THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 18922/2010

In the matter between:

NEDBANK LTD	**PLAINTIFF**

and

PURICARE CC	**FIRST DEFENDANT**
SALIVE AIR CC	**SECOND DEFENDANT**
KENNETH HARRIS	**THIRD DEFENDANT**
OLIVE ANN HARRIS	**FOURTH DEFENDANT**
ALBERT WIFFEN	**FIFTH DEFENDANT**
RIAAN KIRSTEN	**SIXTH DEFENDANT**
HEINER DOMINICK	**SEVENTH DEFENDANT**
UWE DOMINICK	**EIGHTH DEFENDANT**
CHARMAINE LYNN DOMINICK	**NINTH DEFENDANT**

Coram: **ROGERS J**

Heard: **5,6 & 10 FEBRUARY 2014**

Delivered: **18 FEBRUARY 2014**

JUDGMENT

ROGERS J:

[1] The plaintiff ('Nedbank') instituted action against the first defendant ('Puricare') for an amount of R1 450 037,12 plus interest allegedly owing on an overdrawn account. Nedbank sought to hold the 2nd to 9th defendants jointly and severally liable as sureties. Subsequent to the institution of action Puricare went into liquidation. Its liquidators were joined but played no part in the proceedings on the basis that Nedbank would not seek any relief in the action against Puricare. The action continued against the sureties. On 4 February 2014, the day before the trial began, Nedbank reached a settlement with the 2nd to 6th defendants. In terms of the settlement, those defendants agreed to pay Nedbank an amount of R1 million on the basis that Nedbank would release and discharge them from any further liability as sureties. The trial was thus confined to the liability of the 7th to 9th defendants. Mr Vivier appeared for Nedbank and Mr Badenhorst for the 7th to 9th defendants.

[2] For convenience I shall refer to the 2nd to 6th defendants as the Harris group and the 7th to 9th defendants as the Dominick group. The Dominick group comprise Uwe Dominick, his wife Charmaine and his brother Heiner (I shall refer to them by their first names to avoid confusion). The Harris group were the original controllers of Puricare, whose business was water purification and agricultural enhancement technologies.

[3] In February 2009, at a time when Puricare's business was in straitened circumstances, the Dominick group were brought in to provide funding and managerial direction. The facility agreement on which Nedbank sued was concluded in January 2010 at the instance of Uwe. By mid-February 2010 there had been a

falling out between the Harris group and the Dominick group. The Dominick group exited but retained an interest in the affairs of Puricare by virtue of the suretyships they had signed and by virtue of loan funding provided by them.

[4] When Nedbank subsequently sought repayment of the overdraft, Puricare and the Harris group (who by now had sole control of Puricare) contended that Uwe had acted without authority in concluding the facility agreement of January 2010. The Dominick group, by contrast, contended that Nedbank had acted, or allowed the Harris group to act, in a manner which was prejudicial to the interests of the Dominick group as sureties and that the Dominick group was thus discharged from their suretyship liability.

[5] At the trial the issue between Nedbank and the Dominick group remained the question whether the Dominick group had been discharged from their suretyship liability by virtue of prejudicial conduct by Nedbank. Because the onus on this question rested on the Dominick group, they adduced evidence first, calling Uwe as their only witness. Nedbank called Mr Patrick Schwartz, who was the bank's principal representative in its dealings with Puricare. The relevant facts were largely common cause.

The facts

[6] At the time the Dominick group became involved in the affairs of Puricare in February 2009, Puricare had three bank accounts. On one of these accounts there was an overdraft facility of R150 000. For convenience I shall refer to this account as the overdraft account. The other two accounts were referred to in the evidence as the agri account and the plastics account. There were no overdraft facilities on either of these two accounts. The agri account was used by Puricare for its agricultural enhancement business. The overdraft account was used *inter alia* for the water purification business.

[7] It was agreed that the Dominick group would obtain a 40% shareholding in Puricare and would provide certain funding. The shareholders resolved that Uwe and Heiner be appointed as directors. Although they were not formally reflected as

such in the register, Uwe and Heiner operated *de facto* as the managing director and operations director respectively. The business flourished in the months following their arrival.

[8] On 8 April 2009 Puricare provided Nedbank with a mandate in terms of which the authorised signatories on the overdraft account were to be Uwe, Heiner and Belinda Fourie (Uwe's sister-in-law).

[9] Although the business prospered under the Dominicks' control, there was a cash flow difficulty because a considerable part of Puricare's turnover was tied up in work in progress, mainly public sector contracts. As a result, Uwe on 10 September 2009 negotiated a R350 000 increase in the facility on the overdraft account, bringing the total facility to R500 000. This increase was for a three-month period, in the expectation that Puricare would receive contract payments by December 2010. Uwe negotiated this temporary facility with Schwartz, with whom he had a pre-existing cordial relationship by virtue of the fact that the Dominicks had other business with the bank.

[10] The written facility contract of September 2010 was not adduced as an exhibit but it was probably in substantially the same terms as the later facility agreements. It appears that the contract required the 5th to 8th defendants to sign suretyships limited to an amount of R510 000. Those suretyships were executed on 14 October 2009. They were in identical form. I shall deal later in this judgment with the relevant terms of the suretyship contracts. By this stage Nedbank already held unlimited suretyships from the 3rd and 4th defendants (Kenneth Harris and his wife) furnished in 1996, and an unlimited suretyship from the 2nd defendant (a close corporation controlled by Harris and his wife) furnished in 1999.

[11] The temporary increased facility expired on 10 December 2009. Because Puricare had still not received the expected contract payments, Uwe negotiated an extension of the increased facility to 15 January 2010. By that date the debtor payments had still not been received but Uwe was able to negotiate a further extension to 15 February 2010.

[12] Towards the end of January 2010 Uwe realised that even the increased temporary facility of R500 000 would not enable Puricare to meet its salary bill for the month and pay certain creditor payments which were due. He thus approached Schwartz for additional temporary funding of R750 000, which would bring the total temporary facility to R1,25 million. It appears from the email which Uwe wrote to Schwartz on 27 January 2010 that initially he had in mind that his wife Charmaine (the 9th defendant) would borrow the money from Nedbank against the security of a property she owned and that she in turn would on-lend the money to Puricare. However, this was soon changed to a proposal that Puricare itself obtain the additional facility on the basis that Charmaine would provide a suretyship secured by a mortgage over her property. Based on information supplied by Uwe, Schwartz wrote to his seniors on 28 January 2010 to motivate approval for the additional facility. He said that Puricare's figures reflected that substantial funds were coming in and that there was plenty of work on hand. Uwe had offered tangible security in the form of Charmaine's property. Schwarz explained that Puricare's problem was that payments from some of the bigger debtors had been delayed, because local authorities were very slow in processing payment. He included an extract from an email from Uwe to himself, which identified three substantial debtors from whom payment was expected.

[13] Schwartz received approval to grant the temporary increase in the facility. The new facility contract was signed by Uwe (for Puricare) and Schwartz on 29 January 2010. The additional facilities of R350 000 and R750 000 were stated to be temporary and would expire on 15 February 2010. Apart from recording the required securities which had already been part of the earlier facility contracts, the agreement stated that Charmaine was required to furnish a suretyship for R1,2 million and that a first mortgage bond was to be passed over her property. Charmaine signed her suretyship on the same day. Apart from the amount of the limit, its terms were identical to the suretyships signed by Heiner and Uwe. The mortgage bond was registered on 2 March 2010.

[14] The overdraft account reflects that on 28 January 2010 the overdrawn balance was about R598 000. Following the grant of the additional facility, salary

and SARS payments were made on 29 and 30 January 2010 which caused the overdrawn balance to increase to about R1,194 million.

[15] In the meanwhile, the relationship between the Harris group and the Dominick group was becoming frayed. There were meetings and discussions among the shareholders over the period 1 to 4 February 2010. Uwe testified that the 6th defendant (Riaan Kirsten) could not understand why the profit reflected in the management accounts was not translating into money in the bank. There were veiled allegations of impropriety against the Dominicks. There was also a breakdown in the personal relationship between Kirsten and Heiner. Attempts at resolving differences failed, leading to a final parting of the ways by about 15 February 2010. On that day, the 5th defendant (Albert Wiffen), who was now functioning as spokesperson for the Harris group, addressed an email to the Dominicks attaching a resolution which Puricare's shareholders had passed. The resolution recorded that, due to 'non-performance and mismanagement' by the Dominicks' company, Cool Technology (Pty) Ltd, the resolution of 30 March 2009 was revoked. The latter resolution was not placed before the court but presumably set out the terms on which the Dominick group was to obtain a stake in Puricare. The resolution further stipulated that the Dominick group was to be denied access to Puricare bank accounts and premises and was to hand over all equipment and information belonging to Puricare with immediate effect.

[16] Whether or not this decision by Puricare's alleged shareholders was valid is not an issue in the case before me. As a fact, the Dominick group accepted that their managerial involvement in Puricare was at an end. However, they still had an interest in Puricare's affairs, because they had advanced substantial funding to Puricare and had given suretyships. Up to this time the signatories on the overdraft account were Uwe, Heiner and Fourie. Uwe had an electronic banking profile which gave him electronic access to all of the accounts in which he had an interest, including those of Puricare, and which also enabled him to effect transactions electronically on these accounts. With the parting of the ways, Nedbank created a new electronic profile for the Harris group but, probably due to an oversight, Uwe's profile was not amended. Uwe continued to access the Puricare accounts

electronically in order to monitor the flow of funds but he refrained, as from 15 February 2010, from transacting on the accounts.

[17] According to Schwartz, who was receiving information both from the Harris group and the Dominick group, the Harris group sought a further extension of the additional facilities of R350 000 and R750 000, which was granted verbally on 15 February 2010 (the date on which those additional facilities expired in terms of the facility contract of 29 January 2010). The verbal extension was to 8 March 2010. Schwartz said that part of the Harris group's motivation for this request was that they were contesting Uwe's authority to have concluded the facility contract of 29 January 2010. Unless the facility was extended, Puricare would be unable to trade. (One of the questions in the present case is whether this verbal extension was valid, having regard to the non-variation clause in the facility contract of 29 January 2010.)

[18] On 16 February 2010 Uwe sent an email to Schwartz, informing him of the irreconcilable differences between the shareholders and that the Dominick group would be exiting Puricare. He told Schwartz that Puricare would require the current overdraft facilities to continue with its daily operations, adding:

'The shareholders of Puricare [ie the Harris group will] need to sign the suretyship for these facilities as we are not prepared to do so after our official exit from Puricare. This includes the R500k and the R750k used by Puricare to fund current WIP [work-in-progress] projects on hand.'

[19] On 19 February 2010 Puricare (now under the sole control of the Harris group) sent a notification to all its clients, advising them that all future payments should be made into the agri account, not the overdraft account. At that date the overdrawn balance of the overdraft account was about R1,397 million. The intended effect of this instruction was that payments from clients would no longer go in reduction of the overdraft but would instead be added to the credit balance in the agri account. At the close of business on 19 February 2010 the agri account had a credit balance of just under R30 000. For as long as Nedbank allowed this state of affairs to continue, Puricare could fund payments from current cash inflows by way of the agri account without reducing or needing an increase in the overdraft on the overdraft account. Nedbank appears to have facilitated the payment of monies into

the agri account, because on 24 February 2010 it issued a document 'to whom it may concern', confirming that Puricare conducted the agri account.

[20] Uwe, who was monitoring the transactions on the overdraft and agri accounts, wrote to Schwartz on 5 March 2010 about what he saw. On that date the negative balance on the overdraft account was about R1,4 million. Various debit orders were reflected as unpaid items. On the same day, the positive balance in the agri account was about R256 000, following a deposit on 3 March 2010 of R197 807 (this latter payment apparently related to the agricultural enhancement side of the business and would thus in the ordinary course have gone into the agri account). In his email, Uwe pointed out the balances on the two accounts and also told Schwartz that the so-called Harlem funds (being one of the large contracts mentioned in Schwartz's email to his superiors of 28 January 2010, payment in respect of which Puricare had been expecting) were apparently to be paid early in the following week. He continued:

'I request Nedbank to do the right thing and move the funds immediately onto the [overdraft] account and simultaneously cancel the R750k facility signed by Charmaine Dominick. Puricare has not shown any interest in resolving this matter.'

[21] On 8 March 2010 a customer payment of R850 000 was deposited into the agri account. Although at the time Uwe thought that this was part of the Harlem funds, the payment was in fact in respect of the Golden Gate contract, one of the other large contracts mentioned in Schwartz's email to his superiors of 28 January 2010. In the ordinary course, that payment would have been made into the overdraft account. It was presumably made instead into the agri account pursuant to Puricare's customer notification of 19 February 2010. The effect of this deposit was to swell the credit balance in the agri account to about R1,1 million. At the same time, the negative balance in the overdraft account was about R1,4 million.

[22] At some stage prior to 9 March 2010 there had been telephonic discussions between Uwe and Schwartz in which the former had discussed what he regarded as being the prejudicial position of there being a credit balance in the agri account in circumstances where there was a large negative balance in the overdraft account, particularly where expected debtor payments with reference to which Uwe had

motivated the temporary increase in facilities were being diverted by Puricare (under the Harris group's control) to the agri account. My impression from Schwartz's evidence is that he himself appreciated the potential unfairness and that the bank would in the ordinary course have invoked its right (conferred by the standard facility contract) to appropriate the credit balance in the agri account in reduction of the overdraft account. Uwe discussed with him the possibility that he (Uwe) might use his electronic access to the bank accounts to effect inter-account transfers but Schwartz advised against this, saying it might get him into trouble.

[23] Uwe sent an email to Schwartz on 9 March 2010. He attached to his email Puricare's customer notification of 19 February 2010. He said that this notification clearly showed that Puricare (ie under the control of the Harris group) had no intention of reducing the overdraft amount and was instead trading on the agri account, concluding:

'I need Nedbank to please move the funds onto the [overdraft] account and cancel the overdraft facility signed by Charmaine and myself.'

A few minutes later he sent a further email, saying that the Harlem funds were now in the agri account (as noted, the funds were in fact in respect of the Golden Gate contract, but nothing turns on this).

[24] On the same day Nedbank transferred an amount of R913 155 from the agri account to the overdraft account. This caused the credit balance in the agri account to drop to R161 580 and the debit balance in the overdraft account to be reduced to R500 000,27. Uwe at the time believed that Nedbank had acted on his request. Schwartz testified, however, that this was not the case. The verbal extension of the additional facilities of R350 000 and R750 000 expired on 8 March 2010. Schwartz's evidence was that in discussion with the Harris group the bank agreed a further extension of the additional facility of R350 000 to 6 April 2010 but that the further additional facility of R750 000 had not been extended. This meant that the total approved facility on the overdraft account dropped on 8 March 2010 to R500 000. The bank had thus caused an amount to be transferred from the agri account which would reduce the overdraft account to the new approved limit of R500 000 (this was a right accorded by the standard facility contract). Given that the bank did not

transfer the full credit balance in the agri account and that the reduced balance in the overdraft account following the transfer was almost exactly R500 000, I do not have reason to doubt Schwartz's version (which Uwe in the nature of things could not contradict).

[25] Nedbank's conduct in transferring the amount of R913 500 from the agri account to the overdraft account was met with resistance by the Harris group. Reference was made in Uwe's cross-examination to a note made by Wiffen of a meeting which the Harris group had with the bank on 10 March 2010.[1] Schwartz did not give evidence specifically about this note and its content was thus not proved. Nevertheless, the position of the Harris group as reflected in the note accords with the letter which their attorneys, De Klerk & Van Gend, addressed to Nedbank on 12 March 2010. In this letter the attorneys recorded their instructions as being, among other things, that whereas the facility letter for R500 000 had been authorised, Uwe had unlawfully and fraudulently increased Puricare's overdraft facility by a further R750 000 by means of the facility letter of 29 January 2010; that Nedbank had unilaterally recouped funds of approximately R913 000 on 8 March 2010; and that this capital was required for the operations of the company, without which Puricare would be unable to trade and would suffer damages. The attorneys demanded that the 'unilaterally' recovered sum of R913 000 be immediately made available to the company, failing which their instructions were to approach the court for urgent relief. The attorneys also suggested that the matter could be amicably resolved if Nedbank called up the security given by Charmaine Dominick.

[26] Schwartz testified that, following internal consideration of this letter by the bank, he was instructed by the bank's legal department to give effect to Puricare's demand. He did this by transferring a sum of R749 155 back from the overdraft account to the agri account, causing the overdraft balance to increase from about R503 000 to R1,252 million and the agri account credit balance to increase from R189 997 to R939 152. Schwartz did not explain how the precise amount of the re-transfer was calculated. It seems that the bank's intention was to restore the

[1] In the cross-examination it was assumed that the meeting occurred on 10 February 2010. This is clearly a typographical error in the heading. Wiffen signed the note under the date 10 March 2010, and reference was made in the note to the disputed transfer of R913 500 on 9 March 2010.

overdraft balance from about R500 000 to the previous limit of R1,25 million. Of this overdrawn balance, R750 000 was in contention, so a similar amount was made available to Puricare in cash by way of the transfer back to the agri account.

[27] On 23 March 2010, less than a week later, Puricare caused the full credit balance in the agri account, namely R735 990,61, to be transferred to an account at Absa, at which point Nedbank lost any ability it might previously have had to appropriate that sum in reduction of the overdraft account. Schwartz testified that this transfer was effected by Puricare electronically and that he had not been aware of Puricare's intention to do so. He later learnt that Puricare had decided to bank with Absa rather than Nedbank.

[28] Uwe testified that it was only on 24 March 2010 that he accessed the Puricare accounts and saw the transactions of 17 and 23 March 2010. He emailed Schwartz to inform him that Puricare had 'now moved the total funds from the Nedbank account to an Absa account'.

[29] On 12 April 2010 Nedbank sent letters of demand to Puricare and to all the sureties.

[30] On 29 April 2010 an amount of R280 269 was paid into the overdraft account, reducing the overdrawn balance from about R1,29 million to R1 million. Uwe testified that this was a payment in respect of a municipal tender (the Leppell Water contract), a tender which Puricare had won when the Dominicks were still involved in the business. He said that Puricare's tender document had specified the overdraft account as the account into which payments should be made. On the next day Nedbank transferred an amount of R280 269 from the overdraft account to the agri account. Schwartz testified that he did so on the instruction of Puricare. He was informed in that regard by the Harris group that the customer had mistakenly made the payment into the overdraft account instead of the agri account. On the same day Puricare transferred an amount of R282 000 from the agri account to its Absa account.

[31] The full agri account was handed up as exhibit B. It reflects that after 30 April 2010 certain further payments were made into the agri account by various customers and that sums were transferred from the agri account to the Absa account from time to time. The intention of the Harris group as it can be discerned from the pattern of transactions seems to have been to ensure that no substantial funds remained for any length of time in the agri account. The last customer payment into the agri account was in late July 2010. A small credit balance of R12 489 was transferred from the agri account to an unidentified account on 18 October 2010, and the agri account seems then to have been closed.

[32] Nedbank issued summons on 2 August 2010.

[33] Puricare was placed in voluntary liquidation on 5 December 2011. I was informed by counsel that although Nedbank and some of the sureties have proved claims in the liquidation of Puricare, there is little prospect of a dividend.

[34] Agreement was reached between Nedbank and the 7th to 9th defendants that, inclusive of accumulated interest, the liability of Puricare on the overdraft account as at 24 January 2014 was R2 795 313,11 together with interest as from 25 January 2014 at 21% per annum. This does not take into account the amount of R1 million paid by the Harris defendants on 4 February 2014 pursuant to the settlement agreement.

The pleaded case

[35] Nedbank's claim is based on the facility contract of 29 January 2010 and the suretyships signed by the Dominick defendants. The terms of the facility contract and the suretyships are not in dispute. The defendants have not alleged that any of the terms are invalid or unenforceable.

[36] During the course of the trial Nedbank amended its particulars of claim to include the two verbal extensions of the overdraft facility on 15 February 2010 and 8 March 2010. The amendment was not opposed but it was placed on record that the defendants would amend their plea to contend that the verbal extensions were

unenforceable in the light of the non-variation clause in the facility contract. An amended plea to that effect was duly handed up. The clause on which the defendants place reliance is clause 17.1 of the facility contract, which provides that the offer of banking facilities contained in the facility letter constitutes the whole of the agreement between Puricare and Nedbank and that 'no amendment, alteration, addition, variation or consensual cancellation' will be of any force or effect unless reduced to writing and signed by both parties.

[37] The Dominick defendants' defence is that they have been released due to prejudicial conduct by Nedbank. (Certain other defences mentioned in the plea were abandoned.) The prejudice initially pleaded by those defendants did not entirely accord with what Mr Badenhorst outlined in his opening address. The trial proceeded, without objection, on the basis that the defence was as outlined by Mr Badenhorst, subject to my direction that an amended plea was filed without delay. The amended plea was handed up at the beginning of the second day's proceedings.

[38] The amended plea alleges in summary as follows:

[a] There was a duty on Nedbank not to act in a manner that would be prejudicial to the Dominik defendants in their capacity as sureties.

[b] Nedbank, despite having been informed that Puricare had no intention of repaying the overdrawn facility, allowed Puricare to transfer funds from the overdrawn account to the agri account.

[c] In particular, on 17 March 2010 Nedbank unilaterally transferred an amount of R749 155 from the overdraft account to the agri account, despite the fact that at that time no overdraft facility existed, alternatively the overdraft facility was only R150 000.

[d] Furthermore, on 29 April 2010 an amount of R280 269, earmarked to reduce the overdraft, was paid into the overdraft account but on 30 April 2010 Nedbank unilaterally transferred the same amount from the overdraft account into the agri

account, despite the fact that at that time no overdraft facility existed, alternatively the overdraft facility was only R150 000.

[e] As a result of Nedbank's prejudicial conduct towards them, the Dominick defendants are entitled to release from the suretyships.

The law relating to prejudice

[39] Recent judgments of the Supreme Court of Appeal indicate that there is no general principle that a surety is discharged from liability because the creditor has behaved in a manner prejudicial to the surety's interests. In *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA) Olivier JA said that '[a]s a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation' (para 19). The learned judge of appeal went on to point out that the prime sources of a creditor's rights, duties and obligations are the agreement with the principal debtor and the deed of suretyship. If the prejudice is caused by conduct falling within the terms of those agreements, the prejudice suffered is one which the surety 'undertook to suffer'. He went on to demonstrate, on the facts of that particular case, that the alleged prejudicial conduct was expressly authorised by the terms of the suretyship. The defence thus failed.

[40] Despite some academic criticism of *Davidson*, the Supreme Court of Appeal in *Bock & others v Duburoro Investments Pty Ltd* 2004 (SA) 242 (SCA) specifically subscribed to the legal position as set out in *Davidson* (see para 21). *Bock* has also clarified another controversial aspect in this area of the law. Where the prejudicial conduct is not authorised by the principal agreement or suretyship, the prejudice only operates as a defence *pro tanto* (see paras 22-26). If the prejudicial conduct has not caused the surety's liability to be greater than it otherwise would have been, there is no defence. If the prejudice has increased the surety's liability by a quantifiable sum which is less than the full debt claimed by the creditor, he will only be released to that extent. In *Bock* the court assumed in favour of the sureties that the bank had dealt with shares pledged by the principal debtor in a manner contrary to the principal agreement and that the sureties could thus in principle rely on such

conduct as prejudicial conduct. However, on the facts it was not shown that, if the bank had acted as it should have done under the principal agreement, the liability of the principal debtor, and thus of the sureties, would have been any less. The defence thus failed.

[41] The onus of proving prejudicial conduct rests on the surety; and it seems that the surety is also required to prove the financial extent of the prejudice so as to establish whether his release is partial or complete (see also *Khula Enterprise Finance Limited v Geldenhuys & another* [2012] ZASCA 165 para 6), though I do not think in this case that it is necessary to express a final view as to where the onus lies in respect of quantification.

[42] Mr Badenhorst, in his written heads and in oral argument, referred to the prejudice rule as delineated in Caney *The Law of Suretyship* 4th ed and in *Spur Steak Ranches v Mentz* 2000 (3) SA 755 (C) and *Di Giulio v First National Bank of South Africa Ltd* 2002 (6) SA 281 (C). However, the current position is more accurately (though somewhat grudgingly) set out in the 6th ed of Caney at pp 205-207 with reference to the judgements of the Supreme Court of Appeal discussed above. The legal position as set out in *Spur Steak Ranches* and *Di Giulio* has been significantly attenuated by the Supreme Court of Appeal's decisions. In particular, Harms JA in para 21 of *Bock* disapproved the statement in *Di Giulio* that there is a roving enquiry into 'justice, fairness, reasonableness, good faith and public policy'.

[43] At common law, and subject to the express terms of the suretyship, the surety may terminate an indefinite suretyship by giving a notice of withdrawal. However, a suretyship may contain a provision that the surety will not be released on notice without the consent of the creditor. It has been held that such a clause is valid (see *Botha (now Griessel) & another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 781H-784B).

Evaluation

The verbal extension of the overdraft facility

[44] As mentioned, the Dominick defendants contend that the verbal extensions of the facility contract of 29 January 2010 were ineffective in the light of the non-variation clause contained in the facility contract. They make this germane to their prejudice defence by contending that, at the time of the transfers out of the overdraft account on 17 March 2010 and 30 April 2010, there was no approved facility on the overdraft account or alternatively a facility of only R150 000. It is common cause that the transfers out of the account on 17 March 2010 and 30 April 2010 occurred at times when the overdrawn balance was substantially in excess of R150 000.

[45] On Nedbank's own case, by the time of the transfer on 17 March 2010 the approved facility was only R500 000. On that day the debit balance was already slightly in excess of R500 000, and the transfer out of the account caused the overdrawn balance to exceed R1,252 million. On 30 April 2010 the approved facility (if it still existed at all) was only R150 000. The overdrawn balance at that time exceeded R1 million. Accordingly, neither of those debits was in accordance with the verbally extended overdraft facility. However, and as I shall presently explain, I do not think it assists the Dominique defendants that the approved facilities did not cover the debits in question.

[46] However, and to the extent that it might matter, I do not think the verbal extensions were ineffective. There are two reasons for this conclusion:

[a] The first is that because the non-variation clause limits the parties' freedom of contract, it should be restrictively interpreted. On this basis, it was held in *BLP Investments (Pty) Ltd v Angel's Precision Works (Pty) Ltd & others* 1987 (4) SA 308 (C) that the renewal of a lease beyond its original period on the same terms as the original written lease was not hit by the non-variation clause. The non-variation clause precludes the informal variation of the rights and obligations of the parties during the period of their contract. It does not prevent them from concluding an informal contract for a period after the expiry of the written contract. In the present

case, therefore, it was open to Nedbank and Puricare, upon the expiry of the facility recorded in the contract of 29 January 2010, to reach verbal agreement on an extension of the overdraft on the same terms as in the facility contract.

[b] In any event, the non-variation clause exists for the benefit of the contracting parties, here Nedbank and Puricare. The persons now objecting to the verbal agreement are strangers to that contract. According to Schwartz, both Nedbank and Puricare agreed to the verbal extensions, and neither of those parties has taken the point that the verbal agreements are not enforceable.

[47] I return now to why it does not matter that no approved facilities were in place at the time of the transfers. A facility agreement simply means that the bank is bound to honour debits to the amount of the agreed facility until the agreement is validly terminated or lapses with the effluxion of time. The fact that a facility agreement is not in place does not mean that a bank is not entitled in its discretion to honour a customer's debit requests. The debits of which the Dominick defendants complain, namely those of 17 March 2010 and 30 April 2010, were made pursuant to the request of its customer, Puricare. Nedbank was not obliged to honour those requests; but if the requests were authorised by Puricare (and there is no suggestion that they were not, and all indications are that they were), Puricare could not complain if the bank chose to meet the requests. The position was stated thus by Zulman JA in *Absa Bank Ltd v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 675H-676D:

'The fact that the appellant [a bank] might have permitted the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondent in law from liability to make payment to the appellant. The appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in this regard by its agreement with the respondent. It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to then plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence this is precisely what the respondent is contending for. It hardly lies in the mouth of the respondent, who drew the two cheques in

question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This cannot be so… . As pointed out by Cozens-Hardy MR in *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226 at 233:

> "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."'

[48] I thus conclude that, insofar as the principal debt is concerned, Puricare was liable for the full amount owing on the overdraft account, including the indebtedness arising from the transfers of 17 March 2010 and 30 April 2010. Indeed, despite the emphasis which Mr Badenhorst in argument placed on the fact that the agreed facility did not cover the transfers of 17 March and 30 April 2010, he disavowed any suggestion that Puricare was not itself bound to pay the full debit balance in the overdraft account. This highlights, I think, the futility of the defendants' argument on this aspect. An argument by a surety which focuses on non-compliance by the creditor with the contract between itself and the principal debtor is really an argument that the surety is not liable because the principal debtor itself is not liable. Once it is accepted that the principal debtor is liable to the creditor for the amount claimed from the surety, the focus switches to the suretyship, ie to the question whether the suretyship itself covers that particular indebtedness or whether there was a violation of any other term of the suretyship.

Prejudicial conduct

[49] For obvious reasons the Dominick group wished, after 15 February 2010, to be released from their suretyships, and this desire was communicated to Nedbank. However, clause 17 of the suretyships provided that a release upon notice from the surety to Nedbank would only come into effect upon receipt by the surety of written notice from Nedbank acknowledging that the suretyship has been terminated. As noted earlier, such a clause is valid. Nedbank at no stage gave a written notice acknowledging that the Dominick group's suretyships had been terminated. Those suretyships have thus at all times remained of full force and effect.

[50] As to prejudicial conduct, they can be no doubt in a general sense that the Dominick defendants were financially prejudiced by Nedbank's conduct in transferring monies out of the overdraft account on 17 March and 30 April 2010 and by Nedbank's conduct in allowing Puricare to operate a separate account with a credit balance and in permitting a state of affairs in which Puricare was able to transfer money from the credit balance to another bank (as Puricare did on 23 March 2010 and on several occasions thereafter until the agri account was closed in October 2010). I can understand why the Dominick defendants feel aggrieved.

[51] However, and in accordance with *Davidson* and *Bock*, I have to determine whether the Dominick defendants have established that Nedbank's conduct was in breach of a legal duty or obligation. Those cases indicate that the sources, or at least the primary sources, for the duties and obligations in question are the principal agreement and the suretyship contract. If one or other of those contracts expressly authorises the conduct in question, *cadit quaestio*. If there is no express provision covering the matter, one would need to consider implied or tacit terms. An enquiry into implied terms might require a consideration of constitutional values. It is unnecessary, for purposes of this judgment, to go beyond the express terms of the relevant contracts or to consider what scope there might be for the prejudice principle if the surety cannot show that there is a term (express, implied or tacit) which is breached by the conduct in question.

[52] The prejudicial conduct of which Nedbank is accused is allowing debit transactions on the overdraft account on 17 March and 30 April 2010. Although the amended plea does not go beyond these matters, I am willing to assume in favour of the defendants that I should also consider Nedbank's failure, from time to time after 17 March 2010, to set off credit balances in the agri account against the debit balance in the overdraft account. Nedbank undoubtedly had a contractual right to apply such set-off. Clause 12.3.9 of the standard facility letter provided that, where an event of default occurred, Nedbank was entitled in its sole discretion to set off the indebtedness of Puricare to Nedbank against any amount standing to the credit of Puricare in Nedbank's books. Even having regard to the verbal extensions, an event of default had occurred by 8 March 2010, because the overdrawn balance on that date was more than R1,4 million whereas the approved facility had dropped from

R1,25 million to R500 000 (see clause 12.2.1). Nedbank was thus entitled on 9 March 2010 to transfer the amount of R913 155 from the agri account to the overdraft account in order to bring the latter account within the R500 000 limit. And it would have been entitled thereafter to appropriate further credit balances from the agri account from time to time.

[53] The question, however, is whether Nedbank's conduct in transferring amounts out of the overdraft account to the agri account (thus increasing the overdrawn balance to the prejudice of sureties) and in failing to appropriate credit balances in the agri account by way of set-off (a failure which was again to the prejudice of sureties) was in breach of the terms of the principal agreement or suretyships. In essence, what Nedbank did was [a] to honour debit requests made with due authority by Puricare, in circumstances where Nedbank was not obliged to honour those debit requests, given the absence of a facility agreement of sufficient magnitude; [b] to decline to exercise a discretionary right of set-off.

(i) The principal agreement

[54] Insofar as the principal agreement is concerned, I have already explained that in my view the absence of a facility agreement does not mean that a bank is not entitled to honour a duly authorised debit request from its customer. If the debit request is authorised and if the bank in its discretion meets the request, the customer is bound to repay the advanced sum. Nedbank's conduct in meeting the debit requests which gave rise to the transfers of 17 March and 30 April 2010 was thus in accordance with the contractual relationship between customer and bank, and Puricare was obliged to repay any resulting indebtedness. Mr Badenhorst in argument referred to this conduct by Nedbank as 'unilateral'. Mr Badenhorst may have meant that Nedbank's conduct was unilateral in relation to the Dominick defendants (ie without their consent). But Nedbank's making of the transfers was not unilateral insofar as Puricare was concerned; Nedbank was acting at Puricare's request.

[55] Similarly, and insofar as the principal agreement is concerned, Nedbank was entitled but not obliged to exercise the right of set-off. The introductory portion of

clause 12.3 expressly states that Nedbank 'may' exercise the rights listed therein 'in its sole discretion'.

(ii) The suretyship agreements

[56] The identical suretyship agreements signed by the Dominick defendants provided (subject to the limits respectively of R510 000 and R1,2 million) that the surety would be liable for all amounts which Puricare might then or in the future owe to Nedbank arising in any manner and from any cause whatsoever (clauses 1, 2 and 16).

[57] Clause 3 provided that it would always be in Nedbank's discretion 'to determine the extent, nature and duration of any banking facilities to be allowed to' Puricare. Clause 5 stated that Nedbank would be entitled, without prejudice to its rights under the suretyship, 'to give time to, compound with, release from liability or make any other arrangements' with Puricare; and that such action would not exonerate the surety from his or her obligation. There was a renunciation *inter alia* of the benefits of excussion.

[58] Clause 13 stipulated that the suretyship constituted the whole agreement between the surety and Nedbank relating to the subject matter thereof and that no amendment, alteration, addition, variation or consensual cancellation would be of any force or effect unless reduced to writing and signed by both parties. Clause 14 provided that no waiver of the terms and conditions of the suretyship would be binding unless expressed in writing and signed by both parties. In terms of clause 15 the surety acknowledged that neither Nedbank nor any other person had made or given any 'warranties, promises or representations whatsoever' to the surety to procure the undertaking of the suretyship.

[59] There was no attack on the validity of any of these clauses. They are very wide and permit the creditor to deal with the principal debtor in a manner which may very well prejudice the surety. (There are other provisions in the suretyship which permit similar conduct by Nedbank in relation to co-sureties but they are not germane, since the Dominick defendants do not complain of the way in which

Nedbank has dealt with the Harris defendants as sureties.) Nedbank's conduct in giving effect to the debit requests on 17 March and 30 April 2010 and its discretionary decision not to invoke set-off involved an *ad hoc* extension of banking facilities to Puricare. The Dominick defendants acknowledged in their suretyships that the determining of such facilities was always in Nedbank's discretion and also that Nedbank could give extensions of time to Puricare, settle with Puricare for less than its full liability and even release Puricare from liability completely. Furthermore, the Dominick defendants' liability was not confined to Puricare's indebtedness arising from the facility contract of 29 January 2010 or from similar written facility contracts; they were liable for any indebtedness of Puricare howsoever arising. Once one finds (as I do) that Puricare incurred an indebtedness for which it became liable to Nedbank, the Dominick defendants are liable as sureties, even though their liability may have been less if Nedbank had not honoured Puricare's *ad hoc* debit requests and had insisted on earlier repayment by appropriating credit balances in the agri account.

[60] Although the Dominick defendants did not plead the existence of any implied or tacit terms in the suretyship contracts, the wide powers which the suretyships confer on Nedbank may be subject to an implied term that those powers should not be exercised *mala fide* with a view to harming the sureties and improperly benefiting the principal debtor (cf *Nedcor Bank Ltd v SDR investment Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA) para 18). Since the content and limits of any such implied duty were not the subject of argument, I express no opinion on that question.

[61] I should say, though, that in my opinion Nedbank did not (in the respects complained of) act *mala fide*, in the sense of acting out of spite to the Dominick defendants and without a genuine business reason. The relationship between Uwe Dominick and Schwartz was cordial, and seems to have remained so despite the awkwardness brought about by developments within Puricare in and after February 2010. The root of the problem was a falling-out between two groups of shareholders. There were counter-accusations. The majority shareholders (the Harris group), who as from 15 February 2010 became the sole controllers of Puricare, disputed the additional facility of R750 000 which Uwe had organised on 29 January 2010. They accused the Dominick faction of fraud and forgery. By way of their attorneys' letter of

12 March 2010, Puricare, under the control of the Harris group, was threatening Nedbank with interdicts and a claim for damages if Nedbank treated the full overdrawn balance (exceeding R1,25 million) as owing by Puricare and if on that basis Nedbank appropriated monies standing to the credit of the agri account or insisted that payments made by Puricare's debtors remain in the overdraft account.

[62] The dilemma which Nedbank faced was not of its own making. It became embroiled in a fight between warring partners within Puricare. Although Nedbank at no stage conceded the invalidity of the facility contract of 29 January 2010, and although Nedbank, when demanding payment on 12 April 2010 and issuing summons on 2 August 2010, insisted that the facility contract was duly authorised and binding, Nedbank could not be certain, over the period March-April 2010, how the competing allegations by the Harris group and Dominick group would ultimately pan out. Nedbank thus chose the path of caution, allowing Puricare (now controlled by the Harris group) to use cash inflows for the ongoing operations of the company, rather than appropriating them to the disputed overdraft. Although Schwartz did not say so, I have little doubt that in following this course Nedbank drew comfort from the suretyships it held both from the Harris group and the Dominick group, and that but for the suretyships it would not have shown Puricare the indulgence it did. In the case of Harris, his unlimited suretyship was supported by limited real security in the form of a mortgage bond over a property in George; and in the case of Charmaine Dominick, her suretyship for R1,2 million was supported by real security over a property worth substantially more than R1,2 million. However, none of this shows that Nedbank was acting out of spite or malice or that it was motivated by anything other than its own genuine business interests.

[63] Mr Badenhorst submitted that Nedbank allowed the transfers to be made out of the overdraft account at a time when it knew that Puricare had no intention of repaying the overdraft. To the extent that it matters, I do not think the evidence goes this far. Puricare and the Harris group do not appear to have disputed Puricare's liability to the extent of R500 000; they were disputing the additional facility of R750 000. Even Puricare's conduct in transferring the credit balance in the agri account to the new Absa account (which according to Schwartz took Nedbank by surprise) does not show that Puricare had no intention of repaying any part of the

overdraft indebtedness. Puricare may well have effected the transfer to Absa out of fear that if Nedbank appropriated the credit balance Puricare would be unable to continue trading.

[64] Mr Badenhorst contended in argument that the transfers which Nedbank made or allowed to be made from the overdraft account to the agri account on 17 March and 30 April 2010 were not made 'in the ordinary course of business'. However, the defendants did not plead that it was a term of the suretyships that the powers conferred therein on Nedbank could be exercised only 'in the ordinary course of business' (whatever that may mean). Such a qualification would be a material one, going beyond the more limited implied restriction that the powers in question should not be exercised *mala fide*. Apart from the absence of pleading, the notion of 'ordinary course of business' in this context lacks clear content. Nedbank might say that it acted in the ordinary course (ie as a prudent and cautious banker would ordinarily act), given the unusual circumstances which it faced.

Quantification

[65] For the reasons I have set out above, I do not think that the Dominick defendants established prejudicial conduct by Nedbank which was in violation of duty or obligation owed by Nedbank either under the principal contract or under the suretyships.

[66] If this conclusion were wrong, it would be necessary to determine the extent, if any, to which the Dominick defendants were prejudiced and thus the extent of their release. Because of my conclusion on the main issue, it is not necessary to determine that question. I observe, though, that it is by no means apparent that the Dominick defendants would be released in full. Even if Nedbank had declined to make the transfers out of the overdraft account on 17 March and 30 April 2010, Puricare's overdraft liability would not have been extinguished. After the transfer out of the overdraft account on 30 April 2010, the overdrawn balance was R1 302 578. If the transfers out of the overdraft account of R749 155 and R280 269 on 17 March and 30 April 2010 respectively had not been made, the overdraft balance on 30 April 2010 would have been R273 154 (assuming all other entries remained the same).

The Dominick defendants would, I think, be liable at least for said amount of R273 154, together with interest as from 30 April 2010.

Conclusion

[67] It follows from what I have said above that the prejudice defence fails and that the Dominick defendants are, subject to the limits of their respective suretyships, liable for the residual indebtedness to Nedbank after deducting the amount paid by the Harris group in terms of their settlement.

[68] Nedbank is entitled to its costs, save for those costs attributable to the *lis* between Nedbank and the 1st to 6th defendants. Clause 1 of the deeds of suretyship entitles Nedbank to costs on the scale between attorney and client. There was a summary judgment application which, after the filing of affidavits by the Dominick defendants, was refused by agreement with costs to stand over for later determination. Counsel were agreed that these should be costs in the cause.

[69] I make the following order:

[a] Each of the 7th and 8th defendants is ordered to pay the plaintiff the sum of R510 000 together with interest at 11,5 % per annum, calculated daily and capitalised monthly, from 27 July 2010 to date of payment.

[b] The 9th defendant is ordered to pay the plaintiff the sum of R1,2 million, together with interest at 11,5% per annum, calculated daily and capitalised monthly, from 27 July 2010 to date of payment.

[c] The total amount recoverable from the said defendants in terms of the aforesaid orders shall not, either individually or cumulatively, exceed the total of the principal debt, calculated as follows: R2 795 313,11 plus interest thereon at the rate of 21% per annum as from 25 January 2014 to date of payment and allowing a credit of R1 million against the said total on 4 February 2014.

[e] The 9th defendant's immovable property, mortgaged by way of mortgage bond B6072/2010, is declared specially executable.

[f] The 7th to 9th defendants are directed, jointly and severally, to pay the plaintiff's costs of suit on the scale between attorney and client, including those in the summary judgment proceedings against them reserved by this court's order of 11 October 2010 but excluding all costs relating to the proceedings between the plaintiff and the 1st to 6th defendants.

ROGERS J

APPEARANCES

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