REPORTABLE

CASE NO.: SA 24/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANTONIO DI SAVINO **APPELLANT**

and

NEDBANK NAMIBIA LIMITED **RESPONDENT**

Coram: Shivute CJ, Mainga JA *et* Ngcobo, AJA

Heard on: 29/03/2012

Delivered on: 21/06/2012

APPEAL JUDGMENT

NGCOBO AJA:

Introduction

[1] This is an appeal against the whole of the judgment and order of the High Court granting summary judgment together with interest and costs against the

appellant, Mr Antonio Di Savino. The appellant was the third defendant in an action instituted by the respondent, Nedbank Namibia Limited (the bank), against Tile and Sanitary Ware CC (the close corporation) and Mr Barend van den Berg, who were first and second defendants, respectively. In that action, the bank claimed that the close corporation was indebted to it in respect of monies lent and advanced to the close corporation as business loans and by way of overdraft facilities. The appellant and Van den Berg were sued in their capacities as sureties and co-principal debtors.

[2] All the three defendants filed notices to defend. Judgment has since been entered against the close corporation and Van den Berg and they do not feature in these proceedings.

[3] The bank filed an application for summary judgment against the appellant. The application was opposed by the appellant who deposed to an affidavit raising certain defences. The application came before Namandje, AJ, who, on 24 September 2010, granted summary judgment against the appellant in the sums of N$1 997 196-73, N$929 613-35 and N$1 934 302-96 together with interest on each sum of money at the rate of 20.4% and costs.[1] The present appeal is the sequel.

[4] This appeal turns upon the proper interpretation of the various agreements that were concluded by the bank and the close corporation in the light of the cause

[1] The order does not order the appellant to pay these sums of money jointly and severally with the close corporation and Mr van den Berg. In addition, there is discrepancy between the order made by the Court and the order issued by the Registrar of the High Court.

of action pleaded by the bank. By way of background, it is therefore necessary to set out the salient provisions of these agreements as well as the allegations in the particulars of claim that are relevant for the determination of this appeal.

The relevant agreements

[5] The appellant and Van den Berg were members of the close corporation. In consideration of the bank allowing the close corporation certain banking facilities, the appellant and Van den Berg entered into a written Deed of Suretyship with the bank on 27 May 2005, Annexure "A". In terms clause 1 of the Deed of Surety, they bound themselves :

> "…jointly as well as severally, as surety and co-principal Debtor *in solidum* for the repayment on demand of all or any sum or sums of money which the [the close corporation] may now or from time to time hereafter owe or be indebted to the Bank, its successors or assigns, from whatsoever cause and howsoever arising, as well as for the due and punctual performance and discharge by the [close corporation] of any contract or agreement entered into or to be entered into by the [close corporation]…"

[6] Release from suretyship is an elaborate process which requires a written request of release from suretyship, a written acknowledgment of such request and a written confirmation of the termination of suretyship. And termination takes effect once all sums of money already due or accruing at the date of the receipt of notice of termination together with interest and costs have been paid. Clause 6 deals with release from suretyship and provides:

> "6. Upon termination of this suretyship by notice in writing by the undersigned as set out above you may in your entire discretion continue any then

existing facility or open a new facility with the Debtor and any moneys paid in respect of such facility/ies by or on behalf of the Debtor shall not affect your right to recover from the undersigned the full indebtedness of the Debtor to you at the date of such termination, subject to the limitation in amount aforementioned.

6.1 I/We acknowledge that I/we shall only be released from my/our obligations hereunder:

6.1.1 upon written notice from me/us to the Bank or from my/our executors, trustees or other legal representatives, as the case may be, requesting the Bank to release me/us from this suretyship; and

6.1.2 the Bank acknowledged in writing receipt of my written request;

6.1.3 and the Bank in writing advised me of the amount then still outstanding and due by the principal Debtor, for which amount I acknowledge that I shall remain liable notwithstanding such notice of termination until same has been paid in full by either myself and/or the Debtor which shall only be terminated on written notice from the Bank to me/us acknowledging that such suretyship has been terminated, but such termination shall only come into effect when the sum or sums already due or accruing at the date of receipt of such notice together with interest and costs thereon have been paid."

[7] On 29 August 2007, the close corporation, represented by the appellant and Van den Berg concluded a business loan agreement with the bank in terms of which the bank lent and advanced to the close corporation a sum of N$4 000 000.00, subject to the terms and conditions embodied in that agreement

(the first loan agreement), Annexure “C”. The loan was repayable monthly in arrear in 24 monthly instalments of N$191 579-46. In the event of the close corporation committing a breach of the agreement, “the full amount of owing in terms of [the agreement] shall forthwith become due and payable”. This of course was, “without prejudice to any other rights which might thereupon be available to [the bank]”. What constitutes a breach is set out in clause 6.

[8] During September 2008, the bank and the close corporation, represented by Van den Berg, entered into an agreement in terms of which the overdraft facility and the loan agreement that existed at the time were restructured on the terms and conditions set out in that agreement (the restructuring agreement), Annexure “B”. In terms of clause 3.3 of this agreement “The Existing Business Loan will remain as per contract dated 29/8/2007”. This is probably a reference to the first loan agreement that existed at the time, Annexure “C”.

[9] In terms of this agreement, overdraft facilities are “demand facilities” and as such they are “without a specific expiry date” and they are “repayable at the bank’s discretion in accordance with normal banking practice”. Clause 4 says so and provides:

> “4. PERIOD/UTILISATION
>
> 4.1 The overdraft facilities are demand facilities, granted on a fluctuating basis, without a specific expiry date. The arrangements in respect of each such facility are therefore subject to annual review and continuation will depend on the prevailing circumstances. It is however acknowledged that, being demand facilities, such facilities are repayable at the Bank’s discretion in accordance with normal banking practice."

[10] In addition, under clause 9 the bank would be “entitled to claim immediate repayment of all amounts owing under the facility” where a ground for making a demand exists and the close corporation fails to remedy the cause of the demand within the period stipulated by the bank. The grounds upon which a demand could be made are set out in clause 9 and those relevant to these proceedings are clause 9.1.2 and 9.1.8 which provide:

> "9. GROUNDS FOR DEMAND
>
> 9.1 Notwithstanding the provision as outlined, the Bank shall be entitled to claim immediate repayment of all amounts owing under the facility if one or more of the grounds for making demand, set out hereunder, arise and the Borrower concerned fails to remedy the matter within the period stipulated by the Bank at such time.
>
> The following are grounds for making demands, each of which is severable and distinct from the others:
>
> …
>
> 9.1.2 If the Borrower is unable or ceases for any reason whatsoever to conduct its business in an ordinary and regular manner; or
>
> …
>
> 9.1.8 If any material indebtedness or obligation for moneys borrowed constituting indebtedness of the Borrower becomes due and payable prior to its specified maturity for reason of default, or it not paid when due."

[11] Clause 9.2 sets out the rights of the bank in the event of a ground for making a demand arising and provides:

> "9.2 Where any ground for making demand arises, the Bank shall, without diminution of any other rights which it may hereby or otherwise acquire, be entitled to claim immediate repayment of all amounts owing under this offer or from whatever cause arising in connection therewith, all of which amounts shall immediately become due and payable."

[12] Notwithstanding the provisions relating to the circumstances under which a demand may be made, clause 9.5 entitles the bank to demand the payment of the facility at any time and provides.

> "9.5 Notwithstanding the above, nothing herein contained shall prejudice the Bank's right to demand repayment of the facility at any time."

[13] Clause 7 deals with interest applicable, and makes provision for penalty interest and default interest. Of relevance to this appeal are the provisions dealing with default interest which state:

> "7.2.2 Default interest rate:
>
> If the Borrower defaults in respect of any one or more of the facilities, the Bank shall, in addition to any other rights it may have in law, be entitled to charge for any one or more, or even all, of the facilities afforded to the Borrower a default interest rate equivalent to such percentage above the prime overdraft rate charged by the Bank from time to time as would be permissible in terms of the Usury Act 73/1968, as amended."

[14] And finally, clause 5 governs the conflict between the restructuring agreement and any other agreement and provides:

> "5. CONFLICTING PROVISIONS
>
> To the extent that any of the provisions contained herein are in conflict with any of the provisions of any agreement required in terms hereof, including any documentation required in support of any such agreement, whether by way of security or otherwise, the provisions contained in such agreement shall prevail." (My own emphasis)

[15] The final agreement that is relevant to this appeal is a further business loan agreement that was concluded by the bank and the close corporation, represented by Van den Berg, on 22 December 2008 (the second loan agreement), Annexure "D". In terms of this agreement the bank lent the close corporation the sum of N$2 000 000-00, which was payable in arrear in monthly instalments of N$46 796-13. Its terms and conditions are substantially, if not identical to those of the first loan agreement.

[16] It is these agreements that are the subject of this appeal. It now remains to set out the bank's cause of action as set out in its particulars of claim.

The bank's cause of action

[17] The bank's cause of action is set out in paragraphs 6 and 7 of the particulars of claim as follows:

> "6. On 29 August 2008, the Plaintiff in writing confirmed the terms and conditions of the First Defendant's banking facilities, which terms and conditions were accepted in writing by the First Defendant on 1 September

2008. A copy of the letter is attached as annexure 'B'. In terms of annexure 'B':

6.1 First Defendant's existing facilities consisting of an overdraft facility of N$3,800,000.00 and a business loan of N$4,000,000.00 were restructured into:

6.1.1 an overdraft facility of N$2,000,000.00 (clause 3.2.1);

6.1.2 a business loan of N$2,000,000.00 (clause 3.2.2);

6.1.3 First Defendant's existing business loan of N$4,000,000.00 dated 29 August 2007 which had an outstanding balance of N$2,307,793.58 remained in force (clause 3.3)
(hereinafter collectively referred to as the 'facility').

6.2 The overdraft facilities are demand facilities and as such repayable at the Bank's discretion in accordance with normal banking practice (clause 4.1).

6.3 The Plaintiff's prime interest rate will apply in respect of the overdraft facility referred to in 8.1.1 (clause 7.1.1).

6.4 The Plaintiff's prime interest rate less 1% will apply in respect of the business loan referred to in 6.1.2 (clause 7.1.2).

6.5 In the event of First Defendant's default in respect of one or more of the facilities, the maximum permissible interest rate in terms of the Usury Act will apply in respect of all the facilities (clause 7.2.2).

6.6 The Plaintiff is in terms of clause 9.1 of annexure 'B' entitled to claim immediate repayment of all amounts owing under the aforesaid banking facilities in the event of:

6.6.1 The First Defendant is unable or ceases for any reason whatsoever to conduct its business in its ordinary and regular manner; (clause 9.1.2) or

6.6.2 Any material adverse change occur in the financial position of the borrower which will, in the opinion of the Plaintiff, prevent the First Defendant from performing or observing its obligations in terms of annexure 'B' or impede its ability to do so (clause 9.1.8)

6.7 Notwithstanding the aforesaid, the Plaintiff's right to demand repayment of the facility at any time was not prejudiced by the terms of annexure 'B' (clause 9.5).

7. The Plaintiff is entitled to demand immediate repayment of the facility because:

7.1 the First Defendant is unable to conduct its business in its ordinary and regular manner; and/or

7.2 a material adverse change occurred in the financial position of the First Defendant which, in the opinion of the Plaintiff, will prevent or impede the First Defendant to perform its obligations in terms of annexure 'B'.

due to the fact that the First Defendant's Franchisor and Supplier, Italtile Mauritius Ltd t/a the Tile Market CTM advised Plaintiff on 15 April 2009 that

(a) First Defendant has severe cash flow problems and is unable to pay its debt due to the Franchisor; and

(b) The Franchisor intends to cancel first Defendant's CTM franchise and intends to take over the franchised business from the First Defendant."

[18] Based on these allegations, the bank advanced three claims, alleging that:

"CLAIM 1:

8. First Defendant is indebted to the Plaintiff in respect of monies lent and advanced by the Plaintiff to the First Defendant on a current account no. 11000163076 in the amount of N$1,997,196.73 in respect of the overdraft facility referred to in 6.1.1 above, which amount:

8.1 is payable on demand;

8.2 is hereby demanded;

8.3 is now due and payable

8.4 by agreement between the parties, now bears compound interest on the daily outstanding balance due from time to time at the rate of 20.4% per annum, (being the maximum rate permissible in terms of the Usury Act) due to First Defendant aforesaid breach of its facility calculated daily and compounded monthly in arrears and which interest has been calculated and capitalised until 31 March 2009 and which must thus still be calculated on the amount of N$1,997,196.73 from 1 April 2009 until date of payment.

8.5 The Defendants are now jointly and severally liable to pay the Plaintiff.

CLAIM 2

9. First Defendant is further indebted to the Plaintiff in respect of monies lent and advanced by the Plaintiff to the first Defendant on the Business Loan Account number 13290010920 referred to in 6.1.3 in the amount of N$929,613.75, a copy of which loan agreement entered into between the parties on 30 September 2007 is annexed hereto marked annexure 'C', which amount the Defendant are now jointly and severally liable to pay to the Plaintiff with further compound interest thereon calculated at 20.4% per annum, calculated daily and compounded monthly in arrears.

CLAIM 3:

10. First Defendant is further indebted to the Plaintiff in respect of monies lent and advanced by the Plaintiff to the First Defendant on a Business Loan Account number 13290016767 referred to in 6.1.2 in the amount of N$1,934,302.96, a copy of the loan agreement entered into between the parties on 22nd December 2008 is annexed hereto marked annexure 'D', which amount the Defendant are now jointly and severally liable to pay to the Plaintiff with further compound interest thereon calculated at 20.4% per annum, calculated daily and compounded monthly in arrears."

[19] It is these allegations that formed the basis of the application for summary judgment which was resisted by the appellant.

Grounds of attack in the High Court

[20] In the court below, the appellant resisted summary judgment on the ground that (a) he had been released from suretyship; (b) the close corporation was still conducting its business and he was not aware of any adverse material change in its financial position; and (c) the loan advanced under the first loan agreement "has almost been paid". The High Court dealt with (a) and (c) and concluded that they do not establish a *bona fide* defence, and, in the exercise of its discretion granted summary judgment. It did not deal with ground (b) and nothing was said about this ground either in the appellant's heads of argument or in oral argument.

[21] In this Court, Mr Heathcote, who, together with Ms Schneider, appeared for the appellant, raised further grounds that were neither set out in the opposing affidavit nor advanced in the High Court. He contended that summary judgment should have been refused because there was no valid power of attorney; the

allegations made in the affidavit in support of the applications for summary judgment are not adequate and do not comply with the Rules; the particulars of claim do not support the relief sought; and, the particulars of claim do not sustain a claim for default interest. And as will appear below, he advanced an entirely new argument in support of the defence based on release from suretyship.

[22] Understandably, Mr Barnard who appeared on behalf of the bank resisted any reliance on a ground that was not advanced in the opposing affidavit. He submitted that the opposing affidavit does not comply with the provisions of Rule 32(3)(b) which require the opposing affidavit to disclose fully the nature and the grounds of the defence as well as the material facts relied upon. He argued that the new ground of defence should have been set out in the appellant's affidavit. These submissions must be considered in the light of the requirements of Rule 32(3)(b) as well as the principles governing summary judgment.

Principles governing summary judgment

[23] One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a *bona fide* defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3)(b) the affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

[24] The enquiry that the court must conduct is foreshadowed in Rule 32(3)(b) and it is this: first, has the defendant "fully" disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.[2] If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

[25] While the defendant is not required to deal "exhaustively with the facts and the evidence relied upon to substantiate them", the defendant must at least disclose the defence to be raised and the material facts upon which it is based "with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence."[3] Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule.[4]

[26] Where the defence is based on the interpretation of an agreement, the court does not attempt to determine whether or not the interpretation contended for by the defendant is correct. What the court enquires into is whether the defendant has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the defendant may

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[2] *Maharaj v Barclays National Bank Ltd*, 1976(1) SA 418 (A) at 426A-C
[3] *Maharaj v Barclays National Bank*, *supra*, at 426C-D
[4] *Arend and Another v Astra Furnishers (Pty) Ltd*, 1974(1) SA 298(C) at 304A-B

succeed at trial, and, if successful, will establish a defence that is good in law.[5] Similarly, where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law.

[27] But the failure of the affidavit to measure up to these requirements does not in itself result in the granting of summary judgment. The defect may, nevertheless be cured by reference to other documents relating to the proceedings that are properly before the court.[6] In *Sand and Co. Ltd v Kollias* the court held that the principle that is involved in deciding whether or not to grant summary judgment is to look at the matter "at the end of the day" on all the documents that are properly before the court.[7]

[28] This approach to the opposing affidavit in summary judgment is a recognition of the drastic nature of the remedy of summary judgment. It offends against the fundamental right of a litigant to have access to court and be heard. Its aim is to protect the plaintiff against a defendant who has no *bona fide* defence and who has entered appearance to defend to delay the recovery of the debt and whose conduct thus amounts to an abuse of the process of court. But it "was never intended to replace the exception as a test of one or other of the parties' legal contentions; nor to provide the plaintiff with a unilateral advantage of the preview of defendant's evidence."[8]

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[5] *Shingadia v Shingadia,* 1966(3) SA 24(R) at 26A-B; *Tesven CC and Another v South African Bank of Athens,* 2000(1) SA 268 (SCA) at para 26; *Shepstone v Shepstone*, 1974(2) SA 462(N) at 467A; *Marsh and Another v Standard Bank of SA Ltd*, 2000(4) SA 947(W) at 949 para 3

[6] *Sand and Co. Ltd v Kollias,* 1962 (2) SA 162 (W) at 165; *Maharaj v Barclays National Bank Ltd, supra,* at 423H

[7] *Sand and Co. Ltd v Kollias, supra,* id.

[8] *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304F-G

[29] But where the opposing affidavit does not satisfy the requirements of Rule 32(3)(b), the court has a discretion under Rule 32(5) whether or not to refuse summary judgment.[9] This discretion must be exercised with due regard to the drastic nature of the procedure of summary judgment. In *Arend and Another v Astra Furnishers (Pty) Ltd*, Corbett J put the matter thus:

> "In my view, an important factor to be taken into account by the Court in determining how to exercise its discretion is the consideration that the procedure of summary judgment constitutes an extraordinary and very stringent remedy: it permits a final judgment to be given against a defendant without a trial. It is designed to prevent a plaintiff having to suffer the delay and additional expense of the trial procedure where the defendant's case is a bogus one or is bad in law and is raised merely for the purpose of delay, but in achieving this it makes drastic inroads upon the normal right of a defendant to present his case to the Court."[10]

[30] This of course must not be understood as minimising the importance of complying with Rule 32(3)(b). For the court to consider whether the facts alleged by the defendant constitute a good defence in law and whether the defence appears to be *bona fide*, the court must be appraised of the facts upon which the defendant relies. It is for this reason that the Rule prescribes that the nature and grounds of the defence and the material facts relied upon therefor must be fully disclosed in the affidavit. In addition, the contents of the affidavit will enable the court to decide whether or not to exercise its discretion to refuse summary judgment.

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[9] *Maharaj v Barclays National Bank Ltd*, *supra*, at 425H; *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at para 26.
[10] At 304F-G

[31] The importance of raising all possible defences in the opposing affidavit or in the trial court to the administration of justice cannot be gainsaid. It gives the court of first instance the opportunity to consider the grounds of attack and, if the matter should come on appeal, this Court will have the benefit of the views of the trial court. It exposes arguments to scrutiny and reveals their strength or weakness. It provides the parties with the opportunity to reassess their respective positions and consider whether or not to take the matter on appeal. This may help to avoid an unnecessary appeal. This process is not only vital to the proper administration of justice but is also vital to the development of coherent jurisprudence.

[32] It is in this context that the question whether the appellant may raise the new defences for the first time on appeal must be considered.

Raising new defence on appeal

[33] As a general matter the appeal court is disinclined to allow a party to raise a point for the first time on appeal because having chosen the battle-ground, a party should ordinarily not be allowed to move to a different terrain. However, the court has a discretion whether or not to allow a litigant to raise a new point on appeal. In the exercise of its discretion, the appeal court will have regard to whether: the point is covered by the pleadings; there would be unfairness to the other party; the facts upon which it is based are disputed; and the other party would have

conducted its case differently had the point been raised earlier in litigation.[11] In *Cole v Government of the Union of SA, supra,* Innes J, as he then was, put the matter thus:

> "The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."

[34] In my view, this principle is of general application and is applicable in the case of an appeal against an order granting summary judgment.

[35] In *Arend and Another v Astra Furnishers (Pty) Ltd, supra*, the court was concerned with, among other questions, the question whether it is open to the defendant in an application for summary judgment to advance points not taken in the opposing affidavit. One of the points taken was that the plaintiff's particulars of claim did not disclose a cause of action. The court held that it has been generally accepted that a defendant may attack the validity of the application for summary judgment on any aspect.[12] It went on to hold:

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[11] *Cole v Government of the Union of SA* 1910 AD 263 at 272 - 273**;** *Paddock Motors (Pty) Ltd v Igesund* 1976(3) SA 16 (AD) at 23; *Ministry of Regional and Local Government and Housing v Muyunda*, 2005 NR 107 (LC) pp 110 -111.

[12] P 314A - C

> "Where the attack is upon the ground that the plaintiff's particulars of claim do not substantiate a valid cause of action, then, in my view, this is not strictly a defence and it does not fall within the ambit of Rule 32(3)(b) regarding the defendant's obligation fully to disclose his defence. It raises rather the question as to whether plaintiff has complied with Rule 32(1) and (2) relating to the requirements of an application for summary judgment. Accordingly, I hold that a defendant in summary judgment proceedings is not precluded from raising issues relating to the validity of the plaintiff's application merely because he has not referred to these matters in his opposing affidavit."

[36] It seems to me that in the case of summary judgment, which is a drastic remedy, as a general matter, a court should be slow in disallowing the new point. This is apparent from the principles governing summary judgment that are set out above. There may of course be circumstances where the court will, in the exercise of its discretion, refuse to permit the defendant to raise a new defence. This will ordinarily be the case, for example, where it appears to it that the defendant is clasping at straws. This may be indicative of the fact that the defence is an afterthought and that the defendant has no *bona fide* defence and the new defence has been advanced in an attempt to delay the payment of the plaintiff's claim. There is no suggestion that this is the case here.

[37] Accordingly I hold that the appellant is not precluded from raising points that he seeks to raise in this Court merely because they were neither raised in his opposing affidavit nor raised in argument in the court below. These points are covered by the particulars of claim and the agreements annexed to the particulars of claim. However, I am far from being satisfied that there is any merit in the

attacks on the power of attorney, and those based on the ground that the allegations made in the affidavit in support of summary judgment are not adequate and do not comply with the Rules. However, in the view I take of the matter, it is not necessary to reach any firm conclusion on these grounds.

[38] It now remains to apply these principles governing summary judgment to this appeal.

Does the opposing affidavit pass muster

[39] The opposing affidavit is a wholly unsatisfactory document. It is not a model of clarity. Mr Heathcote very properly conceded that "the appellant's opposing affidavit is not exemplary in its clarity". It is inelegantly drafted and pays little attention to the requirements of Rule 32(3)(b). The appellant alleges that the close corporation "is still conducting business and [he] is not aware of any material adverse change which occurred in the financial position of the [close corporation]". He does not set out the material facts relied upon for this allegation. In addition, he alleges that the loan advanced under the first loan agreement, Annexure "C" "has almost been repaid". The material facts relied upon for this allegation are not set out.

[40] One of the grounds upon which the appellant resisted summary judgment appears from paragraph 6 of his opposing affidavit which reads as follows:

> "6.1 Plaintiff furthermore acted totally in conflict with the agreements – Annexures 'B' (dated 29/8/08) and 'D' (dated 22/12/08) to my prejudice without consulting me and having signed by me and therefore I am in

addition released from liability under the 'suretyship', which I cannot be held liable for anymore.

6.2 Plaintiff has totally restructured the whole banking facility with first and Second Defendant as per Annexures 'B' and 'D' without my knowledge and/or without my consent."

[41] These paragraphs are not a model of clarity. But viewing the affidavit as a whole and in the light of the particulars of claim and the annexures, this is what they appear to convey: The bank and the close corporation represented by Van den Berg concluded a restructuring agreement which restructured the banking facilities without the appellant's consent and to his prejudice. As a result of this, he is released from suretyship. These paragraphs, however, do not set out how the appellant was prejudiced by the restructuring of the banking facilities.

[42] Viewing the matter "at the end of the day" and in the light of all the documents that are properly before the court and the new argument that has been advanced in this Court, I consider that the affidavit just passes muster.

[43] What must be considered in this appeal are two arguments advanced in this Court, namely, first, that the particulars of claim do not establish a claim for default interest; and, second, the appellant's contention that he has been released from the suretyship agreement. The question is whether these arguments establish *bona fide* defences to the bank's claims. It will be convenient to deal with the argument based on release from suretyship first.

The ground based on release from suretyship

[44] The appellant contended that he has been released from suretyship because (a) he entered into an oral agreement with the bank in terms of which he was released from future obligations under the suretyship; and (b) the bank entered into the restructuring agreement with the close corporation without his consent and to his prejudice, and, by operation of law, the appellant is released from suretyship. In the view I take of the matter, it is only necessary to consider the second leg of the ground based on released.

[45] In developing this argument, Mr Heathcote submitted that the restructuring agreement constitutes a material variation of the terms of the repayment of the business loan advanced under the first loan agreement that was signed by the appellant. This material variation, it was argued, which is prejudicial to the appellant, operated to release the appellant from his obligations under the suretyship. In the alternative, and if the loan agreements are applicable, Mr Heathcote submitted that the bank should have based its causes of action in relation to claims 2 and 3 on the applicable loan agreements.

[46] Mr Heathcote submitted that the restructuring agreement constitutes a material variation that is prejudicial to the appellant in at least one fundamental respect; it alters the terms of repayment of the loans. It does this by converting the loans into demand facilities and make them payable on demand. He submitted that under clause 9.5 of the restructuring agreement, the bank has the "right to demand repayment of the [loans] at any time" regardless of whether or not the close corporation is in breach of the terms of the loan agreements. This is a

material departure from the loan agreements which provide that the loans are repayable in monthly instalments and that the full amount owing only becomes due and payable upon a breach of the loan agreements, he argued.

[47] In support of this contention he relied upon the decision in *Brinkman v McGill*[13] where the court held that a material variance in the payment of the principal debt will operate as a release of the surety if such variance has taken place without the consent and knowledge of the surety. In addition, we were also referred to the decision in *Minister of Community and Development v SA Mutual Fire & General Insurance Co Ltd*[14], where the court upheld the argument that a departure from the terms of payment under a building contract without the consent of the surety and that is prejudicial to the surety operated in law to discharge the surety from all liability under the deed of suretyship.

[48] These submissions are premised on the assumption that the restructuring agreement overrides the loan agreements. But clauses 3.3 and 5 of the restructuring agreement, on their face, appear to suggest that the provisions of the first and second loan agreements continue to govern the loans despite the provisions of the restructuring agreement. If that is what they convey, then what remains is the appellant's alternative argument, namely, if the loan agreements are applicable, then the bank's causes of action under claims 2 and 3 arise, not from the restructuring agreement as the particulars of claim allege, but under the first and second loan agreements, respectively. The particulars of claim do not

[13] 1931 AD 303 at 315
[14] 1978 (1) SA 1020 (W) at 1023A-1024D

allege a breach of the loan agreements. In that event, the particulars of claim do not disclose a cause of action in respect of claims 2 and 3, it was submitted.

[49] Now these submissions on behalf of the appellant raise questions of the interpretation of the restructuring agreement and the loan agreements. If the restructuring agreement alters the terms of the payment of the loans as Mr Heathcote contended, the question that arises is whether this operates in law to release the appellant from the suretyship. On the other hand, if the restructuring agreement does not govern the repayment of the loans and the loan agreements apply, then the question that arises is whether or not the particulars of claim sustain a cause of action in respect of claims 2 and 3. These submissions raise difficulties of interpretation of agreements and issues of law. They raise triable issues in relation to claims 2 and 3 in respect of which the appellant should be granted leave to defend.

[50] It now remains to consider the ground for resisting claim 1 which is a claim for repayment of overdraft under the restructuring agreement. The appellant contented that the particulars of claim do not lay a foundation for claiming the default interest which is claimable under clause 7.2.2 of the restructuring agreement. Both counsel approached the matter on the footing that the amount of N$1 997 196-73 claimed under claim 1 includes default interest. If that is so, the appellant submitted, in the absence of the allegation that the close corporation has defaulted “in respect of anyone or more of the facilities” as contemplated in clause 7.2.2, the particulars of claim do not disclose the basis for claiming default interest.

[51] Mr Barnard accepted, correctly in my view, that for the bank to claim the default interest, the particulars of claim must allege that the close corporation has defaulted as contemplated by clause 7.2.2. All that the particulars of claim allege in relation to default interest is that in the event of the close corporation defaulting in respect of one or more of the facilities, the maximum permissible interest rate payable under the Usury Act will apply, but there is no allegation that the close corporation has defaulted as contemplated by clause 7.2.2. The defence raised against claim 1 is, in my view, not bad in law.

[52] As I have pointed out above, the opposing affidavit just passes muster. But viewing the opposing affidavit as a whole and, in particular, the allegation that the bank concluded the restructuring agreement to the prejudice of the appellant taken together with the particulars of claim and the relevant agreements, I am satisfied that it appears to raise a *bona fide* defence and that it has disclosed this defence and the material facts upon which it is founded with just – and only just – sufficient particularity and completeness in order to comply with Rule 32(3)(b).

[53] Apart from this, having regard to the difficulties of interpretation and law points raised, I am unable to say that the bank's case is unanswerable and that there is no reasonable possibility that defences raised by the appellant are good in law. In these circumstances, this is an appropriate case for the exercise of the discretion in favour of refusing summary judgment.

[54] It follows, in my view that the appellant is entitled to be granted leave to defend.

Costs

[55] It now remains to consider the question of costs. The costs of the application for summary judgment should no doubt be left for determination by the trial court. What remains are the costs in this Court. The issue of costs is a matter that is within the discretion of the court. Ordinarily costs should follow the result unless there are circumstances that justify a departure from this rule. I think those circumstances exist here.

[56] The appellant has succeeded on arguments that were not raised in the court below. It may well be that had the High Court been presented with these arguments, it would have exercised its discretion in favour of the appellant. This would have rendered this appeal unnecessary and the costs of the appeal would have been avoided. And it may well be that if the appellant had fully set out the nature and the grounds of his defence as well as the material facts upon which these defences are based, the application might have taken a different course. We are left to speculate.

[57] In all the circumstances, I think the appellant though successful, must pay the bank's costs.

[58] In the event, the following order is made;

(a) The appeal is allowed;

(b) The appellant is ordered to pay the respondent's costs, which costs shall include the costs of one instructing and one instructed counsel;

(c) The order of the High Court is set aside and is replaced by the following order:

> "Summary judgment is refused and the third defendant is granted leave to defend the action. The costs of the application for summary judgment are left over for determination by the trial court."

_____
NGCOBO, AJA

I agree.

_____
SHIVUTE, CJ

I also agree.

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MAINGA, JA

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