REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE: 7TH AUGUST 2023

(1) **CASE NO:** 17343/2022
NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

GRINDROD BANKLIMITED Applicant

And

CULVERWELL, ALLAN MONTAGUE First Respondent
CULVERWELL, DUSTIN MONTAGUE Second Respondent

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(2) CASE NO: 17345/2022

In the matter between:

GRINDROD BANKLIMITED Applicant

And

CULVERWELL, ALLAN MONTAGUE First Respondent

CULVERWELL, DUSTIN MONTAGUE Second Respondent

Neutral Citation: *Grindrod Bank v Culverwell and Another; Grindrod Bank v Culverwell and Another (17343/2022 & 17345/2022)* **[2023] ZAGPJHC ---** (07 August 2023)

Coram: Adams J

Heard on: 01 August 2023

Delivered: 07 August 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 07 August 2023.

Summary: Contract – specific contracts – demand guarantee and performance guarantee – compliance – guarantees in question – consisting, as they did, of an undertaking to make payment of amounts of money on the happening of a specified event – autonomous in nature – it must be paid according to its terms – only where fraud was involved that liability may be declined – defences raised by respondents rejected as bad in law – judgment granted in favour of applicants.

ORDER

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(1) Under case number: 17343/2022, the first and the second respondents' application to stay the main application be and is hereby dismissed with costs on the scale as between attorney and own client.

(2) Under the said case number: 17343/2022, judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

(a) Payment to the applicant of the sum of R56 000 000, plus interest thereon at the rate of prime per annum, calculated daily and

compounded monthly in arrears from 6 April 2022 to date of payment, both days inclusive.

(b) The applicant may not recover more than the amount set out in paragraph 2(a) from the respondents and the principal obligor, Eldacc Proprietary Limited (in liquidation).

(c) Payment of costs on the scale and between attorney and own client scale.

(3) Under case number: 17345/2022, the first and the second respondents' application to stay the main application be and is hereby dismissed with costs on the scale as between attorney and own client.

(4) Under the said case number: 17345/2022, judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

(a) Payment to the applicant of the sum of R40 551 603.77, plus interest thereon at the rate of prime per annum, calculated daily and compounded monthly in arrears from 6 April 2022 to date of payment, both days inclusive.

(b) The applicant may not recover more than the amount set out in paragraph 4(a) from the respondents and the principal debtor, Cream Magenta 98 Proprietary Limited (in liquidation).

(c) Payment of costs on the scale and between attorney and own client scale.

JUDGMENT

Adams J:

[1]. On 01 August 2023 the above two opposed applications by the applicant, Grindrod Bank Limited ('Grindrod Bank'), against the same two respondents, came before me in the opposed Motion Court. Grindrod Bank is the applicant in both of these applications and the same persons are the first and the second

respondents in both applications. The further commonality between these two opposed motions is the fact that the factual matrices underlying the applicant's causes of action are almost identical in that they are both based on Guarantees executed by the respondents in favour of Grindrod Bank in respect of the due performance by two related companies in terms of loan agreements. The two respondents also raise the exact same defences in opposition to the claims by the applicant against them in the applications.

[2]. It is accordingly convenient to deal with these two matters in one judgment. The obvious difference between the matters relates to the specific amounts payable in terms of the loan agreements and the guarantees.

[3]. In both applications, Grindrod Bank applies to court for money judgments against the first respondent ('Allan') and the second respondent ('Dustan') jointly and severally. In the first application judgment is sought for payment of the sum of R56 000 000 together with interest thereon and in the second application the applicant seeks judgment in the sum of R40 551 603.77 plus interest.

[4]. The salient facts in both matters are by and large common cause.

[5]. In the first application, Allan and Dustan executed a guarantee on 5 November 2020 ('the guarantee') in terms of which they guaranteed to Grindrod Bank 'the guaranteed obligations' (as defined) and undertook to Grindrod that whenever Eldacc Proprietary Limited ('Eldacc') does not pay any amount when due under or in connection with any of the defined guaranteed obligations, the respondents would within five business days of receipt of a written request from Grindrod, pay that amount as if they were the principal obligor.

[6]. On 5 November 2020, Grindrod and Eldacc concluded a written mortgage bond facilities agreement ('the loan agreement') in terms of which Grindrod afforded two facilities to Eldacc, facility 1 being a mortgage bond facility in the maximum amount of R55 880 500 and facility 2 being a mortgage bond facility in the amount of R3 576 500.

[7]. In July 2021, it became apparent that Eldacc would not be able to meet Its obligations in terms of the loan agreement and consequently, an addendum was concluded on 1 September 2021, in terms of which the development period as defined was extended by a further three months, which meant that it would expire on 7 October 2021. Eldacc would be obliged to make payment of interest and the final repayment date (as defined) was extended for a further three months. Eldacc went into default immediately and remains in default.

[8]. On 9 February 2022, Grindrod's attorneys directed a letter of demand to Eldacc, which demand was not complied with. Instead, on 16 February 2022, Eldacc and a related entity, Cream Magenta 98 (Pty) Limited ('Cream Magenta') – which company also concluded a loan agreement with Grindrod Bank and for which the respondents also executed a guarantee – instituted an application under case number 2022/6023, seeking an interdict preventing Grindrod from 'implementing credit control and recovery procedures' against Eldacc, Cream Magenta and the respondents until such time as the mortgage bond over Erf [...] Elandshaven is removed and Eldacc and Cream Magenta are given a reasonable time to sell or finance that immovable property and the release of Erf [...] Elandshaven from Grindrod's security. I will revert to this application later on in the judgment, as the relief which was sought in that application forms an important part of the respondents' grounds of opposition to the applications for judgment against them.

[9]. It is worth noting that Erf [...] is not owned by Eldacc, but rather by Cream Magenta and is bonded in favour of Grindrod for the debts owed by Cream Magenta to Grindrod. It has nothing to do with the repayment of the debt upon which the first application is based. And this may very well sound the death knell for the respondents' case in the first application.

[10]. All the same, it is not in dispute that Eldacc is indebted to Grindrod in the amounts of R55 705 947.65 and R2 420 106.17 together with interest thereon, and that these amounts have been due and payable by Eldacc to Grindrod since during or about February 2022. This then means that, on first principles and having regard to the wording of the guarantee, the respondents are liable to

pay to Grindrod Bank the amount payable by them as per the undertaking they gave in terms of the guarantee.

[11]. The aforegoing sequence of events and the stated facts, with minor modifications, are also of application in the second application. The difference being that, in that matter, the respondents executed the guarantee on 12 August 2020 and in terms of which they guaranteed to Grindrod the defined guaranteed obligations and undertook to Grindrod that whenever Cream Magenta 98 (Pty) Limited ('Cream Magenta') does not pay any amount when due under or in connection with any of the guaranteed obligations as defined in the guarantee and undertook to Grindrod, the respondents would within five business days of receipt of a written request from Grindrod, pay that amount as if they were the principal obligor.

[12]. The maximum liability of the respondents in the second application, jointly and severally, is to make payment in a limited amount of R43 000 000.

[13]. On 12 August 2020, Grindrod and Cream Magenta concluded a written mortgage bond facilities agreement ('the loan agreement') in terms of which Grindrod made available to Cream Magenta a facility in the amount of R42 677 500 of which R29 200 000 was to be utilised to settle amounts owed to Mercantile Bank and R12 300 000 was to be utilised for working capital.

[14]. On 16 August 2020, a mortgage bond was registered by Cream Magenta in favour of Grindrod to secure its indebtedness.

[15]. Cream Magenta breached the terms of the loan agreement by failing to pay the agreed monthly instalments and despite various demands, it remains in default.

[16]. As is the case in the first application, there is no dispute – none whatsoever – that Cream Magenta is indebted to Grindrod in the amount of R40 551 603.77 together with interest thereon, and that this amount has been due and payable by Cream Magenta to Grindrod since during or about February 2022. This then means that, on first principles and having regard to the wording of the guarantee, the respondents are liable to pay to Grindrod Bank the amount payable by them as per the undertaking they gave in the guarantee.

[17]. In both applications, an answering affidavit was filed on behalf of the respondents. The sum total of the defences raised by them in respect of the claims of Grindrod Bank were allegations to the effect that the respondents are not liable to Grindrod, because: (1) Grindrod allegedly caused the respondents to be unable to make payments – which assertion, as submitted by Mr Smit, Counsel for Grindrod Bank, is not supported by any fact and is contrary to the express terms of the guarantee; (2) Grindrod had no right to accelerate the loan which, again, is contrary to the express terms of the loan agreement; and (3) It is contended by the respondents that the matters are *lis pendens*, in that there are other litigation pending between related entities in relation to the very same debts owing to Grindrod, notably the application brought by Eldacc and Cream Magenta against Grindrod for interdictory relief to stay debt collection processes against them and also Grindrod's liquidation applications against both the aforementioned companies.

[18]. A convenient starting point for an analysis of the validity and the sustainability of the respondents' grounds of opposition to the applications, is the legal point of *lis pendens* raised by them. A plea of *lis alibi pendens* is based on the proposition that the dispute *(lis)* between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation.

[19]. It is trite that here are three requirements for a successful reliance on a plea of *lis pendens*. They are: (1) that the litigation is between the same parties; (2) that the cause of action is the same; and (3) that the same relief is sought in both. In that regard, see *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated*[1], in which the SCA (per Nugent JA) held as follows: -

'[17] There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.'

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[1] *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated* 2001 (4) SA 542 (SCA) at para 17;

[20]. *In casu*, none of these requirements are met. For starters, the respondents are not parties to the other three applications and it cannot possibly be suggested that the litigation in those proceedings are the same as in these applications. Moreover, the causes of actions in those applications are totally different from those in these applications – for example liquidation of companies versus claims for monetary judgments.

[21]. Accordingly, the respondents' legal points *in limine* of *lis alibi pendens* are without merit and fall to be rejected without more.

[22]. In their answering affidavits, the respondents also contend that there are factual disputes and that Grindrod should have proceeded by way of action as opposed to motion proceedings. However, as was submitted by Mr Smit, the material facts on which Grindrod relies for the relief are undisputed. Importantly, in both applications, the indebtedness of the principal debtors to Grindrod and the fact that it advanced to them the amounts claimed are not seriously challenged. Therefore, in my judgment, a real, genuine and *bona fide* dispute of fact does not exist.

[23]. The respondents also make much of the fact that, through no fault on their part, they are unable to pay their debts. As righty contended by Grindrod, this fact is entirely irrelevant. What is sought by Grindrod, is a judgment for payment by the respondents. In any event, no facts are advanced by the respondents in support of their sweeping statements in this regard.

[24]. As regards the half-hearted dispute by the respondents of the quantum of Grindrod's claim, which the respondents contend to be contradicted in Grindrod's own papers, the respondents' contention entirely disregards the existence of the certificates of balance put up by Grindrod, and their legal efficacy. Absent evidence by the respondents, the certificates of balance serve as *prima facie* evidence of the amounts claimed and, because no countervailing evidence has been put up by the respondents, it has become conclusive.

(*Senekal v Trust Bank of Africa Ltd*[2]). Accordingly, I conclude that this ground of opposition is baseless.

[25]. That then leaves the respondents' contention that they have a counterclaim against Grindrod for damages which resulted from their unlawful conduct. These damages, so the respondents aver, amount to about R5 670 000 for rental income and R15 000 000 in respect of the loss of business reputation as a result of the ill-considered liquidation applications by Grindrod. There are a number of difficulties with these claims, not the least of which is the fact that, as submitted by Grindrod, they are completely unsupported by facts. What is more is that these claims, if they do exist, would be those of Eldacc and Cream Magenta and not of the respondents. Even more telling is the fact that the alleged claims fly in the face of the express terms of the loan agreements and the guarantees and do not provide a defence to the respondents from making payment to Grindrod. The terms of the loan agreements and the guarantees are clear. The guarantees oblige the respondents to make payment to Grindrod whenever Eldacc and Cream Magenta do not pay any amount when due under or in connection with the guaranteed obligations, within five business days of receipt of written request from Grindrod. That condition has been met and the respondents have, despite the five business days' written request, failed to make payment.

[26]. The simple fact of the matter is that the nature and the wording of the Guarantee Agreements between the respondents and Grindrod Bank, as well as the applicable legal principles. do not lend themselves to the defences raised by the respondents in these applications. It may be apposite at this point, before I deal with the legal principles, to cite the guarantee provisions of the guarantee agreements, which read thus:

'4 **GUARANTEE**

4.1 Guarantee and indemnity

Subject to clause 4.2, the Guarantors, jointly and severally and as principal obligors and not merely as sureties and on the basis of discrete obligations enforceable against the Guarantors –

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[2] *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A);

4.1.1 guarantee to the Lender the Guaranteed Obligations;

4.1.2 undertake to the Lender that whenever the Borrower does not pay any amount when due under or in connection with any Guaranteed Obligations, the Guarantors shall, within 5 business days of receipt of written request from the Lender, pay that amount as if the Guarantors were the principal obligor;

4.1.3 agree with the Lender that if any Guaranteed Obligation is or becomes unenforceable, invalid, illegal or suspended, the Guarantors shall, as an independent and primary obligation, within 5 business days of receipt of written request from the Lender indemnify the Lender against any cost, loss or liability the Lender incurs as a result of the Borrower not paying any amount which would, but for such unenforceability, invalidity, illegality or suspension, have been payable by it under any Guaranteed Obligation on the date when it would have been due, and the amount payable by the Guarantors under this indemnity will not exceed the amount the Guarantors would have had to pay under this clause 4.1 if the amount claimed had been recoverable on the basis of a guarantee. Without limitation to the generality thereof it is recorded that this clause 4.1.3 indemnity applies to any Guaranteed Obligation which becomes either entirely, partially or conditionally suspended because of any business rescue proceedings in relation to the Borrower or which is compromised or discharged in whole or in part pursuant to the adoption of a business rescue plan in relation to the Borrower or which is compromised in terms of section 155 of the Companies Act; and

4.1.4 agrees that if the Borrower fails to pay or procure the payment of the whole or any portion of a Repayment Amount ("Monthly Repayment Deficit) payable on any Lease Period Payment Date in accordance with the Facility Agreement, the Guarantors shall pay such Monthly Repayment Deficit to the Lender forthwith upon receipt of written notice from the Lender requesting payment of such Monthly Repayment Deficit.

4.2 … … …'.

[27]. In *Phillips & Ano v Standard Bank of South Africa Ltd & Others*[3], the court dealt with an application to stop payment under a letter of credit because the goods delivered were defective. The application was refused. Goldstone J held as follows:

'In my opinion the documentary credit issued in this case does indeed constitute a contract independent of the contract of purchase and sale between the applicants and the third respondent. In respect of that question, the dicta I have cited from the *Sztejn and the Royal Bank of Canada* cases appear to me to correctly reflect our own law, as well as the correct approach which should be adopted by our Courts.'

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[3] *Phillips & Ano v Standard Bank of South Africa Ltd & Others* 1985 (3) SA 301 (W);

[28]. Also, in *Loomcraft Fabrics CC v Nedbank Ltd & Another*[4] Scott AJA remarked as follows relative to the interpretation of guarantees:

'The system of irrevocable documentary credits is widely used for international trade both in this country and abroad. Its essential feature is the establishment of a contractual obligation on the part of a bank to pay the beneficiary under the credit (the seller) which is wholly independent of the underlying contract of sale between the buyer and the seller and which assures the seller of payment of the purchase price before he parts with the goods forming the subject matter of the sale.

The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or for that matter even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof or fraud on the part of the beneficiary.'

[29]. In *FirstRand Bank Ltd v Brera Investments CC*[5], it was held as follows:

'The guarantee in question – consisting as it did of an undertaking to make payment of an amount of money on the happening of a specified event – was of the same nature as a performance guarantee, performance bond or letter of credit. The autonomy of a guarantee of this nature was well recognised; it must be paid according to its terms. It was only where fraud was involved that the issuing institution may decline liability, and in the present case no such issue arose.'

[30]. In *Petric Construction CC t/a AB Construction v Toasty Trading t/a Furstenburg Property Development and Others*[6], a dispute arose between the applicant and the first respondent as to the validity and legality of the first respondent's purported termination of the principal building agreement, which issue was referred to arbitration. Pending resolution of the dispute, the applicant approached the High Court on motion for an order restraining the second and third respondents from paying the first respondent any amount

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[4] *Loomcraft Fabrics CC v Nedbank Ltd & Another* 1996 (1) SA 812 (A);

[5] *FirstRand Bank Ltd v Brera Investments* CC 2013 (5) SA 556 (SCA);

[6] *Petric Construction CC t/a AB Construction v Toasty Trading t/a Furstenburg Property Development and Others* 2009 (5) SA 550 (ECG);

claimed by the first respondent in terms of the construction guarantee. The application was granted in the form of a *rule nisi*. Sandi J held that the alleged disputes between the applicant and the first respondent were irrelevant to the construction guarantee, that the first respondent had complied with the provisions of the construction guarantee, and, there being no evidence that the first respondent had committed fraud, the second respondent was obliged to comply with the terms thereof. At para [27] the Court remarked as follows:

'The alleged disputes between the applicant and the first respondent are irrelevant to the construction guarantee. Irrelevant too is clause 36.6 of JBCC Contract which prohibits cancellation of the agreement by the respondent on the ground of a material breach of the JBCC agreement. The second respondent, the guarantor, is not taking part in these proceedings and has not alleged any reason why it should not pay the guarantee to the first respondent. It is the applicant that invites the court to go behind the terms of the guarantee. The court cannot do so. The parties to the guarantee are the first and second respondents. The applicant plays no part in it.'

[31]. Applying these principles *in casu*, I conclude that the respondents' defences to the applicant's claims are bad in law.

[32]. In the circumstances, Grindrod is, in both applications, entitled to judgment against the respondents for payment, jointly and severally, of the amounts claimed.

[33]. There is one more issue which I need to deal with and that relates to applications brought rather belatedly by the respondents for the stay of these proceedings, pending appeals against a judgment which went against Eldacc and Cream Magenta in the applications alluded to above. I intend giving short shrift to these applications for the simple reason that, if regard is had to my aforegoing findings, there is no point in staying an application which should fail howsoever one views the main application, which is sought to be stayed. The point is simply that one of the requirements for the stay of proceedings is that same must be in the interest of justice, which will not be the case if there are no prospects of success for the applicant for the stay of the proceedings. Those applications therefore fall to be dismissed.

Conclusion and Costs

[34]. In sum, in both applications, Grindrod have made out cases for the relief sought by them and judgment should therefore be granted in their favour against the respondents.

[35]. As regards costs, the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[7].

[36]. I can think of no reason why I should deviate from this general rule. The agreements in question provide that costs, in the event of litigation, should be awarded on the scale as between attorney and own client.

Order

[37]. Accordingly, I make the following order: -

(1) Under case number: 17343/2022, the first and the second respondents' application to stay the main application be and is hereby dismissed with costs on the scale as between attorney and own client.

(2) Under the said case number: 17343/2022, judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

(a) Payment to the applicant of the sum of R56 000 000, plus interest thereon at the rate of prime per annum, calculated daily and compounded monthly in arrears from 6 April 2022 to date of payment, both days inclusive.

(b) The applicant may not recover more than the amount set out in paragraph 2(a) from the respondents and the principal obligor, Eldacc Proprietary Limited (in liquidation).

(c) Payment of costs on the scale and between attorney and own client scale.

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[7] *Myers v Abrahamson* 1951(3) SA 438 (C) at 455

(3) Under case number: 17345/2022, the first and the second respondents' application to stay the main application be and is hereby dismissed with costs on the scale as between attorney and own client.

(4) Under the said case number: 17345/2022, judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

(a) Payment to the applicant of the sum of R40 551 603.77, plus interest thereon at the rate of prime per annum, calculated daily and compounded monthly in arrears from 6 April 2022 to date of payment, both days inclusive.

(b) The applicant may not recover more than the amount set out in paragraph 4(a) from the respondents and the principal debtor, Cream Magenta 98 Proprietary Limited (in liquidation).

(c) Payment of costs on the scale and between attorney and own client scale.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	1st August 2023.
JUDGMENT DATE:	7th August 2023 – judgment handed down electronically
FOR APPLICANT IN BOTH APPLICATIONS	Advocate J E Smit
INSTRUCTED BY:	Edward Nathan Sonnenbergs Inc, Umhlanga Rocks
FOR FIRST AND SECOND RESPONDENTS IN BOTH APPLICATIONS:	Advocate Jan Wentzel
INSTRUCTED BY:	Advocate Jan Wentzel (Advocate with Trust Account) Elandshaven, Germiston