NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 12027/2016

AMEROPA COMMODITIES (PTY) LTD **PLAINTIFF**

and

GEORGE CHARALAMBUS **DEFENDANT**
(ID: […])

Order

The following order is made:

1. **The deed of suretyship executed by the defendant in favour of the plaintiff on 16 July 2014 is rectified by**
   (a) deleting the whole of clause 5 of the standard terms and conditions of the deed of suretyship;
   (b) deleting the whole of clause 7.2 of the standard terms and conditions of the deed of suretyship;

(c) deleting the words "the trustees for the time being of" appearing in the first paragraph of the deed of suretyship and replacing them with the words "Salvage and Stockfeed Parcels CC"; and

(d) deleting the words "the memorandum of agreement signed by the debtor on or about the same time as this deed of suretyship and any renewal, amendment or cancellation of such loan agreement" where they appear in the first paragraph of the deed of suretyship and replacing them with the words "the agreements of sale between the debtor and creditor for the sale of wheat".

2. Judgment is granted in favour of the plaintiff against the defendant for:

(a) payment of the sum of R27 724 029.97;

(b) interest thereon at the prime rate of the Standard Bank of South Africa plus 2% per annum, from 1 October 2016 to date of payment;

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

3. The defendant's counterclaim is dismissed with costs on the attorney and own client scale.

JUDGMENT

OLSEN J

[1] The plaintiff, Ameropa Commodities (Pty) Limited, has sued the defendant, Mr George Charalambus, for payment of an amount of R27 724 029.97 together with interest thereon at the prime rate of the Standard Bank of South Africa plus two percent per annum, from 1 August 2016 to date of payment. It is the plaintiff's case that the amount represents the balance outstanding in terms of certain contracts for the sale of wheat by the plaintiff to Salvage and Stockfeed Parcels CC ("SSP"), for which payment the defendant stands as surety and co-principal debtor.

[2] The deed of suretyship in question was drafted off a precedent and as a result contains a number of erroneous or inapplicable provisions with regard to which the plaintiff seeks an order of rectification. The defendant has raised no objection to the rectification and acknowledges his position as surety. The issue at trial was whether the claim was good against SSP. SSP is in liquidation, and was presumably not sued in this action because it is recognised that it is unable to pay. Mr Mark Poole, one of the three liquidators of SSP gave evidence. In short his evidence was to the effect that SSP, through its liquidators, regards the plaintiff's claim as good.

[3] I propose to commence with an outline of the claim and the defendant's response to it. In the process I will dispose of some issues of a peripheral nature before thereafter turning to the issues argued at the trial once all the evidence had been led.

THE CLAIM AND SOME PERIPHERAL ISSUES:

[4] The plaintiff's claim was, in summary, pleaded as follows.

(a) During August, September and October 2015 four contracts for the sale of wheat by the plaintiff to SSP were concluded. The one was for the sale of German milling wheat and the other three for the sale of Russian milling wheat. The quantities involved were large: 1600 tons in terms of each of the first two agreements, 2000 tons in respect of the third agreement and 3000 tons in respect of the fourth agreement (which was concluded on 5 October 2015).

(b) The wheat would be delivered by the plaintiff on the instructions of SSP within a fixed time frame into certain silos situated at a mill operated by Prograin (Pty) Limited ("Prograin"). An independent third party known as a "collateral manager" would manage the storage facility at Prograin's premises. (The collateral manager was a business known as Drum Commodities. It changed its name during the course of the events which gave rise to this litigation but, for the sake of convenience, I will refer to it as "Drum".)

(c) When SSP wanted wheat it (or its customer Prograin) would notify the plaintiff which would notify Drum as a result of which the specified quantity of wheat would be released from the silos by Drum to Prograin.

(d) The plaintiff would invoice SSP weekly for deliveries out of the silos and the purchase price would be paid within sixty (60) days of the date of each invoice.

(e) Certain quantities of wheat were delivered following the regime but not all of it was paid for. In support of the claim the plaintiff annexed to its particulars of claim a copy of the statement reflecting each unpaid invoice, illustrating that as at 31 May 2016 the amount owing by SSP to the plaintiff was R26 405 500.99. Another annexure to the particulars of claim was a document titled "Confirmation of Debtor Balance as at 31 May 2016", which reflected the same amount as owing and as having been audited by both parties. The document was signed on behalf of the plaintiff by its chief financial officer and on behalf of SSP by the defendant himself in his capacity as member of it.

[5] Copies of each of the contracts were put up with the particulars of claim. Each of them recorded that the contact person for SSP was a Mr Johan Pottas, who was called as a witness by the plaintiff. Mr Pottas was in fact the manager of the mill owned by Prograin. It is unsurprising that he was the contact person nominated on behalf of SSP. The defendant was the *de facto* single member of SSP, and the director and the controlling mind of Prograin. The convenience of the delivery of the wheat into Prograin's silos lies in the fact that Prograin would be buying the wheat from SSP, milling it and selling the flour on to its customers at a profit. And on the evidence led at trial it is Mr Pottas (if not on occasions the defendant himself) who would initiate a request to be made by SSP to the plaintiff for a delivery of wheat to Prograin from the silos under Drum's control. If the plaintiff was satisfied that the account or credit limit was under control (the credit limit had recently been increased to USD1,7 million), or if a payment was then made to bring the credit limit under control, the plaintiff would authorise the delivery which would be made by Drum to Prograin.

[6] The contracts contained subsidiary provisions regarding, *inter alia*, storage costs and interest charges, the latter being somewhat complex in nature, and not exactly the same from one contract to the next. It seems that the price per ton of the wheat stipulated in each contract was formulated as something of a base price. Storage charges in the Durban Harbour, where the wheat was landed, were exorbitant. If the wheat was not removed from the harbour to the silos on Prograin's premises in the time frame set by the contract the effect would be a *de facto* increase in the price of the wheat generated by debits in respect of storage charges and interest. This rate of interest was different to the one charged on unpaid invoices in respect of the wheat deliveries made by Drum into the Prograin mill. All of these charges were reflected on invoices, just as were the charges for wheat at the contract price per ton. Neither the invoices nor the monthly statements received by SSP were queried. The plaintiff's claim is confined to wheat deliveries up to 10 August 2016 and contractual charges of the kind just discussed up to July 2016. None of these charges, which were clearly listed in a schedule prepared by Mr Hamman, who was at the material time the chief finance officer of the plaintiff, was challenged in evidence and no argument was made that the rate of interest claimed

by the plaintiff on the outstanding balance was incorrect. I accordingly do not need to concern myself with an intricate analysis of the accounting for the plaintiff's claim. This approach is fortified by SSP's financial statements for the four month period ending June 2016 which reflect a balance owing to the plaintiff which coincides with the certificate (referred to above) signed by the defendant.

[7] The defendant's plea was in large measure an exercise in obfuscation. In the plea the defendant admitted that the parties "purported" to conclude the agreements relied upon by the plaintiff, but at the Rule 37 conference it was accepted that the agreements were concluded. However the defendant pleaded that they were *contra bonos mores* because they purported to incorporate certain standard form terms (the precise nature of which is irrelevant), but in the same breathe contradicted or undermined what the defendant contended were rights which SSP would obtain under those standard terms. This point (that the agreements were unenforceable for being *contra bonos mores*) was not conceded during the Rule 37 conference, but it was not dealt with in evidence nor pursued by the defendant at trial.

[8] It was then pleaded that 3000 tons of the wheat which was the subject of one of the contracts between the plaintiff and SSP was in fact subsequently sold to an entity known as "Sesfikile" with the result that some R11 million fell to be deducted from the plaintiff's claim. Why this was so was not revealed in the plea. The defendant was asked when led in evidence to discuss certain transactions in which Sesfikile was involved, but his explanation did not tie in at all with the proposition that any transactions between the plaintiff and Sesfikile, or, more pointedly, Sesfikile and Prograin, had any impact whatsoever on the plaintiff's claim against SSP, which, as regards wheat deliveries, was confined to wheat actually delivered into the Prograin mill.

[9] The defendant's plea (and his excipiable counterclaim which was not pursued at trial) made reference to the fact, which was uncontested, that Drum's records showed that at the time when deliveries to SSP were stopped because payments due by SSP to the plaintiff were not being made, more or less 4500 tons of wheat ought to have been in the Prograin silos, a figure above the capacity of those silos. The relevance of that allegation to the plaintiff's claim is not apparent from the plea.

It is however raised by way of an attempt at excusing the defendant's signature to the certificate of the amount owing as at 31 May 2016. In the plea the allegation that the certificate was signed by the defendant is denied, and it is stated "in amplification of such denial" that Mr Hamman (of the plaintiff) furnished the defendant with the stock report from Drum which reflected that some 4500 metric tons of wheat were in the silos. It is said that the defendant signed the certificate based on this misrepresentation, as in fact it turned out that some 4000 metric tons or so had been stolen from the silos. The logic of this was not explained in the plea, and neither did it emerge from the evidence. One would have thought that if more wheat was in the silos than ought to have been there, considering the plaintiff's claim as to how much wheat was moved from the silos into Prograin's mill, one could argue that there was reason to query the level of off-take contended for by the plaintiff. Here the opposite was the case. Taking into account the off-take contended for by the plaintiff there should have been much more wheat left in the silos than was actually there. Although the defendant's evidence on the subject was not perfectly clear, as I understood it the issue of the belief that there was some 4500 tons available in the silos did not arise in connection with, or affect his decision to sign, the certificate acknowledging the amount due (and thereby acknowledging, *inter alia*, the amounts of wheat delivered from the silos to Prograin). He was negotiating a sale of Prograin and the presence of that quantity of wheat in Prograin's silos was apparently a matter of some importance to the proposed buyer. I must confess to having found it difficult to follow this aspect of the defendant's evidence. Perhaps what he wanted to say was something he was reluctant to say directly: that he was happy to sign the certificate, there being nothing wrong with it, so long as the sale went through because he could pay the plaintiff out of the proceeds; but he would not have signed the certificate if he did not believe that the sale would go through, and that was the connection between the representation that there was some 4500 tons of wheat on the site and the fact that he signed the certificate.

THE PRINCIPAL DEFENCE: PROOF OF DELIVERY OF WHEAT

[10] A lot of evidence was led, and there was excessive cross-examination of witnesses, because the defendant went to trial hoping that the plaintiff would be unable to prove its case. This applies especially to the issue as to whether the

plaintiff had delivered the quantities of wheat into the Prograin mill which are reflected in its account of how its claim against the defendant is comprised. The plaintiff has not claimed for the price of wheat bought by SSP which was not delivered into the Prograin mill because SSP was unable to service its account.

[11] One would have thought that the fact that all of the invoices and all of the statements were presented to SSP without any complaint that the wheat deliveries reflected therein had not been made would have been sufficient to persuade the defendant that it was futile to defend the claim against him on the footing that the wheat deliveries were not made. SSP's acceptance of the accuracy of the claims set out in the commercial documents sent to it is reflected in its own financial statements for the four month period ending June 2016.

[12] Asked in cross-examination why the defendant approached the case upon the footing that the plaintiff must prove delivery of the wheat, the defendant said that he had received advice that a release note issued by Drum (reflecting the transfer of wheat from the silos to the Prograin mill) does not constitute proof of delivery; that there is in fact no proof of delivery; that Mr Pottas (representing Prograin) had to have "signed for delivery into the mill", and that the absence of such signatures meant that the wheat should be regarded as not having been delivered. (The issue as to the origin of the advice was not pursued.)

[13] When wheat was delivered the plaintiff would of course issue an invoice to SSP. When asked what happened upon the issue of such an invoice the defendant stated that SSP would then generate an invoice directed at Prograin, Prograin would pay SSP and SSP would pay the plaintiff. (Obviously the payment elements in this account of the system became problematic.) When asked whether there was any verification of invoices reflecting deliveries of wheat to SSP the defendant conceded that SSP would ask Prograin if the wheat had been received. He accepted that Mr Pottas would have verified the deliveries on each occasion.

[14] According to the defendant Drum issued monthly audit reports of its receipts and deliveries of wheat which appear in the bundle of documents to which the

defendant was referred. These coincide with the plaintiff's billings, and no disputes were raised as to the accuracy of the records of deliveries into the Prograin mill.

[15] The plaintiff produced the so-called "release instructions" sent by the plaintiff to Drum authorising releases of wheat to Prograin. Each release authorisation followed a request by SSP for such a release and the plaintiff's agreement to make the release which, as mentioned earlier, would only be made after considering the state of SSP's account with the plaintiff. Each of these was copied to Mr Pottas who explained in evidence that the release instructions were copied to him so that he could know that the authorisation had in fact been given. He would then be able to put in motion the process of delivery of the wheat from the silos into the mill for him to produce the product which Prograin would sell. Mr Pottas's evidence was absolutely clear. There was no occasion when he received a release instruction, but did not receive the wheat to which it related.

[16] What I have said hitherto under the present heading is on its own decisive of the issue as to whether the wheat in question was delivered to Prograin (and accordingly to SSP). The evidence is overwhelming. There is no need for me to reproduce in this judgment an account of the other evidence led in this case, and especially that elicited in cross-examination, which canvassed in some detail the various processes followed and the documents generated in respect thereof, concerning wheat deliveries. Aside from the evidence I have just referred to, the evidence of Mr Hamman and, up to a point, Mr Poole also went to this issue. So did the evidence of a Ms Aldworth who was at the material time employed by Drum as the contract manager for, *inter alia*, the management of the silo facility at Prograin, and the movements of wheat in and out of the silo system. I have considered all of that evidence and see nothing which contradicts the conclusions reasonably to be drawn from the documents, and the evidence of Mr Pottas and the defendant himself.

[17] Mr Mohamed, who appeared for the defendant, confronted with all this evidence, took refuge in an argument that the evidence to which I have referred, even that from the defendant, was not sufficient for the plaintiff's purposes because the plaintiff had not complied with the best evidence rule.

[18] Ms Aldworth canvassed the question of how transfers of wheat from the Prograin silos into the Prograin mill were handled. One Seggie was employed by Drum to actually manage the silos. (Ms Aldworth was not on site.) He would be told what wheat to release to Prograin. He would make the release in conjunction with Mr Pottas, the mass of the wheat delivered being measured by a scale built into the delivery mechanisms which transported the wheat from the silos into the mill. Having done this Mr Seggie would record in a book the details of the transfer which had taken place. As I understand the argument, besides the fact that, according to the defendant, Mr Seggie should have been called, the book in question would have been the so-called "best evidence" of the deliveries.

[19] This argument has no merit at all. If the "best evidence rule" means what counsel argued it to mean, then the correct course would have been to object to evidence which undermined the operation of the rule. That was not done, and one wonders about the footing on which counsel might have presented an objection to his own client's concessions.

[20] For present purposes it is sufficient to say that the position with regard to the best evidence rule is as stated by Conradie J in *Welz and Another v Hall and Others* 1996 (4) SA 1073 (C) at 1079 C-D.

'As far as the best evidence rule is concerned, it is a rule which applies nowadays only in the context of documents and then only when the content of a document is directly in issue. It does not apply where the document serves to record a fact capable of being proved outside the document. It provides that the original of the document is the best evidence of its contents.'
(See also *S v B M* 2014 (2) SACR 23 (SCA) at para 33.)

The content of the book used by Seggie was not an issue in the trial. The issue was whether or not the wheat was delivered. If he could have been found (apparently he was "on the run" in connection with missing wheat) Seggie could have confirmed or denied the assertion by Pottas that all the wheat was delivered. The fact that he would have turned to his book to see what he had recorded in order to deal with

such questions did not make the book a document the contents of which were an element of the plaintiff's cause of action.

UKRAINIAN WHEAT:

[21] The plaintiff's particulars of claim assert that wheat was delivered in terms of the contracts pleaded. As a matter of fact a quantity of the wheat delivered under one of the contracts for wheat of Russian origin was in fact wheat of Ukrainian origin. That this was the case was not pleaded, although the documents I have mentioned reflecting wheat deliveries openly recorded that the wheat in these instances was of Ukrainian origin, but nevertheless allocated to the contract in question for wheat of Russian origin.

[22] The defendant did not plead, even in the alternative, that if the plaintiff proved delivery of the quantities of wheat, some of it was of Ukrainian origin and accordingly not in accordance with what the contract required. On occasions during the course of evidence reference was made to the Ukrainian deliveries without any point being made that such deliveries were irrelevant, considering the plaintiff's pleadings, or that the evidence was objectionable in any respect. The defendant himself said that it may have been agreed to deliver Ukrainian wheat instead of Russian wheat, which merely elicited a question in re-examination, as to whether the defendant had signed an amending agreement to that effect.

[23] As the mode of business already described in this judgment illustrates, SSP delivered the Ukrainian wheat it received from the plaintiff to Prograin, which in turn milled the product and sold the resultant flour. No complaints were made, whether as to the quality or origin of the wheat, or as to its allocation to the contract for Russian wheat. It was not put to any of the plaintiff's witnesses (including Mr Pottas) that the delivery of Ukrainian wheat could not satisfy an obligation to deliver wheat of Russian origin, nor that, in the case of Mr Pottas, that he ought to have raised a complaint. The defendant himself had every opportunity to state that wheat of Ukrainian origin could not substitute for wheat of Russian origin under the contract, but he gave no such evidence.

[24] For the first time in argument counsel for the defendant asserted that the plaintiff had failed to prove performance under the contract for Russian wheat to the extent that such performance involved the delivery of Ukrainian wheat; and that to succeed in respect of that portion of its claim which related to the delivery of Ukrainian wheat, the plaintiff ought to have pleaded and proved a written variation to the contract in question. (The contracts each contained so-called non-variation clauses.)

[25] The learned authors of Christie's The Law of Contract in South Africa, 6 ed at 427 describe the judgment of Claassen J in *Van Diggelen v De Bruin* 1954 (1) SA 188 (SWA) at 192 – 193 as an "admirable summary of the law" on the question as to whether performance, to be valid, must be exactly in the manner specified in the contract, or whether it may be made in some equivalent manner that is equally effective. *Van Diggelen's* case involved a tender of alternative performance by a contracting party which was rejected by the other one. The issue was whether the tender coincided with the provisions of the contract. Against that background the learned Judge set out the proper approach to a dispute as to whether the equivalent performance was permissible. And so, for instance, the first step in approaching such a question would be considering the surrounding circumstances taking into consideration "everything which can give a clue to the intention of the parties". How would the parties have reacted if this question had been specifically contemplated by them before the contract was concluded? If there is no clear answer the presumption is that precise performance (*in forma specifica*) is required. There is no need in this judgment to give a full account of the judgment in *Van Diggelen*, save to mention that the learned Judge observed that "the Court's paramount concern is always, within the frame-work of the law, to do justice between man and man."

[26] In this case, because the point raised in argument was not dealt with in the pleadings, and indeed was not raised during the course of evidence, one is left to deal with the argument that deliveries of the wheat of Ukrainian origin did not meet the requirements of the contract, by judging the matter, so to speak, *ex post facto*, having regard to the conduct of the parties in connection with such deliveries.

[27] Requests for deliveries from the silo to the Prograin mill emanated from SSP (almost certainly at the request of Prograin and Mr Pottas) or from Prograin on behalf of SSP. In the instances now under consideration those requests (in whatever terms they may have been stated) generated deliveries of Ukrainian wheat and documentation which reflected the origin of the wheat. The allocation of such deliveries to the contract for Russian wheat was quite clear. The rate per ton for such wheat was in accordance with that contract for Russian wheat. The deliveries were accepted and no protest was made concerning the origin of the wheat or the charge made for it.

[28] That being the case, SSP must be taken to have accepted as sufficient and proper the delivery of Ukrainian wheat as an equivalent to Russian wheat under the contract, and it must be concluded that as a matter of probability the contract permitted such equivalent delivery. That outcome strikes me as the only one which fulfils the goal mentioned in *Van Diggelen's* case, that, within the frame-work of the law, the court should be concerned to do justice between the contracting parties.

THE NATIONAL CREDIT ACT NO. 34 OF 2005:

[29] In its particulars of claim the plaintiff relied solely upon the four agreements pleaded, each of which provided for payment within sixty (60) days from date of invoice. Each agreement was accordingly a credit agreement as defined in s 8(4) of the National Credit Act. The plaintiff then pleaded that SSP was a juristic person whose asset value and/or annual turnover at the time of conclusion of the sale agreements exceeded R1million, as a result of which the provisions of the Act do not apply to the sale agreements, and consequently to the suretyship relied upon in suing the defendant. Those allegations were denied.

[30] It is argued on behalf of the defendant that given that compliance with s 129 of the Act was not proven, this action must fail.

[31] As I understand it, the principle argument is based upon the proposition that although the plaintiff did not base its claim on a "credit facility", there is evidence from both the plaintiff and the defendant that such a credit facility had been granted,

and the plaintiff had not proved that when the facility was granted, SSP's turnover or asset value exceeded R1million. I assume that what counsel for the defendant is referring to is the fact that at a certain stage SSP had a credit limit of USD 700 000, which was subsequently increased to USD 1.7million.

[32] A credit facility is defined in s 8(3) of the Act, and its primary feature is that it involves a credit provider undertaking to supply goods or services to the consumer, or at the direction of the consumer. That implies an agreement which obliges the credit provider to do so. The credit limit was mentioned in evidence only for the purpose of explaining that the plaintiff would not supply goods if the credit limit had been exceeded. The question as to whether the plaintiff was actually obliged to allow purchases up to the credit limit, upon the footing that it had, as the section requires, "undertaken" to do so, was not pursued or elucidated in any way.

[33] Given the basis upon which the plaintiff sued (ie relying on four credit agreements of the type contemplated in s 8(4) of the Act), if the defendant wished to assert that in fact the plaintiff's claim was to enforce the provisions of a credit facility as defined in s 8(3) of the Act, that had to be pleaded, and the allegation made that at the time when the so-called credit facility was granted, the defendant had neither a turnover nor an asset value in excess of R1million; and that, for want of compliance with s 129 of the Act with regard to the claim to enforce a credit facility, the actions have to fail. That was not pleaded. And indeed, the proposition was not canvassed in evidence.

[34] The notion that SSP's credit limit would have been set at USD 700 000, let alone at USD1.7 million, if it did not have a turnover of at least R1 million per year is so improbable that it can safely be discarded. However there is in fact evidence as to the situation at the time the defendant now contends is material. Mr Hamman identified the first grant of credit to SSP in April 2014 which was based on SSP's audited financial statements for the year ending February 2013 and management accounts as at 31 December 2013. The limit is recorded as R7 million which was presumably the equivalent of the USD 700 000 limit that was mentioned in evidence. With his counterclaim the defendant put up what he said to be all of the contracts concluded between the parties since April 2014. In April alone SSP bought some

R5.8 million worth of wheat from the plaintiff. The notion that it did so, or would have been allowed to do so, if it had a turnover of less than R1 million per year is beyond comprehension.

[35] Counsel for the defendant has also attempted an argument based on the proposition that the agreements relied upon by the plaintiff are incidental credit agreements. His assertion seems to be that the provisions of s 4 of the Act (dealing with the applicability of the provisions of the Act to a credit agreement when the consumer is a juristic person) do not apply to incidental credit agreements. No authority is cited for that proposition. Counsel did not explain his assertion to that effect by argument as to the proper construction of the relevant provisions of the Act. I am unable to discern from a reading of the Act that there is any basis upon which to argue that the restrictions upon the applicability of the Act to juristic persons do not apply in the case of incidental credit agreements.

[36] It is beyond doubt that when the four contracts pleaded by the plaintiff were concluded, the annual turnover of SSP exceeded the sum of R1 million. The amounts involved in those four contracts themselves give the lie to any contrary argument. So too do the financial statements of SSP as at June 2016 to which the defendant was referred in evidence. They illustrate that not only SSP's turnover, but also its asset value, must have exceeded R1 million at all material times.

[37] There is no merit in the contention that the plaintiff's failure to comply with s 129 of the Act is an obstacle to judgment in favour of the plaintiff in this action.

COSTS:

[38] Clause 3.4 of the deed of suretyship provides that the defendant must pay all costs "whatever (on an attorney and own client scale) relating to any claim or proceedings arising out of or in connection with this suretyship …". That clause obviously covers the plaintiff's claim against the defendant.

[39] As for the counterclaim, whatever its meaning and intent, it purported to have been a claim of SSP which had been ceded to the defendant. I cannot say that it

constitutes proceedings "in connection with" the suretyship. However costs were incurred in dealing with the counterclaim. The making of it, and not pursuing it, presumably because it was recognised that it had no merit, is litigious conduct of a kind which deserves sanction. I gained the clear impression that the defendant was a despondent witness, and that he made the concessions he did because he could not bring himself openly to deny under oath what was perfectly obvious. The validity of the plaintiff's claim was only challenged in August 2016 when an application was made to wind up SSP. It is difficult to resist the conclusion that, right up to trial, the defence of the claim and the delivery of a counterclaim were designed to gain time. It is both convenient and justified to grant the costs of the counterclaim on the same scale as must be allowed in the case of the claim.

INTEREST:

[40] The plaintiff has claimed interest on the capital sum running from 1 August 2016. However the certificate of balance reflecting that same capital sum records that the balance is fixed as at 30 September 2016. I propose to grant interest to run from 1 October 2016.

[41] Counsel accepted during argument that any order for interest I make would be subject to the limits set by the *in duplum* rule.

The following order is made.

1. **The deed of suretyship executed by the defendant in favour of the plaintiff on 16 July 2014 is rectified by**
   (a) deleting the whole of clause 5 of the standard terms and conditions of the deed of suretyship;
   (b) deleting the whole of clause 7.2 of the standard terms and conditions of the deed of suretyship;
   (c) deleting the words "the trustees for the time being of" appearing in the first paragraph of the deed of suretyship and replacing them with the words "Salvage and Stockfeed Parcels CC"; and

(d) deleting the words "the memorandum of agreement signed by the debtor on or about the same time as this deed of suretyship and any renewal, amendment or cancellation of such loan agreement" where they appear in the first paragraph of the deed of suretyship and replacing them with the words "the agreements of sale between the debtor and creditor for the sale of wheat".

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(a) payment of the sum of R27 724 029.97;

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3. The defendant's counterclaim is dismissed with costs on the attorney and own client scale.

OLSEN J

Date of Hearing:	02, 03, 04, 05 & 06 August 2021
Date of Judgment:	28 September 2021
For the Plaintiff:	Ms L Mills
Instructed by:	Hayes Incorporated Plaintiff's Attorneys (Ref.: HX1161) (Email: hugo@themis.co.za) **c/o Shepstone & Wylie** 24 Richefond Circle Ridgeside Office Park Umhlanga Ridge Durban (Ref: JCS/mr/Haye35375.3) (Tel: 031 – 575 7000) (Email: smith@wylie.co.za)
For the Defendant:	Mr R Mohamed
Instructed by:	Motala & Associates Defendant's Attorneys 104 Windmill Road Musgrave Durban (Ref: G Charalambus12027/16 M Motala) (Tel: 082 726 1290) (Email: motalaassociates@gmail.com)