26/10/2017

IN THE HIGH COURT OF SOUTH AFRICA /MF

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / (NO)
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

26-10-2017. .....

Case No: 27865/2014

Appeal Case No: A757/2015

Date: _____

In the matter between:

ALLEWYN BURGER ROSSOUW N.O. First Appellant
In his capacity as trustee of the Nywela Trust
Registration number IT7540/1999

LIZETTE ROSSOUW N.O. Second Appellant
In her capacity as trustee of the Nywela Trust
Registration number IT7540/1999

NICO KRUGER N.O. Third Appellant
In his capacity as trustee of the Nywela Trust
Registration number IT7540/1999

ALLEWYN BURGER ROSSOUW N.O. Fourth Appellant
ID No. 640125 5072 088

LIZETTE ROSSOUW N.O. Fifth Appellant
ID No. 631120 0006 083

BLUE ANVIL TRADING (PTY) LIMITED Sixth Appellant

and

FIRST RAND BANK LIMITED Respondent
t/a RMB PRIVATE BANK

JUDGMENT

PRINSLOO, J

[1] The Respondent bank instituted motion proceedings against the Respondents /Appellants for payment of an amount of R3, 268,543.36 plus interest and costs on a punitive scale.

[2] The claim is based on the alleged breach by the Respondents of the so-called "Facility Agreement" entered into on 6 March 2008 between the Respondent bank and the first three Appellants, in their capacities as trustees of Nywela Trust.

[3] The Fourth, Fifth and Sixth Appellants, at the time, bound themselves as sureties and co-principal debtors. All this is common cause.

[4] In round figures, it appears that the Respondent advanced some R3, 200,000.00 to the trust in terms of the Facility Agreement in 2008. The amount was repayable in 240 months at some R38,000.00 per month. In round figures, it appears that by 2014, the minimum instalment due had been reduced to some R30,500.00 per month.

[5] The amount of some R3,200,000.00 claimed in terms of the Notice of Motion is alleged to be the outstanding balance as at 28 February 2014, payable on the strength of an acceleration clause because of the alleged breach on the part of the Appellants.

[6] The application was opposed and came before the Learned Judge *a quo*, Baqwa J, on 2 February 2015, when judgment was granted for the full amount together with interest and costs as prayed for in the Notice of Motion.

[7] On 12 March 2015, an application for leave to appeal was dismissed with costs.

[8] On 21 September 2015, leave to appeal was granted to the Full Court of this Division by the Supreme Court of Appeal.

[9] In the appeal before us, Mr. Gibbs appeared for the Appellants and Mr. Roux S.C. appeared for the respondent.

Brief synopsis of the case presented in the founding papers:

[10] Should the First, Second and Third Appellants fail to pay any amount due to the Respondent in terms of the agreement when it is due and owing, **or** the facility sum is exceeded by the First, Second and Third Appellants, the latter will be in default of the agreement, should they not rectify the aforementioned breach within the prescribed period mentioned in the written notice as received from the Respondent. [Emphasis added.]

[11] Should these Appellants remain in default of the agreement, the Respondent may claim immediate payment of the full outstanding balance.

[12] A certificate of balance issued by an authorised employee of the Respondent will constitute *prima facie* evidence of the outstanding amount.

[13] The first three Appellants are in breach in terms of the Facility Agreement in that they **exceeded the Facility Sum** with an amount of R48 543,36 on 27 February 2014. On 28 February 2014 the outstanding balance in terms of the agreement came to R3 268 543,36 (the judgment sum) with interest as claimed. [Emphasis added.]

[14] The certificate of indebtedness relied upon echoes these allegations.

[15] The Respondent duly complied with the provisions of the Facility Agreement and section 129 (read together with section 130) of the *National Credit Act*, 34 of 2005("NCA") having delivered to the first three Appellants a Letter of Notice and a Letter of Demand in terms of section 129(1)(a) of the NCA prior to the institution of the application, to which notice the first three Appellants failed and/or neglected to respond. The last-mentioned allegation, namely that the Appellants failed to respond to the demand, is in dispute on the papers as I will point out.

These two demands relied upon are attached to the Founding Affidavit as "RMB5.1" and "RMB5.2".

[16] It appears that, in the course of litigation, and before the matter came before us, the parties agreed that the *("NCA")* does not apply to this case. Nothing turns on this, for present purposes, apart from the fact that the second demand, "RMB5.2",

purports to be a typical demand in terms of section 129 of the NCA and, to that extent, Respondent relies on that letter in support of its case.

[17] These two "demands" such as they are, constitute, in my view, the most crucial aspects to be considered for purposes of deciding this appeal. For that reason, it is necessary to consider these letters in some detail:

(i) **The first letter, "RMB5.1"**

- Crucially, the letter is dated 20 September 2012 and according to the registered post slip it was dispatched on 21 September 2012 to the Nywela Trust, to which it is also addressed, at Plot 50 Zeekoegat, Pretoria.

- This is almost exactly seventeen months before the alleged breach on the part of the first three Appellants when they allegedly "exceeded the Facility sum" on 27 February 2014.

- Understandably, this "demand" contains no reference whatsoever to the alleged breach of 27 February 2014 which, at the time when the letter was written and dispatched, was lying some seventeen months into the future.

- This letter purports to rely on an entirely different breach which, for obvious reasons, must have preceded September 2012, although the date is not mentioned. It is convenient to quote the relevant portions of the letter which was addressed to the Nywela Trust:

"3. ***You have failed to pay the monthly instalments in terms of the agreement*** *and are currently in arrears with your monthly instalments with R72 544,48.* [Emphasis added]

4. *You are therefore in breach of the agreement and should you not rectify the aforementioned breach within 20 (twenty) days of receipt of this letter, you will be in default of the agreement.*

5. *Should you fail to remedy the breach and be in default of the agreement, RMB* ***may withdraw the facility*** *and claim immediate repayment of the full outstanding balance under the agreement,* ***or terminate your Facility*** *without affecting any of RMB's other rights. The outstanding balance in terms of your agreement amounts to R3 265 435.46.* [Emphasis added]

6. *We trust that this will not be necessary and RMB is looking forward to receiving your payment in the amount of R72 544.48, as a matter of urgency within the aforementioned prescribed period."*

- It is convenient, at this stage, to record the provisions of the Facility Agreement dealing with the question of default:

"*15.3* <u>*Default*</u>

15.3.1 Any of the following acts will place you in default of this Facility if you do not rectify them within 20 (twenty) days of receiving written notice from the Bank to do so:

15.3.1.1 failing to pay any amount owing to the Bank when it is due;

15.3.1.2 exceeding the Facility Sum;

[There are eleven other so-called acts of default stipulated in 15.3.1, which are not applicable for present purposes.]

15.3.2 If you are in default of this Facility, then the Bank may ***withdraw the Facility*** *and claim immediate* ***repayment of the full outstanding balance, or terminate your Facility*** *without affecting any of its other rights.* [Emphasis added.]

- From the aforegoing, the following can be observed about "RMB5.1":
  - ❖ It precedes the alleged February 2014 breach by seventeen months;
  - ❖ It relies on an entirely different purported breach alleging a much larger amount of default than the alleged breach on which the Respondent's claim is based;
  - ❖ It purports to rely on an entirely different cause of action or "act of default" to the one allegedly perpetrated by the first three Appellants on which the Respondent relies to prove its case: "RMB5.1" relies on an act of default resorting under 15.3.1.1 of the contract, namely *"failing to pay any amount owing"*, whereas

the Respondent, for purposes of this application, relies on another *"act of default"* namely that to be found in 15.3.1.2 or *"exceeding the Facility Sum"*;

- In a word, it bears absolutely no relationship to the alleged breach of February 2014 relied upon by the Respondent in order to obtain this judgment. This, despite the fact that the Respondent alleges in the Founding Affidavit that it *"duly complied with the provisions of the Facility Agreement and section 129 (read together with section 130) of the National Credit Act, having delivered to the First, Second and Third Respondents a Letter of Notice and a Letter of Demand ... prior to the institution of this application ..."*. This was a clear reference to alleged compliance with the provisions of 15.3.1 and 15.3.2 of the Facility Agreement.

- Moreover, on my reading of the evidence, the Respondent neither *"withdrew"* nor *"terminated"* the Facility as it was entitled to do in terms of 15.3.2. Indeed, it is common cause that the Appellants kept on making payments which were accepted by the Respondent. Furthermore, in the Opposing Affidavit it is alleged that the Appellants are ahead with their payments. The response to this allegation in the Replying Affidavit is somewhat difficult to understand and unconvincing:

> *"Save to state that the account was in arrears the Applicants* [sic] *submit that the section 129 notice was sent merely as a precautionary measure, and it was not*

necessary to send same, the remainder of the allegations contained in this regard are noted."

(ii) The second letter, "RMB5.2"

- It is dated 23 October 2012, refers to "RMB5.1" and relies on the same alleged breach (undated) which had to precede September 2012.
- As I mentioned, it purports to be a section 129 of the NCA letter and again affords the Appellants twenty days to remedy the alleged 2012 breach.
- To this extent, it also bears no relationship to the alleged breach relied upon by the Respondent in this application and is also based on an incorrect *"cause of action"* as explained.
- It also threatens to *"suspend your Facility"*, something which, for the reasons mentioned, appears never to have happened.

[18] Returning to the Founding Affidavit, the deponent deals with the sureties, namely the Fourth, Fifth and Sixth Respondents, and relies on the February 2014 breach, the same certificates of indebtedness and the 2012 demands, identical to "RMB5.1" and "RMB5.2".

[19] There are no statements of account attached to the founding papers, which may support a case to the effect that the Appellants were in arrears with their obligations or, for that matter, exceeded the *"Facility Sum"* in the spirit of 15.3 of the agreement.

[20] So much for the case presented in the founding papers.

I turn to the Opposing Affidavit with annexures.

Brief synopsis of the defence advanced by the Appellants in the Opposing Affidavit:

[21] As I have mentioned, the affidavit is dated 23 July 2014 and the deponent is the First Appellant, who is also the Fourth Appellant. He states that he deposes to the affidavit on behalf of the Nywela Trust and with the necessary authority and consent of his co-trustees as well as the Sixth Appellant, of which he is the sole director.

[22] The allegations about the contract, the terms thereof and the suretyships are not in dispute.

[23] The deponent was not receiving statements from the Respondent bank and, as a result, he was unsure as to what the monthly instalment was from time to time. He was under the impression that an amount of R30 000.00 per month would be sufficient. As a result he implemented a debit order against his current account in the amount of R30 000.00, which was paid regularly.

[24] The "*section 129 notices*" which he refers to as Annexures "RMB5", "RMB13", "RMB14" and "RMB15", were received by him in October 2012. The last three letters are those sent to the sureties.

When he noted the allegation that he *"owed the bank an amount of R72 544.48"*, he attempted to ascertain how it came about that this amount was owing, but did not receive any satisfactory answer. He assumed that it was the result of a clerical mistake by the Respondent.

[25] Despite his misgivings *"and in order to avoid litigation and to comply with the requirements of section 129 of the National Credit Act"* he elected not to dispute the issue, but to bring the payments under the agreement up to date at that time. After making the payments (which, on a general reading of the affidavit, and particularly paragraphs 2.7, 2.8 and 4.2 thereof, can only be a reference to the R72 000.00) he continued paying the R30,000.00 as per his debit order, confident that the amount was sufficient in respect of the obligation towards the Respondent.

[26] Then, on 22 April 2014, he received this application and, still under the impression that R30 000.00 which had been paid regularly is sufficient, he sought legal advice.

In addition, and *ex abundanti cautela* (i.e. "out of abundant caution; to make assurance double sure – *Hiemstra and Gonin, Trilingual Legal Dictionary*, second edition, page 192) he made a payment two days after receipt of the application in an amount of R90 000.00, which was almost double the amount of R48 543.36 alleged in the founding affidavit to have been in arrears on 27 February 2014. The two payments, totalling R120 000.00, are reflected in the statement attached to the Opposing Affidavit, covering the period 4 April 2014 to 3 May 2014.

[27] Importantly, it is obvious (and common cause) that the Respondent never sent another demand, in the spirit of 15.3 of the agreement, to place the Appellants on terms to remedy the alleged 2014 breach on which the application is based.

[28] A further payment of R30 000.00 was made on 2 May 2014 (making up the R120 000.00 payments reflected in the account referred to), which R30 000.00 payment was part of the regular debit order payments.

[29] After consultation with his attorney, it was pointed out to him that on the aforesaid statement, "ABR1", the minimum payment was reflected to be R30 595.62, which is slightly in excess of R30 000.00. This inspired the deponent to increase the debit order to R35 000.00 per month with effect from June 2014. This would be after service of the application on 22 April 2014.

[30] The deponent states in the Opposing Affidavit that he will continue henceforth to pay not less than the minimum amount required. On a general reading of the papers, as I have already remarked, the deponent appears to have been good to his word.

[31] The deponent goes so far as to apologise for any inconvenience which *"my ignorance may have caused"*, but he submits that he was always under the impression that he was paying an amount above that which was required and, importantly in my view, he confirms *"that the absence of any notices, aside from the section 129 notice which I had received on 23 October 2012 and which I had considered to be a mistake by the bank, gave me no reason to suspect that my payments were not sufficient to cover my obligations to the Applicant"*. From this I

gather that "RMB5.1" (which was not crafted along the lines of a section 129 notice) was not received by the deponent as he says he only received the section 129 notices. Not much turns on this. I am also alive to the fact that 15.5.2.2 of the agreement stipulates that a notice given by registered post will be deemed to have been received on the 7th day following the posting.

[32] The deponent goes on to develop an argument that he complied with the spirit of sections 129 and 130 of the NCA by taking these steps to bring the payments up to date and making advance extra payments. He reiterates his earlier allegation that upon receipt of the section 129 notice in October 2012, he responded by paying the alleged overdue amount of some R72 000.00.

[33] Importantly, the deponent then makes the following submissions:

- The default alleged in the section 129 notice was cured in the process and the obligations under the agreement were brought up to date by that payment.

- His subsequent failure to pay the correct instalment, which he admits was due to his negligence, as explained, was not brought to his attention by the Respondent and if the Respondent had done the same as it did with the notices of October 2012, he would undoubtedly have made the payment as he did within two days of receiving this application (by paying the R90 000.00, followed by the regulation R30 000.00 as explained).

- He argues that it was the duty of the Respondent to bring this default to his attention *"by means of a section 129 notice"* to provide him with an opportunity to resolve any dispute or to develop a plan to bring the payments up to date, but such notice was never issued or delivered. It is clear that the deponent was still referring to a section 129 notice because the 2012 notice was crafted as such. I assume this was before there was an agreement that the NCA was not applicable. Nevertheless, it remains of the utmost importance, in my view, that no further notices were issued after 2012 to place the Appellants on terms in the spirit of 15.3 of the agreement.

[34] The deponent alleges that he instructed his attorney to make an attempt to settle the matter, but the Respondent was unwilling to do so. A confirmatory affidavit by the attorney is attached to the Opposing Affidavit.

[35] Because the parties are in agreement that the NCA does not apply, I refrain from taking the NCA arguments presented by the deponent into account for present purposes. Nevertheless, I am in respectful agreement with the deponent's submission that the Respondent was precluded, for purposes of this application, from relying on the 2012 notices, which precede the alleged February 2014 breach by some seventeen months. In my view, this argument is fortified by the fact that after the R72 000.00 was paid in 2012 to cure the alleged default of that time, the Respondent kept on accepting regular payments. The argument is also strengthened by the fact that there is no sign, on the evidence, as far as I could make out, that the facility was either *"withdrawn"* or *"terminated"* as provided for in 15.3.2 of the agreement.

[36] I repeat my earlier remarks that it is alleged in the Opposing Affidavit that, at the time of signature thereof in July 2014, the payments were up to date, and, in fact, the *"current instalment of R35 000.00"* exceeded the liability in terms of the agreement.

[37] The deponent concludes by lamenting the fact that no further notices were served before the Respondent approached the Court.

The Replying Affidavit and certain submissions made as to the legal position:

[38] For the first time, allegations are made that the Appellants fell in arrears with their payments during the earlier part of 2012. The amounts of the arrears alleged are relatively modest. This is not the case that was made out in the Founding Affidavit. The Respondent relies solely on a case that the Appellants *"exceeded the Facility Sum with an amount of R48 543,36 on 27 February 2014"*. There are no allegations about arrears in 2012. The *"section 129 notice"*, "RMB5.2" and others, is relied upon simply in an attempt to make out a case for compliance with 15.3 of the agreement, some seventeen months before the alleged breach.

[39] Fresh allegations, in the Replying Affidavit, of alleged breaches in 2012, amount to a new case being introduced in reply. This is not permitted and should not have been considered by the Learned Judge – *Titty's Bar and Bottle Store v. A.B.C. Garage & Others*, 1974(4) SA 362 (TPD) – at, for example, 368A to 369C.

[40] In any event, the deponent on behalf of the Appellants states that the alleged arrears of R72 544.48 referred to in the October 2012 demand was paid. This is a version which I have to accept in terms of *"Plascon-Evans principles" 1984(3) SA 623AD at 634C-635 D.* I add that this amount is not even mentioned in the Replying Affidavit. I have dealt with the unconvincing and confusing *"denial"* about the payment of the R72 000.00. There is no outright denial of this allegation. In any event, I must accept the Appellants' version.

Inasmuch as it may be arguable, as counsel for the Respondent attempted to do with reference to the well-known case of *Pillay v. Krishna,* 1946 AD 946 at 947, that the onus was on the Appellants to prove payment, I am of the view that such onus was discharged through the clear allegation that the R72 000.00 was paid, which was not met with a direct denial in the Replying Affidavit. The allegation of the payment is fortified by application of the *Plascon-Evans* principle.

In any event, where no case was made out in the Founding Affidavit about alleged arrears in 2012, and where the Respondent relies solely on the alleged Facility Sum contravention in February 2014, a debate about the arrears in 2012 is irrelevant.

[41] Moreover, the allegation by the Appellants that R90 000.00 was paid two days after receipt of the application, which is almost double the alleged amount of some R48 000.00 by which the Facility Sum was said to have been exceeded, is admitted in reply.

Where it is common cause that there was no 15.3 notice following the alleged February 2014 breach, as there should have been in my opinion, the Respondent failed to make out any case whatsoever for a breach as intended by 15.3 of the agreement, i.e. failure to remedy non-payment after a 20 day notice.

[42] As I have illustrated, the allegation in the Opposing Affidavit that the Appellants were up to date, and, indeed, ahead with their payments, at the time when the Opposing Affidavit was deposed to is also uncontested.

[43] Against this background, I have come to the conclusion that the Respondent, in these motion proceedings, had failed to prove a breach, or *"default"* in the spirit of 15.3 of the agreement, let alone the right to *"withdraw"* or *"terminate"* the Facility and claim repayment of the full outstanding balance, as intended by 15.3.2 of the agreement – see for example *Amler's Precedents of Pleadings,* 8th edition, page 111 and the authorities there quoted.

[44] I add that, in his comprehensive argument, counsel for the Respondent referred us to the so-called "*doctrine of election*" and, if I understood him correctly, submitted that the Respondent was entitled, in 2014, to exercise an election, on the strength of the alleged 2012 breach, to enforce the agreement and claim the outstanding balance in terms of the acceleration clause.

Counsel referred to some passages from *Christie's Law of Contract in South Africa.* Counsel did not indicate which edition he had in mind, but I found the passages, although at different pages, in the 7th edition.

On page 638 to 639 the learned author says the following:

> *"The innocent party's choice is subject to what is usually known as the doctrine of election. Enforcement and cancellation being inconsistent with each other or mutually exclusive, the innocent party must make an election between them; and cannot both approbate and reprobate the contract; cannot blow both hot and cold. The doctrine is stated by Watermeyer AJ in Segal v. Mazzur* [my note: 1920 CPD 634 at 644 to 645]: *'Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence ... '."*

It seems to me that the following can be said about the present matter:

- One is confronted with the extraordinary state of affairs of the Respondent relying on a 2014 breach, but conveying no election whatsoever after this alleged breach and before launching the motion proceedings;

- In an effort to stay inside the ambit of the 15.3 requirements, namely a twenty day notice to either withdraw the Facility and claim

repayment of the full outstanding balance or terminate the Facility, the Respondent relies on the 15.3 20 day notice preceding the February 2014 breach relied upon by seventeen months. It appears that no election was made, one way or the other, after the alleged 2012 breach (which I have found not to have been proved on the papers) because, on the weight of the evidence, the Appellants simply paid the R72 000.00 upon receipt of the 20 day *"section 129"* notice and then carried on merrily paying the monthly instalments, which were duly accepted by the Respondent;

- If an election was exercised in February 2014 on the strength of the 2012 notice, such election had to fly in the face of the doctrine of election because the reasonable time foreshadowed by the Learned Judge in *Segal* would clearly have expired. The only reasonable inference to be drawn is that the Appellants, following payment of the R72 000.00 in 2012, and keeping up regular instalments after that, would have been brought under the impression that the Facility Agreement remained intact. Indeed, on the weight of the evidence it seems to be intact, with the Appellants making regular payments and even being ahead of their obligations by the time the Opposing Affidavit was signed;

- I cannot see how, under all these circumstances, the Appellant can be held to be in default, in the spirit of 15.3, for failing to meet a twenty day deadline set already in 2012;

- The learned author, Christie, also states at page 637 that *"If the contract lays down the procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective ...".* party in *mora*, not having contained all the necessary details. Against this background, I am of the view that the Respondent failed to comply with the requirements of 15.3 of the contract by not dispatching a twenty day notice before launching these proceedings and claiming the outstanding balance. In that sense, the application is premature and ought to have been dismissed. Quite apart from anything else, it means that the Respondent failed to prove the required "default" on the part of the Appellants as intended by 15.3 of the agreement. Where R90 000.00 was paid within two days of service of the application, without a preceding 15.3 notice, there can be no question of "default".

The judgment:

[45] The judgment is a concise four page affair.

[46] After referring to "RMB5.1" (which the deponent for the Appellants in any event alleged not to have received) and the requirements of 15.3 of the agreement, the Learned Judge concluded that *"Even though Respondents have stated in their reply that they have paid what was owing at the time, which is admitted by the Applicant, it does not appear, as submitted by Applicant's counsel, that whatever payment was made was within the twenty day period".* The Learned Judge appears to have held

that the onus was on the Appellants to prove that payment was made within the twenty day period. In my respectful view the Learned Judge erred in this regard because the onus is on the party wishing to cancel to prove that the right to cancellation has accrued - *Amler's, supra,* at 111.

Moreover, I am of the respectful view that the Learned Judge erred in basing his decision on an alleged 2012 breach which is not the breach relied upon by the Respondent.

[47] Commenting on the argument advanced on behalf of the Appellant that the action was based only on the February 2014 breach and that the Respondent could not argue a case based on a 2012 breach, the Learned Judge said the following:

> *"Upon a proper reading of the papers it would, however, appear, as pointed out by counsel for the Applicant that the whole history of breaches was canvassed in the papers by Applicant, that is, between 2012 and 2014. This is apparent from the annexure to the Founding Affidavit to which I was referred. It would seem, therefore, that Respondents were at liberty to deal with all the allegations and provide evidence to refute any allegations that they did not agree with."*

I have already made the remark that the *"payment history"* introduced for the first time in reply, ought not to have been considered in view of the trite authority referred to. In any event, this "*payment history*" is confined by and large to 2012, a period not relied upon by the Respondent in the

application. Moreover, alleged short payments early in 2014, again not mentioned in the Founding Affidavit, would have been extinguished by the R90 000.00 (followed by R30 000,00) payment made shortly after service of the application on 22 April 2014.

[48] The Learned Judge embarked upon an exercise leading him to a conclusion, on a reading of "RMB5.2", that the twenty day deadline set in "RMB5.1" (which the deponent for the Appellant said he did not receive) had expired, thereby constituting a breach. The Learned Judge, with respect, overlooked the fact that "RMB5.2" set another twenty day deadline for compliance. There is no evidence whatsoever (with the Respondent bearing the onus as I suggested) to the effect that the last-mentioned deadline was not met by the payment of the R72 000.00.

[49] The Learned Judge also erred, in my respectful view, by evidently completely ignoring the alleged February 2014 breach or *"default"* by not considering whether the R90 000.00, paid two days after service of the application in April 2014, (followed by R30 000.00) may have cured any default which there may have been. Against this background, I am of the respectful view that the Learned Judge erred in concluding that *"Applicant cannot now, in my view, be prevented from relying on previous breaches"*.

Conclusion:

[50] In all the circumstances, I have come to the conclusion, and I find, that the appeal ought to be upheld.

[51] The costs should follow the result.

The order:

[52] I make the following order:

1. The appeal is upheld with costs;

2. The order of the Court *a quo* is set aside and replaced with the following:

"The application is dismissed with costs".

W.R.C. PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A757/2015

I agree

L.M. MOLOPA-SETHOSA
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

P.M. MABUSE
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 3 MAY 2017
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INSTRUCTED BY: KLAGSBRUN EDELSTEIN BOSMAN DE VRIES INCORPORATED
COUNSEL FOR THE RESPONDENTS: J. ROUX S.C.
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