in terms of the parol evidence rule that the alleged disputes of fact on which the first respondent's counsel sought to rely were founded. For the reasons discussed above, that evidence is irrelevant; as, consequently, also is the related debate about the effect of the application in the case of the principles expressed in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5. There are no relevant disputes of fact. The position is summed up succinctly in Botha JA's observation about the effect of the parol evidence rule in *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) at 26B-D:

> The rule is well summarised by Wigmore, *Evidence*, 3rd ed., vol. 9, sec. 2425, as follows:
>
> > "This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: *When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*" (Italics in the original.)

[26] The applicant relied on an alleged statement by the first respondent during a conversation with the applicant in December 2015 that he would unable to settle the debt unless he was able to sell his house or won the lottery as an act of insolvency. The first respondent has denied making any such statement. Accordingly it falls to be considered whether the applicant has established that the respondents are actually insolvent. In this regard, the applicant's counsel propounded the adoption of the approach enunciated in *De Waard v Andrews & Thienhans* 1907 TS 727 at 733, as it was applied in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 446 I- 447D, where Berman J held:

> A debtor's unexplained failure to pay his debts is, as was stated in *Mackay v Cahi* [1962 (4) SA 193 (O)] referred to above at 204H, a fact to which the Court has always attached much

> weight in determining the question of solvency. The oft-repeated and, with respect, eminently commonsensical and practical statement of Innes CJ in *De Waard v Andrews & Thienhans Ltd* 1907 TS 727 at 733 is singularly apt in the instant context, viz:
>
> > 'To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes',
>
> words which were echoed by Bristowe J in his judgment in the same case, in which he said at 739:
>
> > 'After all, the *prima facie* test of whether a man is insolvent or not is whether he pays his debts; and if he cannot pay them, that goes a long way towards proof that he is insolvent.'
>
> It is true that in the *De Waard v Andrews* case the question of solvency or insolvency on the part of the debtor turned on the commission of an act of insolvency but there is no good reason to confine the language used in that case to those cases only in which an act of insolvency is involved. Certainly Key fails to pass the test enunciated by Bristowe J and, for all the juggling with figures and amounts and the various permutations of assets versus liabilities advanced in argument on Key's behalf, an examination conducted in the critical spirit suggested by Innes CJ reveals a muddy picture of Key's assets and liabilities, … . That Key is actually insolvent was sufficiently established and certainly so on an inferential basis where a precise assessment of his assets and liabilities cannot be made.

[27] The evidence shows clearly that the first respondent is under some financial constraint. The bank is unwilling to lend him more and his wife has been forced to go out to work to supplement the family income. His only assets appear to be his residential property in Somerset West and his shares in Bedshelf. The property was placed on the market in 2008 at an asking price of R11 million. That price has been reduced over time, with the last indicated asking price having been R7,95 m. It has recently been sold, but transfer has been held up by virtue of the effect of the provisional sequestration order. The nominal extent of the mortgage encumbrance of the property is R6,8 million. The selling price is not apparent on the papers. If the property were sold at the most recent asking price, there would no doubt be agents' commission, which would reduce the proceeds in his hands.

[28] The only indication of the value of the first respondent's shares in Bedshelf is his averment that they are worth R1,55 million. He expressed that opinion on the basis of a valuation that he says he was given by an 'independent valuator'. The valuator is not identified, no confirmatory affidavit was filed, and nothing more than the aforementioned unconfirmed report was offered in substantiation of the claim.

The valuation is therefore unsubstantiated. What is known, however, is that the company appears to have experienced long-term and ongoing operating difficulties due to inadequate working capital.

[29] If the first respondent has any other assets, he has chosen not to disclose them.

[30] It is clear from the first respondent's averments, including the assertions he made in his aforementioned email to the applicant's attorney that he has other creditors apart from the applicant and the bank. He has not disclosed who they are, or the value of their claims. He has, however, stated that the monthly cost of servicing his debt exceeds R70 000 per month.

[31] The applicant's counsel pointed out that one could extrapolate the extent of the respondents' disclosed and acknowledged debt with reference to the currently applicable bank prime lending rate, which, it is well-known, currently stands at 10,5% per annum. Counsel did the arithmetic to arrive at a figure of R7 million; his sums let him down, however. Correctly calculated, the extrapolated indebtedness of the first respondent would amount to R8 000 000 (70 000x12x100÷10,5),[7] and that would be only in respect of the debt that he is currently servicing. Most, if not all, of the monthly service charge is probably in respect of the mortgage debt, which it will be recalled was in respect of monies advanced to Bedshelf. Those loans are unlikely to have been advanced at prime lending rate.

[32] In addition, his indebtedness to the applicant in the amount of £50 000 with interest at 8% per annum from 1 July 2012 amounts to more than R880 000 if calculated at the contractually fixed conversion rate of R13 to the Pound. The amount would be considerably higher if the fixed conversion rate applies only to the payment of interest and not the capital, which is very arguably the case in terms of paragraph 4 of the substantive agreement clause.

[33] The first respondent has admitted to having stood surety in respect of other debts. He has not indicated what these were, or whether they have been settled.

[7] The extrapolated acknowledged debt would actually exceed R8 million because it is calculated on the assumption of a monthly service charge of R70 000, whereas the first respondent has averred that it is costing in excess of that amount to service the debt.

[34] His response to the proposal that he should enter into the settlement agreement, described above, was to state that to do so would be a fraud on his other creditors. That is a statement that only an insolvent could make.

[35] In my judgment the evidence makes out a prima facie case of actual insolvency, at least on a justified inferential basis (to borrow the expression used by Berman J in *Rhebokskloof*). The effect was to place an evidential burden on the respondents to 'present to the Court a full, true and accurate picture of [their] assets and liabilities' (see *Rhebokskloof* supra, at 444E).[8] They failed even to attempt to discharge it.

[36] An advantage to creditors is demonstrated in the ability of a trustee to ensure that the unsecured debt of the respondents is settled in an orderly fashion without undue preference. It will also facilitate an investigation of the respondents' actual assets and liabilities for the benefit of the general body of creditors. That this may be advantageous is to some extent underscored by the failure of the respondents to have made a full disclosure in their answering papers, as might have expected having regard to the exigencies of the case.

[37] In the result I have been persuaded that the requirements for a final order in terms of s 12(1) of the Insolvency Act have been satisfied.

[38] It was argued on the respondents' behalf that should I reach this conclusion I should nevertheless exercise the court's discretion in favour of the respondents and decline to make a final order. It is only exceptionally that a court will refuse a final order when a case for it has been made out. As the applicant's counsel pointed out, it is only in cases in which it is evident that it would unduly prejudicial to the respondents to place their estates into sequestration that the discretion is ordinarily used. An example might be where the provisional order had been obtained on the basis of an act of insolvency and it was demonstrated on the return day that the respondent was nevertheless factually solvent and that his debts would be redeemed in full if the provisional order were to be discharged. No such unusual circumstances

[8] Inasmuch as the judgment in *Rhebokskloof* might be read to suggest that an onus in the true sense is attracted by a respondent in such circumstances, I would respectfully differ. Nevertheless, it is trite in any civil matter that if the party bearing the onus makes out a prima facie case, that case will be sufficient if at the end of the day it is unaffected by rebutting evidence. I think it is clear from what Berman J said at 443F that this is what he meant when he referred to an 'onus' on the respondent.

are present in the current matter. There is no good reason to withhold from the applicant the relief to which he would ordinarily be entitled *ex debito justitiae*.

[39] The following order is made:

1. The provisional order for the sequestration of the joint estate of the first and second respondents is hereby made final.
2. The applicant's costs of suit in the application, including the costs of two counsel where such were employed, shall be costs of administration in the sequestration.

A.G. BINNS-WARD
Judge of the High Court