IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no. **2690/2015**

In the matter between:

BBT ELECTRICAL & PLUMBLING CONSTRUCTION & MAINTENANCE CC t/a BBT CONSTRUCTION Applicant

and

Respondent

RETMIL FINANCIAL SERVICES (PTY) LTD

CORAM:	**I VAN RHYN, AJ**
HEARD ON:	**6 FEBRUARY 2020**
JUDGMENT BY:	**I VAN RHYN, AJ**
DELIVERED:	**24 FEBRUARY 2020**

INTRODUCTION:

[1] The Applicant, BBT Electrical & Plumbing Construction & Maintenance CC t/a BBT Construction ("BBT") claims the rendering of a true and proper statement of account with substantiating documentation and a debate thereof relating to seven (7) contracts it concluded with the Respondent. The Respondent, Retmil Financial Services (Pty) Ltd ("Retmil"), in conjunction with Government, provides small businesses such as BBT with financial assistance to compete in the open market place. On behalf of BBT it was conceded that one of the seven (7) contracts is not applicable and therefore the application only concerns six (6) of the contracts, each allocated with a specific number, referred to in the Notice of Motion. Retmil opposes the application and contends that BBT is not entitled to the relief sought.

[2] Approximately twenty (20) years ago the relationship between BBT and Retmil (then known as Notley & Company) commenced. Through the years BBT and Retmil have entered into numerous loan and credit agreements, most of which have been settled. During 2014 a dispute arose between the parties regarding the outstanding balances allegedly due, owing and payable by BBT. On 21 July 2014 the attorney acting on behalf of Retmil addressed ten (10) letters of demand to BBT in terms of the provisions of Section 129(1) of the National Credit Act, Act 34 of 2005 claiming payment of the amount of R2 883 427.20.

[3] BBT, through its attorney denied its indebtedness and queried the correctness of the amount claimed. Subsequent to a meeting held between the legal representatives acting on behalf of the parties and in a letter dated 22 August 2014 Retmil, after certain recalculations were done, claimed a reduced amount of R1 198 816.02. Mr Snellenburg SC, counsel on behalf of BBT contends that Retmil has a duty to account to BBT due to the fact that it demanded payment of approximately R2 800 000.00 during July 2014 and revised the amount to R1 197 000.00 on 22 August 2014. Then, on 4 September 2014 and based on the same agreements, Retmil demanded payment of R900 000.00. Mr Snellenburg SC argued that this is indicative of Retmil's inability to provide BBT with a proper and substantiated calculation of the amount allegedly owed by BBT.

[4] In support of its argument that BBT is entitled to the relief sought, it is contended that in two (2) of the six (6) contracts referred to in the Notice of Motion, the right to claim a statement of account and debatement thereof, is included. Although the other remaining four (4) contracts do not contain the contractual right to claim the delivery of an account and debatement thereof, the relief sought in the provisional counter-application that, in the event of the court granting an order that Retmil render true and proper statements of account together with substantiating documents, the loan agreement and guarantee should, for practical purposes, also be included in the debatement of the accounts.

[5] Mr Reinders, who appeared on behalf of Retmil relinquished the application to strike out the inadmissible evidence included in BBT's application, more specifically the inclusion of privileged communications. Several letters marked "w*ithout prejudice*" were appended to BBT's papers in support of the contention that Retmil failed to provide it with a detailed, concise and arithmetically understandable breakdown of what is due, owing and payable in terms of the various contracts. Retmil's opposition to the relief sought is on the basis that BBT failed to allege and prove that it (Retmil) has a duty to deliver substantiating documents and the debatement of the accounts relating to the six (6) contracts referred to by BBT.

STATEMENT AND DEBATEMENT OF ACCOUNT:

[6] In an action for a statement of account the Plaintiff should aver his/her right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or a statutory duty. In **Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd**[1] it was held that:

"The right at common law to claim a statement of account is, of course, recognized in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an

[1] 1975 (1) SA 961 (W) at 963.

account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account."

[7] If the plaintiff relies upon such a contractual right as in the present matter, the terms of the contract must be alleged and proved.[2] Furthermore, the defendant's failure to render an account or, if an incomplete account has been rendered, the failure to render a proper account has to be established.[3] On proof of the aforegoing the court will usually order the rendering of an account within a specific time. The degree or amplitude of the account to be rendered will depend on the circumstances of each case. In some cases it might be necessary that vouchers, or other substantiating documents or explanations be included in the order. The parties should then proceed to debate the account between themselves. If they are unable to reach an agreement, they should then formulate a list of the disputed items. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or an amendment of the pleadings then set the matter down for debate in court.[4]

[8] If the plaintiff has already received an account which he avers is insufficient, the court may enquire into and, determine the issue of insufficiency, in order to decide whether to order the rendering of a proper account. What is clear is that the procedure to be followed is not rigid and should enjoy such measure of flexibility as practical justice may require.

RELEVANT FACTS:

[9] I turn more fully to the facts of this application. Early in 2014 BBT was awarded a contract for the building of Limo Mall, Bloemfontein to be developed by the Sue Celken Trust. Retmil was still considering BBT's application to finance the Sue Celken project when BBT landed another project, referred to as the Babereki project. Retmil approved the financing of both projects and loan agreements were concluded with BBT to proceed with

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2 Beck's Theory and Principles of Pleading in Civil Actions (6th Edition) Butterworths 190.
3 Doyle and Another v Fleet Motors P.E. (Pty) Ltd 1971 (3) SA 760 at 762 F – H.
4 Doyle at p. 763 A.

both projects. Both loan agreements contained a renunciation by BBT of all legal exceptions. BBT's obligations towards Retmil were secured by cession agreements in terms whereof the developer would pay the money due to BBT, directly to Retmil. During July 2014 Retmil was alerted to the possibility that BBT, probably due to cash flow problems, agreed with one of its cessionaries (pertaining to the Babereki project) to disregard the cession agreement and make payment of an amount of R228 660.52 directly to BBT. On 23 July 2014 BBT acknowledged that it did in fact receive the funds from the cessionary, but denied any wrongdoing. BBT averred that the cessionary erroneously paid the money into its account and proposed to repay the said amount to the cessionary for payment to Retmil. According to Retmil the events caused a total breakdown of trust in their relationship.

[10] BBT, on the other hand, denied this to be the reason for the breakdown in the trust relationship and stated that the breakdown was due to Retmil's failure to properly account to BBT regarding the amounts due in respect of the numerous loan and credit agreements. According to BBT a meeting was then held between the parties' legal representatives on 22 August 2014. Recalculations were done whereafter the amount due, owing and payable "*was reduced*" from R2 883 342.72 to R1 198 816.02.

[11] From the correspondence appended to the parties' papers it is evident that a meeting was also held on 13 August 2014. In a letter dated 14 August 2014, addressed to BBT's attorney, the following was stated: *"With reference to the above we wish to confirm that the account was fully debated on your client's insistence on Wednesday 13th August 2014. We furthermore confirm that each and every payment was ticked off the list to your satisfaction."* Appended to the letter was a copy of the account which was the subject of the debatement incorporating all the outstanding balances. BBT was referred to the balance owed in the amount of R1 198 816.02. Included in the letter was a settlement proposal. Evidently, an offer in the amount of R1 000 000.00 for the plot situated in Estoire, the property of BBT, had been received. It was proposed that, subsequent to the sale of the plot which is encumbered by a bond held by Retmil, and the balance to be collected from the first payment on the next cession payment, all outstanding debts with Retmil will be regarded as settle.

Furthermore, BBT should then return the four (4) outstanding guarantees, two in possession of the Mangaung Metropolitan Municipality ("MMM"), one delivered for the Babereki project and another for the Sue Celken/Limo Mall project.

[12] During 2011 BBT tendered for and was ultimately awarded a contract (No. W0904) for certain construction work with the MMM. MMM required a guarantee in the amount of R1 286 548.12 for BBT's due, timeous and proper execution of the contract. Retmil was approached by BBT to provide the required guarantee to MMM. It was agreed between Retmil and BBT that, in the event of MMM calling up the guarantee and claiming payment in terms thereof, BBT would reimburse Retmil. To provide Retmil with security, a loan agreement was concluded between Retmil and BBT. Retmil avers that BBT failed to fulfil its obligations in terms of the construction contract with MMM whereafter MMM cancelled the agreement. BBT disputed the averments made by Retmil regarding the termination of the construction contract. This formed the basis for the so called "guarantee application" under case number 3007/2015.

[13] In a letter dated 19 August 2014, BBT responded and referred to the consultation held between the legal representatives of both parties on the 13th August 2014 and stated the following; *"… we confirm that your client undertook to give us a spreadsheet with regards to the payments received and payments made in respect of the two projects."* On 22 August 2014, Retmil's attorney addressed a letter to BBT's attorney and recorded that a further meeting was held during the morning of 22 August 2014 and that BBT was requested to provide proof of insurance pertaining to the various assets under hire purchase and lease agreements. The letter furthermore contained the following statement: *"… we furthermore confirm that you are in receipt of the latest statements in all these various agreements."*

[14] It is evident that further discussions regarding a settlement of the issue occurred during the meeting as it was recorded as follows: *"Our clients is willing to settle the matter as suggested by yourself, in that your client pays our client the amount of R1 198 816.02 plus insurance costs if our client has to ensure*

the said assets." Again reference is made to the prerequisite that the four (4) original guarantees had to be returned whereafter all three (3) sessions will be cancelled and the assets subjected to the hire purchase agreements and the bond will be released.

[15] With reference to previous correspondence relating to this matter BBT's attorney then addressed a letter to Retmil's attorney on 29 August 2014 and again requested *"… a breakdown of all the instalment sale agreements from their respective inceptions as our client has confirmed that he has the necessary funds to settle same"*. Retmil was furthermore requested to provide BBT with confirmation of its revocation of the guarantees in writing so as to enable BBT to collect the original guarantees for delivery to Retmil.

[16] On 1 September 2014 Retmil explain that due to some of the instalment sale agreements dating back seven (7) years, copies of the required documents could not readily be made available. With regard to the guarantees, Retmil confirmed that same have been revoked and again requested BBT to collect the original guarantees from the employers for delivery to Retmil. It is clear that Retmil's attorney was taken aback by the persistent requests for a breakdown of all the instalment sale agreements and mentioned that the request surprized him. The following day, 2 September 2014 BBT replied and confirmed that the guarantees will be collected as requested. As is evident from the contents of a letter dated 8 September 2014 and addressed to BBT's attorney, a further meeting occurred on 4 September 2014. The following settlement proposal was contained in this letter: *"Your client to effect payment to our client in the amount of R900 000.00 in full and final settlement of all the contracts …"*

[17] The return of the four (4) guarantees, cancellation of the bond and ownership of the leased assets were again included in the settlement proposal. On 16 October 2014 Retmil again explained that some of the statements requested, date back as far as ten (10) years and are not in Retmil's possession. The agreements, although signed during 2009 and 2010 replaced previous existing agreements. The balances were brought forward and included in follow-up agreements. For Retmil to give a full

statement from date of inception will take at least three (3) months. The balances however were accepted by BBT at the beginning of the new financial year on 1 March 2014 and the relevance of the previous statements were questioned. On 2 February 2015 BBT once again requested *"…a debatement of account in respect of all the contracts with your client, from the respective date of inception"*. The debatement concerned ten (10) different contracts.

[18] In reply, on 3 February 2015, Retmil "*actually welcomed*" the opportunity to debate the said accounts but again questioned the purpose of such a process. The letter furthermore contain a detailed proposal regarding the process to be followed in order for the debatement of each account to be "*practical*". In short, it was proposed that the debatement should be conducted in different stages and that after each session regarding the debatement of an account, BBT should enter further queries within a specified time. If no queries regarding an account were received, payment should follow on the agreed amount and to be kept in Retmil's attorney's trust account until such time as all the accounts were debated and paid by BBT. Thereafter a reconciliation will take place, if necessary.

[19] However, on 10 February 2015 and in response to the proposal regarding the debate of the account, BBT replied as follows: *"As previously stated, our client does not want to sit with your client and go through each transaction. Our client requests a statement from the date of inception of the contracts to the current standing in order for our client to provide same to his accountant in order to verify all said information."* Again Retmil was offered ten (10) days to provide *"a full breakdown of the contracts"* from their respective dates of inception.

[20] Retmil responded the following day, 11 February 2015, and pointed to the "*contradictio*" in BBT's request for a debatement of the account with regard to the statement that the intention is not to sit with Retmil to go through each account but to provide statements to their accountant for perusal. Again Retmil reiterated that it will provide copies of the statement of account as soon as possible but not within the stated time period of ten (10) days. In their reply BBT did not afford Retmil with an undertaking that any

outstanding amount will be settled subsequent to completion of the whole process. Retmil responded and explained that BBT must, as the employer in terms of the guarantee, approach the employer for instance, MMM to obtain the original guarantee. In terms of the provisions stipulated in the guarantee, it will remain in full force and effect during the term of the contract either until the date of issue of a certificate of completion for the whole or final portion of the works or until any liability by the contractor has been satisfied. The guarantees are secured by loan agreements consisting of a fee component as well as an interest component. Up until such time as the original guarantees have been returned, BBT is charged accordingly. The guarantee pertaining to the Sue Celken matter had by then been received and Retmil was awaiting delivery of the Babereki guarantee. The two guarantees provided to MMM were still outstanding.

[21] A dispute ensued as to whose responsibility it was to retrieve the original guarantees from Babereki and MMM and in a letter dated 13 February 2015 BBT's attorney made the following statement: "*We are unsure as to how not having the guarantees make it impossible to finalize the statements for inspection*". In a further letter dated 26 February 2015 Retmil's attorney again requested BBT to submit the two guarantees delivered in favour of MMM. In an attempt to obtain the original guarantees from MMM, Retmil, through its attorneys, endeavoured to retrieve the original guarantees but was informed by MMM that BBT should claim the same from MMM. Retmil once again explained that the final statement of account cannot be finalized until such time as the guarantees are received as this remains a variable that can have a financial implication for BBT.

[22] On 29 June 2015 Retmil launched an application under case number: 3007/2015 for an order that the present application be stayed pending the final adjudication of the guarantee application and an order that the MMM, cited as first respondent, be ordered to calculate the final amount due, if any, by Retmil to the MMM in terms of Retmil's guarantee for execution of contract number W0904. BBT was cited as the second respondent in the guarantee application. On 11 December 2015 the court dismissed the guarantee application and an appeal followed regarding the costs order

which also succeeded. Daffue R, held that Retmil has no contractual right to obtain the relief claimed from MMM. The guarantee issued by Retmil only becomes relevant once a certificate of completion has been issued in respect of the contract works. Due to the fact that the contract concluded between MMM and BBT, forming the basis of the guarantee has not been finalized, any money which might be due, owing and payable in terms of the guarantee cannot be calculated prior to a certificate of completion being issued.

DISCUSSION

[23] Since delivery of the answering affidavit on 20 October 2015, no further steps were taken in relation to the present application until May 2019. BBT served and delivered its replying affidavit in this application on 13 May 2019, approximately three (3) years and seven (7) months after Retmil's answering affidavit was delivered. BBT avers that "*no penalties have been imposed or even mentioned by the Municipality. No notifications of penalties have been received*". BBT further contends that the guarantee is irrelevant to the debatement sought by the Applicant.

[24] I agree with the contention on behalf of Retmil that the final account due, owing and payable cannot be calculated prior to the cancellation of the guarantees issued to MMM. BBT argues that the guarantee application launched by Retmil was unsuccessful but fails to take cognisance of the reasons for dismissal of the application. Daffue R acknowledged that, prior to the certificate of completion being issued, MMM will not be able to provide Retmil with the amount due in terms of the guarantee. Until BBT submits the original guarantee provided to MMM, Retmil is held ransom and will not be in a position to provide BBT with the final calculations. BBT's argument that the guarantee is irrelevant to the debatement of the account held with Retmil is therefore flawed.

[25] Mr Snellenburg SC's argument that contracts 547 and 548 specifically grants the right to BBT in clauses 19.13.3.2 and 19.13.3.3 to "*an order compelling the delivery of a statement of account*" and/or review of a statement of

account, and thus disposes of the argument that BBT is not entitled to the relief claimed, at least in the relation to those specific contracts is not that simple. Clause 19 of contracts 547 and 548 has similar provisions and in clause 19.2 the following contractual rights are included:

"*19.2 We will provide (you) with a statement of account periodically and in the frequency and medium selected by you in the application form for this loan. You may dispute all or part of the statement delivered to you by sending us written notice of your objections. Failure to resolve a statement will not entitle you to refuse or fail to pay any amount that is due to us.*"

[26] BBT failed to refer to the application form it supposedly completed for the loan or to which election was made regarding the frequency and medium of the accounts to be provided by Retmil. BBT contended that "… *ex facie such contracts Applicant is entitled to comprehensive statements from time to time, which Respondent has failed to provide*". Retmil contended that an employee, whose confirmatory affidavit is appended to the answering affidavit, personally handed complete copies of the statement of the accounts, from the date of inception of the contract to Mr Matete, the deponent and sole member of BBT together with any other documents which Mr Matete, from time to time, requested. Even though this averment is denied by BBT, it was conceded, rather vaguely, that BBT did receive statements from time to time. BBT's objection is however that the balances did not correspond and add up "*and there are charges which simply makes no sense*".

[27] In **Moila v City of Tshwane Metropolitan Municipality**[5] Willis JA held that "*the right to debate an account is not to be confused with the right to receive the same. The two are not coextensive*". In my view BBT has shown its right to receive an account in terms of the contract, however, no mention was made to the timeframes elected for delivery of accounts and whether it was monthly or every second month. Retmil does not deny BBT's right to

[5] (249/16) [2017] ZASCA 15 (22 March 2017) at [10]

receive a statement of account pertaining to the outstanding amounts. Apparently Retmil complied with its obligations in this regard. The next issue is BBT's contention regarding the insufficiency and inaccuracy of the accounts rendered to BBT. Mr. Snellenburg SC argued that the discrepancies in the different balances stated in Retmil's claim dated 21 July 2014, in the amount of R2 883 342.72 and subsequent "revised" balances, are proof of the fact that Retmil is unable to provide BBT with a clear, concise and justifiable breakdown of the amount due, owing and payable by his client.

[28] The correspondence referred to in support of the contention that Retmil's revisions of the amount due is indicative of its failure to properly account to BBT were appended to the papers. The majority of the letters referred to were marked "w*ithout prejudice*" which words are accepted as a standard formula indicating that the writer of the letter intends to claim privilege in respect of the contents thereof. Both parties, not only the party making the statement aimed at settling a dispute, are entitled to the privilege. The amounts referred to as "*revised*" and "*demanded*" being R1 198 816.02 on 22 August 2014 and R900 000.00 on 4 September 2014 were amounts provided in an attempt to settle the dispute and were evidently not representative of a calculated or "*revised*" amount. What is also clear is that the amount of R1 198 816.02 referred to in Retmil's letter dated 22 August 2014, was the amount proposed by BBT's attorney for a possible settlement. This amount corresponds with the amount of indebtedness as reflected in an account appended to the letter addressed to BBT's attorney and dated 14 August 2014. This amount represents the amount calculated subsequent to the meeting held on the previous day, 13 August 2014.

[29] BBT failed to explain in which respects the accounts received were insufficient. The interest charged by Retmil was not placed in dispute nor any increase in the rate applied. No averments were made that payments were made by BBT which were not accounted for. Apart from the vague and unsubstantiated allegation that the accounting was insufficient, no further particulars were proffered. In my view the contention that Retmil's inability to provide properly calculated statements of account is substantiated by the

difference in the amounts reflected in the letters of demand and further correspondence, is opportunistic. From the contents of the letters appended to the papers it is evident that several meetings took place where the accounts, spreadsheets and settlement proposals were discussed.

[30] Retmil prepared a spreadsheet pertaining to the account which formed the basis from which payments received were checked and ticked off to the satisfaction of BBT's attorney during the meeting held on 13 August 2014. A copy of the account "*which was debated together with all the outstanding balances were appended to the letter dated 14 August 2014*". In the follow-up letter from BBT's attorney reference was made to "*consultations held on the 13th August 2014*" and Retmil's undertaking to provide BBT with a spreadsheet. No mention was made to the failure to attach the spreadsheet or that the copy that was appended was illegible or incomplete. The spreadsheets and documents appended to the letters from Retmil's attorney was completely ignored by BBT. Without referring to the appended documents or for that matter, Retmil's failure to append the documents, a further request for "*a complete breakdown"* of what is still owing in terms of the agreements was made, time and time again. BBT conceded that "*a type of spreadsheet*" was submitted by Retmil but failed to indicate, even remotely, in which respects the spreadsheet is inaccurate or insufficient.

[31] Holmes JA, held in the **Doyle**-case that, if it appears that the plaintiff has already received an account which he avers is insufficient, the court may enquire into and determine the issue of sufficiency in order to decide whether to order the rendering of a proper account. It has to be noted that the process to be followed by a party claiming the right to accounting and debatement thereof, is normally by way of action proceedings. Any objections which a plaintiff may have to an account, in the sense that it was incorrect or incomplete or defective in any way, should be specifically pleaded. In the light of BBT's failure to aver and prove any defects in the accounts or the spreadsheet submitted by Retmil, this court is not in a position to adjudicate upon the aspect of accurateness or sufficiency relating

to the accounts rendered to BBT.[6] Once the court is satisfied that the accounting by Retmil was indeed insufficient or inadequate, will the question of further relief, e.g. an order for the rendering of a proper account be adjudicated upon. BBT failed to make the necessary allegations in support of its contention that Retmil failed to provide proper accounts. Clause 19.13 in contracts 547 and 548 provides as follows:

"*19.13 You have a right to:*

19.13.1 Resolve a complaint by referring the matter to a dispute resolution agent, the Consumer Court or the Ombud with jurisdiction and/or

19.13.2 File a complaint with the National Credit Regulator in respect of any alleged contravention of the Act; and/or

19.13.3 Make an application to the National Consumer Tribunal ('Tribunal') or;

19.13.3.1 An order resolving a dispute over information held by a credit bureau; and/or

19.13.3.2 An order compelling the delivery of a statement of account; and/or

19.13.3.3 Review of a statement of account; and/or

19.13.3.4 Permission to bring a complaint directly before the Tribunal; and/or

19.13.3.5 An order allowing a late filing.

The contact details of the above bodies and institutions are available at your request."

[32] Retmil indicated that it endeavoured to obtain the contracts concluded in the past and relevant to BBT's queries, but was frustrated largely by the fact that the documents were not available and kept in storage. Throughout the correspondence exchanged between the legal representatives acting on behalf of the parties, Retmil alluded to the fact that the documents requested spanned over many years since 2009. It is unclear how these past records and documents could have contributed or caused any change regarding the contents of the statements provided to BBT. Nor was it clear what BBT's

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[6] Doyle 767 A - E

intentions regarding the copies of the contracts and statements already finalized entailed apart from the intention to provide the same to its accountant for verification purposes.

[33] On Retmil's version the accounts pertaining to previous contracts were settled or the outstanding amounts were carried over to subsequent agreements. It is clear from the context of Clause 19.13 and the sub-clauses quoted above, that the right to an order compelling the delivery of a statement of account and for review of a statement of account specifically refers to such steps or orders granted by the National Consumer Tribunal as stated in Clause 19.13.3. Whether the parties intended to sidestep the agreed process to resolve a dispute as provided for in Clause 19.13 and proceed with court proceedings to resolve the conflict, were not addressed by the parties. In light of the outcome of the application it is not necessary to ponder the issue any further, suffice to say that several options were made available to BBT in respect of complaints pertaining to accounting by Retmil.

[34] Mr Reinders's argument that the application is incompetent in the absence of a fiduciary or contractual relationship between the parties, remains the issue to be adjudicated upon.[7] On behalf of BBT it was argued that even though the remaining four (4) contracts do not contain a similar right to demand a full statement of account and debatement thereof, it will be nonsensical to proceed with such a process in relation to only two (2) of the contracts referred to in the Notice of Motion. Mr Snellenburg SC further argued that the guarantee delivered to MMM and the six (6) loan accounts should be included in the order for delivery of accounts and debatement thereof in order for the process to make sense and to be feasible. On the same basis the account relating to the mortgage bond should also be included in the debatement process.

[35] What BBT is actually saying is that, even though the right to claim a statement of account and debatement as such, lack a contractual basis apart from the two (2) contracts referred to, it should be granted for practical

[7] Absa Bank BPK v Janse Van Rensburg 2002(3) SA 701 at [15] and [16].

reasons. The reason why BBT claims delivery of "*proper*" statement of accounts relating to all the agreements as far back as 2009 is to calculate the exact amount due, owing and payable by BBT to Retmil, then to make payment of the amount actually due and owing with the ultimate intent to proceed with the cancelation of the bond registered over the property owned by BBT. It became clear that BBT wishes to sell the property located at Estoire, but is obstructed in its objective due to the fact that the bond has not been cancelled. From the papers it appears as if Retmil did not claim payment of any further arrears and/or instalment payments from BBT since 2014 – 2015 and therefore BBT is not in a position to settle the amount due and payable.

[36] Action procedure for delivery of an account is well-known in our law and the circumstances in which it can be claimed have been laid down by our courts.[8] There is no legal duty upon Retmil to debate the account with BBT. It is evident that several meetings did take place between the legal representatives and in some instances representatives of Retmil also attended the same. These meetings were scheduled in an endeavour to settle the dispute regarding the amount due, owing and payable by BBT. The argument that the meetings can be construed as 'debatements of account' and that debatement thus already occurred is not borne out of the facts. "Debate" bears the connotation 'to consider, to contend, to discuss, to contest and to dispute' with 'debatement' having a corresponding meaning.[9] Several proposals pertaining to a possible settlement ensued, all without success. The letters appended to the application were communications sent after the dispute arose during June 2014 and were aimed at settling the dispute between the parties.

[37] The amounts reflected in the letters referred to cannot be construed as being the final calculated amount due by BBT as it was on numerous occasions stated by Retmil that it will not be in a position to finalize the account without the guarantees being returned. Therefore the argument on behalf of BBT

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8 Maitland Cattle Dealers (Pty) Ltd v Lyons 1943 WLD 1 at 19.

9 Rellams (Pty) Ltd v James Brown & Hamer Ltd 1983(1) 556 (NPD) at 561 H.

that the incompatible and inconsistent amounts are validating their argument that Retmil is unable to submit a proper account, is flawed.

[38] On behalf of Retmil it is contended that the loan agreement, contract 823 was entered into with the purpose of acquiring funds to meet BBT's obligations in terms of contracts 547, 870, 473 and 474. Clause 7 in contract 823 contains a renunciation by BBT of the exception "*debatement of account*" as well as other legal exceptions. The renunciation of the exception of debatement of account results therein that the other contracts which BBT seeks to debate cannot be debated in isolation as it will serve no purpose.

[39] A further point raised on behalf of Retmil is that all BBT's indebtedness to Retmil, both present and in future was secured by a mortgage bond no. B 188/2011 registered on 11 January 2011. At page 2 thereof, BBT renounced all legal exceptions available to it including "*errore calculi*" and "*hersiening van rekenings*". All BBT's indebtedness to Retmil (both present and in future) was secured by the registration of the bond over BBT's property situated at Plot 61, Estoire, Bloemfontein. A further difficulty for BBT lies in the terms of loan and mortgage agreements. The terms of the loan agreement, which include the suspensive and special conditions relating to the mortgage bond, make it artificial to separate the antecedent contract of loan from the bond agreement.

[40] In **Burger v Central South African Railways,**[10] Innes CJ held that:

"… our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable". Mr Snellenburg SC concluded his arguments with the submission that his client is held ransom by Retmil, who is not claiming payment of the outstanding amount from BBT, but retains security by way of the mortgage bond for a period of 30 years. This conduct is regarded as unfair and BBT's only remedy is to obtain an order as prayed for in the Notice of Motion.

[10] 1905 TS 571 at 576.

[41] The law of contract is of fundamental importance in the modern world and it is woven into and inseparable from every form of economic activity.[11] The principle that the courts should enforce contracts, expressed by the adagium *pacta sunt servanda* is applicable as a general principle. The argument that parties to all contracts should exercise their contractual rights in accordance with reasonableness, fairness and good faith was placed in perspective by our courts. In **South African Forestry Co v York Timbers**[12] it was explained as follows:

"…although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty."

CONCLUSION

[42] Retmil's suggestions to debate the accounts in a structured manner was rejected by BBT without any counter proposals regarding the procedure to be followed. BBT failed to formulate a list of disputed items and issues regarding the issue of insufficiency of the accounts delivered to BBT. To be successful BBT must demonstrate that it is entitled to the delivery of accounts and debatement thereof. I agree with Mr Reynders that it is expected of an applicant, where he/she relies on the provisions contained in a contract, to aver and prove that the respondent had contractually bound himself thereto to deliver and debate the account.

[43] BBT, only during argument referred to the two (2) contracts (contract 547 and 548), of which copies had not been appended to the present application, to substantiate their claim for debatement of the account. The specific

[11] Christie's Law of Contract in South Africa (Seventh Edition) Lexis Nexis p 1.
[12] 2005 (3) SA 323 (SCA) at [27].

clauses contained in contract 547 and 548 were not mentioned in the application and only alluded to during argument by Mr Snellenburg SC as the basis for the relief sought. On behalf of BBT it was furthermore argued that the spreadsheet should have been appended to Retmil's answering papers, but instead no documentary evidence substantiating the allegation regarding the delivery of the spreadsheet had been proffered. I am of the view that due to BBT acknowledgment that "a type of the spreadsheet" was indeed made available, the spreadsheet should actually have been referred to by BBT as a basis to claim "proper" accounting. To succeed with its application for delivery of a true and proper statement of account, together with substantiating documentation, BBT should have used the accounts rendered as well as the spreadsheet to convince this court of the insufficiencies and inaccuracies contained therein and to determine the issue of sufficiency. Only then would it have been convenient to grant the relief claimed in the Notice of Motion.

[44] **For the above reasons, I make the following order:**

The application is dismissed with costs.

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I VAN RHYN AJ

On behalf of the Applicant: ADV. N SNELLENBURG SC
Instructed by: BLAIR ATTORNEYS

On behalf of the Respondent ADV. S. J. REYNDERS
Instructed by: VAN WYK & PRELLER ATTORNEYS