

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CIV-ACT-CON-2017/01241

In the matter between:

**FIRST NATIONAL BANK LIMITED**

**PLAINTIFF**

and

**GESIE CHRISTINA OBERHOLSTER**

**FIRST DEFENDANT**

**ALWIE OBERHOLSTER**

**SECOND DEFENDANT**

**Neutral citation:** *First National Bank Limited v Oberholster* HC-MD-CIV-ACT-CON-2017/01241 [2019] NAHCMD 183 (31 May 2019)

**Coram:** PRINSLOO J

**Heard:** 28 - 30 January 2019 and 5 March 2019

**Delivered:** 31 May 2019

**Reasons:** 12 June 2019

**Flynote:** Rectification – Principles to be considered – Defendant bears the onus of establishing the said principles – Important to note that the only common error which

can be rectified is when the agreement does not reflect the common intention of the parties.

**Summary:** The plaintiff, First National Bank Limited, instituted a claim against the first defendant for payment in the amount of N\$ 697 000.00; interest on the aforesaid amount at the rate of 20 % per annum as from 29 July 2016 to date of final payment, cost on a scale as between attorney and client; and further and/or alternative relief. The defendants are Gesie Christina Oberholster and her husband Awie Oberholster. The second defendant is cited as an interested party and no relief is sought against him. The plaintiff's claim is based on a surety agreement wherein the first defendant bound herself jointly and severally as surety and co-principal debtor *in solidum* with the second defendant, ostensibly binding herself to the plaintiff as surety for the debts owing by the second defendant to the plaintiff for an unlimited amount and from whatsoever cause and however arising.

The first defendant pleaded that the common continuing intention between the plaintiff and the first defendant was that her liability under the suretyship would be limited to the second defendant's liability to the plaintiff in terms of the defendant's home loan with the plaintiff and to reduce that to writing in the suretyship. The first defendant further pleaded that due to *bona fide* mistake common to the parties to the suretyship, it does not conform to the aforementioned continuing intention and accordingly the first defendant claims the rectification of the suretyship.

*Held that* the suretyship as it currently stands does not reflect the common continuing intention of the parties to the grant of loan letter/agreement because it is not limited to the second defendant's indebtedness to the plaintiff in terms of the home loan but extended it to all the second defendant's debts.

*Held further that* the only common error which can be rectified is when the agreement as recorded does not reflect the common intention of the parties.

*Held further that* the contract of suretyship as it currently stands is not a true reflection of the terms agreed upon prior to the execution of the written instruments and that by *bona fide* mutual error the terms were in correctly recorded. The defence of rectification of the suretyship raised by the first defendant must therefore succeed

---

## ORDER

---

Judgment is hereby granted as follows:

1. The Plaintiff's claim is dismissed with costs.
2. Such costs to include one instructed and one instructing Counsel.

---

## JUDGMENT

---

PRINSLOO J

### Introduction

[1] The parties before me are First National Bank Limited, a public company registered and incorporated as such in terms of the Company Laws of the Republic of Namibia and a duly registered Banking Institution. The defendants are Gesie Christina Oberholster and her husband Awie Oberholster. The second defendant is cited as an interested party and no relief is sought against him.

[2] In the present action the plaintiff prays for judgment against the first defendant in the following terms:

1. Payment in the amount of N\$ 697 000.00;

2. Interest on the aforesaid amount at the rate of 20 % per annum as from 29 July 2016 to date of final payment;
3. Cost on a scale as between attorney and client;
4. Further and/or alternative relief.

[3] The plaintiff's claim is based on a surety agreement wherein the first defendant bound herself jointly and severally as surety and co-principal debtor *in solidum* with the second defendant.

#### Background and common cause facts

[4] The first and second defendant are married out of community of property. The first defendant is employed by First National Bank (the plaintiff) and is stationed at the plaintiff's Kuisebmond, Walvis Bay Branch.

[5] The second defendant was the member of a close corporation which trade under the name and style of Fiscon Investments Two Hundred and Ninety Three CC (herein after referred to as 'Fiscon')

[6] The plaintiff claims in the current action that the first defendant is jointly and severally liable with the second defendant for the Fiscon judgment debt by virtue of a suretyship which she signed on 22 July 2014, ostensibly binding herself to the plaintiff as surety for the debts owing by the second defendant to the plaintiff for:

- (a) An unlimited amount; and
- (b) From whatsoever cause and however arising; including Fiscon judgment debt.

[7] Subsequent to the aforementioned agreement, on 22 July 2016 the plaintiff, in case number A 189/2016 obtained default judgment in terms of a loan agreement dated 9 September 2014 against Fiscon as principle debtor and the second defendant as surety, under suretyship dated 9 September 2014 for payment of:

- (a) N\$ 481 058.03 plus interest thereon at the rate of 13.75% per annum, and
- (b) N\$ 3 198 656.30 plus interest thereon at the rate of 12.75% per annum
- (c) Plus cost.

[8] Following thereafter this Court issued a writ of execution on 17 August 2016 against the second defendant and Fiscon. The Acting Deputy Sherriff, Walvis Bay, executed the aforementioned writ and provided a *nulla bona*.

[9] On 24 January 2017 the plaintiff resolved to reduce the amount claimed against the first defendant to N\$ 687 500, which is 50% of the market value of Erf 1950, Walvis Bay, which is the defendants' family home, which the couple owns in equal undivided shares.

### The pleadings

#### *Particulars of claim*

[10] It is the case of the plaintiff that the first defendant bound herself jointly and severally as surety and co-principal debtor, *in solidum*, with the second defendant for the due and punctual performance by the second defendant of his obligations and his indebtedness to the plaintiff, which he may from time to time owe to the plaintiff from whatsoever cause and howsoever arising, and whether as a principal debtor, guarantor or otherwise and whether trading alone or in partnership or under any other name, as well as for the due and punctual performance and discharge of any contract or agreement entered into by the second defendant with the plaintiff.

[11] The second defendant has thereby renounced the benefits arising from the legal exceptions *non numerate pecunia*, *non causa debiti*, *errore calculi*, revision of the accounts, and no value received and also the benefit *non numeratae pecuniae*, the

meaning of which the first defendant admitted to be acquainted with with reference to the contract of suretyship.

[12] The material terms of the contract of suretyship is that the amount recoverable from the first defendant shall be unlimited plus such further sums for interest of finance charges on the amount, charges and costs as may from time to time and howsoever arising, become due and payable by the second defendant, including interest, finance charges, discounts, commissions, stamps and all attorney and own client cost including value added tax incurred in the institution of legal action against either the first or the second defendant.

[13] As a result the plaintiff therefor proceeded to claim against the first defendant payment in the amount of N\$ 697, 500, interest and costs.

*First defendant's plea*

[14] The first defendant pleaded that the common continuing intention between the plaintiff and the first defendant was that her liability under the suretyship would be limited to the second defendant's liability to the plaintiff in terms of the defendant's home loan with the plaintiff and to reduce that to writing in the suretyship.

[15] The first defendant further pleaded that due to *bona fide* mistake common to the parties to the suretyship, it does not conform to the aforementioned continuing intention and accordingly the first defendant claims the rectification of the suretyship by substituting clause 2<sup>1</sup> with 'the amount of the Debtor's liability in terms of his home loan with you' for '~~limited to~~ UNLIMITED'. Subject to the rectification claimed, the first defendant admits the allegations in the said paragraph to the extent that it accords with the express provisions of the suretyship, but she denies them to the extent that it does not so accord.

---

<sup>1</sup> 2. Notwithstanding anything to the contrary therein contained, the amount recoverable from me/us shall be ~~limited to~~ UNLIMITED'.

[16] The first defendant denied that the judgment debt of Fiscon and the second defendant is covered by the suretyship rectified and as a result denies liability in respect of the claim *in casu*.

#### Issues to be determined by this court

[17] In the joint pre-trial order the issues of fact to be resolved is whether it was agreed between the plaintiff and the defendants that their liabilities as sureties would be limited to their home loan with the plaintiff.

[18] On the issues of law to be resolved is whether the suretyship signed by the first defendant should be rectified to limit her liability to the home loan referred to above.

#### The evidence

##### *Plaintiff's case*

[19] On behalf of the plaintiff two witnesses testified, namely Charlotte Morland and Azelle Mouton.

##### *Charlotte Morland*

[20] Mrs Morland is employed with the plaintiff as the Head of One Legal Department, a department within the plaintiff where centralized pre-legal and collection services are rendered, for and on behalf of the plaintiff.

[21] The witness confirmed the common cause facts and stated that on 24 January 2017 the plaintiff demanded from the first defendant the amount of N\$ 697, 500 in terms of the suretyship.

[22] Ms Morland denied that the suretyship concluded between the plaintiff and the first and second defendants is liable for rectification on any basis. She maintained that the suretyship contains no mistake and or error common to the parties thereof. The witness stated that at no time has the suretyship been varied and/or amended, in terms of the agreement, to limit the extent of the first defendant's surety with regards to the second defendant's indebtedness to the plaintiff.

*Azelle Mouton*

[23] Ms Mouton is currently employed at ENSAfrica|Namibia<sup>2</sup> as a candidate attorney but was during 2014 employed as a conveyancing clerk at the same law firm.

[24] Ms Mouton does not have independent recollection of the specific matter relating to the defendants but stated that she assumes that she worked on the file pertaining to the defendants as her signature appears on the said file.

[25] The witness stated that the practice is that an instruction is received from the bank via a gateway that she referred to as GhostInstruct. This is apparently a gateway via which FNB panel attorneys will use to receive bond instructions. Together with the instruction the legal firm would also receive a transmission sheet containing the details of the parties to the agreement. The particulars and conditions of loan would be uploaded by the home loan consultant and the documents are then generated at the offices of the legal practitioner by making use of the Legal Perfect System. It is in template format that the documents are generated, printed and presented for signature.

[26] According to Ms Mouton documents generated in this manner would be for example the grant of loan, mortgage bond and suretyship documents and these documents are amongst those that are pre-populated. Certain of these documents can be edited to a limited extent and other documents cannot be edited at all, for example the grant of loan letter. As for suretyship documents it is pre-populated with surety's

---

<sup>2</sup> Now trading under the name and style of ENSAfrica|Namibia.



details at the bank already by the relevant consultant and this detail cannot be edited. However, the address of the surety is often left blank and the clerk at the legal practitioner's office tasked to generate the document must enter the required detail. In addition thereto the said clerk must enter the type of surety, in the instance where the plaintiff requires a contract of security.

[27] The witness further stated that once an application is approved by the credit manager on behalf of the plaintiff the said credit manager will set the terms and conditions applicable to the granting of the loan. These terms and conditions will be forwarded to the legal practitioner's officer via either the credit manager or via the clerk or home loan consultant.

[28] Ms Mouton stated on a question put to her as to how she would know what type of suretyship was required, that she could determine same from the conditions of the grant of loan letter and in the matter *in casu* the condition was that linking sureties would be required. Ms Mouton stated that this instruction is normally repeated in the transmission report and if she was unsure about the nature of the suretyship then in practice she would contact the home loan consultant to determine the terms of the suretyship where after she would then proceed to draw the suretyship agreement according to the instructions. The witness conceded that the reference to linking sureties does not specify either limited or unlimited surety,

[29] Mrs Mouton indicated that she made certain enquiries from the home loan consultant but the enquiry related to the amount that the home was ensured for as it was not contained in the papers that she generated. The witness could however not confirm whether she made enquiries regarding the terms of the suretyship as her office file does not contain any notes in that regard. She stated that the standard practice is that if the instructions do not specify whether the surety should be limited or unlimited, she would call and confirm the true position with the home loan consultant. Mrs Mouton could not explain why her file did not contain this information. When asked during cross-examination where she then got the instruction from that the suretyship is unlimited the

witness indicated that it must have been from whoever the consultant was who worked at the bank. However, the witness had not independent recollection thereof and based her evidence in this regard on what would happen in practice.

[30] Further, during cross-examination on the issue of the contract of suretyship it was determined from the witness that the contract of suretyship is a standard agreement with standard terms which is pre-populated into the document already when it is generated in the offices of the legal practitioner. The clerk at the witness' office would then delete the relevant term not applicable to surety, namely limited or unlimited and if limited then enter the amount the surety is limited to.

[31] It was further determined that apart from generating the documents and presenting it for signature the legal practitioners are not involved with the concluding of the agreement and she would therefore have no knowledge of the agreement.

[32] After preparing the documents Ms Mouton indicated that she travelled to Walvis Bay together with her colleague Ms Leanna Isaaks on 22 July 2014 to present the contract of suretyship to the defendants for signature. The witness apparently confirmed this fact with Ms Isaacks and also stated that that must have been the case as she signed as a witness on the relevant documentation.

[33] Ms Mouton stated that she would have expressly and exhaustively explained the grant of loan to the defendants and also take them through the terms of the agreement, as is practice. Similarly she explained the terms of the suretyship but seemingly not in as much details as the grant of loan agreement and predominantly concentrated on the first page of the agreement. Ms Mouton stated that together with the aforementioned documents she would have also explained the contract of suretyship in respect of the second defendant and the Power of Attorney to pass the bond.

[34] The witness stated that she is unable to recall the exact conversation between her and the defendants but stated that it is unlikely that she would have told the defendants that the suretyship is merely limited to the bond amount.

*First Defendant's case*

[35] On behalf of the defendants only one witness testified, namely Gesie Oberholster, the first defendant.

[36] The witness stated that prior to July 2014 her husband, the second defendant, applied for an increase in their existing home loan with the plaintiff. When they applied for the increase the plaintiff was represented by Anzelle Beukes, who made no mention of suretyships on the said occasion. She stated that although her husband went to the bank to sign off on the application she had a telephonic conversation with Ms Beukes and at no stage was any mention made regarding suretyship.

[37] In terms of a grant of loan letter received from the plaintiff the following was set out:

- (a) The plaintiff agreed to lend and advance a further N\$ 300 000 to the witness and her husband against security of a fourth mortgage bond over their family home, Erf 1950, Walvis Bay;
- (b) The plaintiff, in addition, required '*linking sureties to be obtained by both*' the witness and her husband.
- (c) The loan would be subject to the terms of the plaintiff's standard house loan mortgage bond;
- (d) The terms of the bond would prevail in the event of there being any inconsistency between those terms and the terms set out in the letter.

[38] As a further mortgage bond over their family home was required ENSAfrica| Namibia prepared all the legal documentation, including suretyships. The prepared

documentation were brought to the witness and her husband by Mses Leanne Izaaks and Azelle Mouton at her place of employment to sign on 22 July 2014.

[39] When the issue of suretyship was addressed with the defendants they both indicated to Ms Mouton that they were not aware of the suretyship to be signed as it was not a term agreed to during the application for the loan. Mrs Oberholster stated that the reason why she specifically addressed this issue is because at the time her husband, the second defendant, was about to start a new business and she was not prepared to jeopardize the security of their family home in the event that something goes wrong with her husband's business.

[40] Mrs Oberholster stated that when she and her husband enquired from Mses Isaaks and Mouton why they had to sign suretyships because there was no mention of suretyships when the loan was applied for, they were informed that it was a condition of the letter of grant of loan and the couple was referred to Schedule B paragraph 4 which stated as follows: 'LINKING SURETIES TO BE OBTAINED BY BOTH ½ SHARE APPLICANTS'.

[41] Mrs Oberholster stated that when she enquired as to why the surety was for an unlimited amount they replied that should the couple apply for a further increase in the home loan, the suretyships of the witness and her husband will cover all future home loan applications as it is unlimited and there would be no need to complete and sign further suretyships covering further home loans.

[42] The witness stated that she further went through the power of attorney attached to the draft mortgage bond and she noted that the security provided in terms of the proposed mortgage bond was limited to the letter granting the loan and this persuaded the first defendant and her husband that the suretyships were limited to the home loan. This set her mind at ease and she signed the contract of suretyship.

[43] On the said date the witness and her husband then signed (a) the letter granting them the loan (b) the suretyship by the witness in favor of the plaintiff for the debts of her husband owing to the plaintiff; (c) the suretyship by Mr Oberholster in favor of the plaintiff for debts owing by the witness, Mrs Oberholster, to the plaintiff, and (d) the power of attorney by the couple in favor of the plaintiff over their family home at Erf 1950, Walvis Bay, as security for the loan.

[44] Mrs Oberholster was adamant that they signed the suretyship without realizing that they covered, in addition to the home loan, any debt which her husband might then or from time to time thereafter owe to the plaintiff, from whatsoever cause and whatsoever arising, whether as principal debtor, guarantor or otherwise. At the time the letter granting the loan was unsigned by the plaintiff and was apparently signed only some three months later.

[45] The witness stated that the effect of this agreement was that she bound herself to the plaintiff as surety for the debts which her husband would owe as surety for the debts owing by Fiscon to the plaintiff, in addition to the home loan. She stated that she personally spoke to the home loan consultant, Ms Beukes and at no stage was this the agreement between them.

[46] Mrs Oberholster stated that the suretyship does not correctly record the agreement between the plaintiff and the defendants. She states that accordingly the suretyship has to be rectified by substituting clause 2 with the wording: 'limited to the debtor's home loan with you' for, '~~limited to~~ UNLIMITED'.

[47] The witness stated that the common continuing intention of the parties was that the suretyships be limited to the home loan. She further stated that a *bona fide* mistake common to the parties caused the suretyship, which the plaintiff relies on in proving its claim, not to be in accordance with the prior agreement between the parties.

[48] The witness also referred to an e-mail correspondence exchanged between Messrs Martin Roos and Tienie Brits, in their capacities as senior credit manager Windhoek and credit manager Swakopmund respectively, apparently admitting the first defendant's liability as surety to the plaintiff limited to her husband's liability to the plaintiff in respect of their home loan with the plaintiff.

#### Evaluation of the evidence

##### *Charlotte Morland*

[49] The evidence of Mrs Moreland relates specifically to the recovery of the debt from the first defendant on the strength of the contract of suretyship. She has no knowledge of the discussions and the agreement reached between the parties.

##### *Azelle Mouton*

[50] Ms Mouton has no independent recollection of the matter before court. Throughout her evidence she referred to what her practice or protocol would be under the circumstances.

[51] She cannot recall if she communicated with the home loans consultant to get further direction regarding the terms of the suretyship. The witness indicated that in the event of having a conversation with the said consultant she would have made a note thereof on her file, yet there was no such notes in the file. When the suretyship document is generated it would indicate 'limited to' and 'unlimited' and she had to obtain direction from the home loan consultant whether it will be limited or unlimited surety. But again has no recollection of same.

[52] The witness conceded that the special condition of 'linking sureties' does not constitute unlimited suretyship.

[53] Mrs Mouton bases her evidence on what normal procedure and protocol would be. She cannot recollect the questions or the discussion with the defendants and is therefore unable to gainsay the version as presented by the first defendant.

[54] Although the honesty of the witness is commendable, her evidence is unfortunately not great assistance to this court in adjudicating the matter *in casu*. It is understandable that Mrs Mouton does not have any independent recollection of signing the documents, nor of the underlying transaction as she has attended to hundreds of matters of a similar nature and it would appear that nothing in the transaction with the defendants stood out for her that would jog her memory. This court cannot place sole reliance on normal procedure or protocol as each matter must be treated on its merits. There is nothing before this court to show what the instructions was that Mrs Mouton received. There is no notes in her file as to a conversation confirming instructions from the plaintiff's home loan consultant.

[55] Mrs Mouton can neither confirm nor deny what issues were raised by the defendants at the time of the signing of the contract of suretyship

[56] Having considered the evidence of Mrs Moreland's and Mrs Mouton, which with all due respect did not take the matter any further, the court will proceed to consider the evidence of the first defendant.

*Gesie Oberholster*

[57] It is important to note that the evidence of the first defendant in essence stands unchallenged. Although subjected to thorough cross-examination the witness stuck to her point as to what happened at the time of signing the contract of suretyship.

[58] The witness was able to give a clear and concise version of what happened in respect of the transaction and nothing in the evidence of the witness stood out as being inherently improbable. The witness was not present at the time when the second

defendant went to see Ms Beukes, the home loan consultant, but it is undisputed that she had contact with Ms Beukes telephonically regarding the application. The first defendant was the one who set up the appointment and one must again not lose sight of the fact that the first defendant and Ms Beukes were colleagues and had free access to one another to discuss any issues arising.

[59] In considering the probabilities and the improbabilities of the first defendant's version, the fact that she is employed with the plaintiff is an important factor in my opinion. By virtue of her being in the banking industry she must have been alive to the dangers of an unlimited suretyship and the possible risk that it can expose her to.

[60] The first defendant was adamant that the purpose of the suretyship was for the home loan and that although this was not initially agreed upon and after having studied the documents and having received a satisfactory explanation for the existence of the contract of suretyship, she signed it.

[61] The first defendant was taken to task during cross-examination in respect of a myriad of issues but ultimately her evidence stands. There is no evidence before me to show the contrary to the evidence of the first defendant wherein she stated that she had the mistaken belief that the suretyship was limited to the home loan.

### Onus

[62] In respect of the defence based on rectification, it is trite that the onus is on the defendant to prove her entitlement to rectification of the suretyship agreement. Within the ambit of the defendant's plea she will discharge the onus if she shows on a balance of probabilities that, due to a mutual mistake, the agreements do not reflect the common intention of the parties in view of the fact that the terms already referred to have been excluded therefrom<sup>3</sup>.

---

<sup>3</sup> See *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253, 258; *Lazarus v Gorfinkel* 1988 (4) SA 123 (C) at 131A-H.



[63] In *Bardopoulos and Macrides v Miltiadous*<sup>4</sup> Clayden J explained the principle to be applied as follows:

'A party seeking to obtain rectification must show the facts entitling him to obtain that relief 'in the clearest and most satisfactory manner' - see *Bushby v Guardian Assurance Co.* (1915, W.L.D. 65 at p. 71), and as is pointed out in *Taylor v Cape Importers* (1938 CPD 362 at p. 368), where the common intention is to be shown not by any writing but by verbal evidence, the Courts may have great difficulty in determining whether there was a mistake in the written contract. These cases do not, I consider, require more than a balance of probability in favour of the party seeking rectification but indicate that such a claim is in fact difficult to prove.'

#### The relevant legal principles

[64] Rectification may be relied upon as a defence without having to claim rectification. The facts necessary to establish rectification must be alleged in the plea and the court is then asked to adjudicate the matter on the contract as rectified<sup>5</sup>.

[65] An action to be taken by a party to a contract affected by a common mistake will depend on the circumstances. If a party attempts to enforce the contract against another he/she can rely on the mistake as a defence without counterclaiming for rescission and if the mistake consist in the failure of the written contract to record the true terms between the parties he/she need not counterclaim for rectification, it being sufficient for him/her to proof such facts as would entitle him/her to rectification<sup>6</sup>.

[66] In *Shikale v Universal Distributor of Nevada South Africa (Pty) Ltd*<sup>7</sup> the Supreme Court enumerated the requisites applicable to rectification as follows:

'[27] The court a quo referred to the principles applicable to rectification; so did counsel on both sides, including the principle requiring what a litigant seeking a rectification of a written

<sup>4</sup> 1947 (4) SA 860 (W) at 863-864.

<sup>5</sup> *T Scheffler t/a Night Watch Services v Institute for Managed Leadership Training* 1997 NR 50 HC 511-52C; *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* [1980] 1 All SA 423 (A).

<sup>6</sup> Christie *The Law of Contract in South Africa* 5 Edition at 329.

<sup>7</sup> (SA 10/2013) NASC (17 April 2015).

document must allege and prove as set out in *Denker v Cosack and Others* 2006 (1) NR 370 (HC) at 374E and as approved by this court in *Namibian Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) at 224F, namely —

- '(a) an agreement between the parties which had been reduced to writing;
- (b) that the written document does not reflect the common intention of the parties correctly. In *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 425H Van Blerk JA says that in reforming an agreement all the Court does is to allow to be put in writing what both parties upon proper proof intended to be put in writing and erroneously thought they had (cf *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253);
- (c) an intention by both parties to reduce the agreement to writing;
- (d) that there was a mistake in the drafting of the document. See *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 411F – H. Rectification and unilateral mistake are mutually exclusive concepts. See *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A);
- (e) the actual wording of the agreement as rectified. See *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H – 1148A.'

[See also Amler's Precedents of Pleading 6 ed at 298 – 299.]

[67] The principles applicable to a claim for rectification are not in dispute. Accordingly the defendant bears the onus of establishing that the suretyship agreement does not express the terms which she and the plaintiff agreed upon when the document was generated by the conveyancing clerk of ENSAfrica|Namibia, with the wording UNLIMITED inserted. Accordingly, the first defendant must show the facts which entitle her to such relief pleaded “in the clearest and most satisfactory manner”.

#### Brief discussion of the applicable principles and the application thereof on the facts

##### *Written contract*

[68] From my understanding of the facts in this matter the instructions came from the credit manager alternatively home loan consultant and this instruction was incorporated as a condition in the letter of grant.

[69] Notwithstanding its unilateral nature, the plaintiff intended to embody in the contract of suretyship the common intention of both surety and creditor. The unilateral nature of the suretyship does not bar its rectification. This much is clear from the *locus classicus* on the law of rectification, *Meyer v Merchants' Trust Ltd* 1942 AD 244<sup>8</sup>.

[70] The contract of suretyship was reduced to writing on the aforementioned instructions and subsequently signed by the first defendant thereby cementing the intention of the parties to reduce the agreement to writing.

#### *Common continuing intention*

[71] Proof of an antecedent agreement may be the best proof of the common continuing intention which the parties to the written contract intended to express therein. However, such common continuing intention may be proven in any other manner. The decision in the case of *Meyer v Merchant's Trust Ltd*<sup>9</sup> made it clear that, in order to obtain a rectification, it was not necessary to show that an antecedent agreement between the parties had, by mistake, not been embodied in the writing of the document sought to be rectified; it is sufficient if it is proved that the parties did have a common intention in some respect which they intended to express in the written contract but which through a mistake they failed to express. The mistake or error sought to be relied on to obtain a rectification must be an error in *corpore aut substantia* and not merely an error in the motive or reason which actuated the agreement<sup>10</sup>.

[72] From the letter granting the loan it is evident that the terms of the loan are subject to the plaintiff's standard home loan mortgage bond. The requirement of linking

---

<sup>8</sup> *Steelmets Ltd v Truck And Farm Equipment (Pty) Ltd And Another* 1961 (2) SA 372 (T).

<sup>9</sup> The fact that a cheque or promissory note is a unilateral document signed initially only by the drawer or maker and not the payee does not preclude the parties from having a common intention such as to justify rectification if the other elements are present. (cf. *Netherlands Bank of South Africa v Stern, N.O., and Another*, 1955 (1) SA 667 (W) at 672B – H).

<sup>9</sup> 1942 AD 244; cf. *Shikale v Universal Distributor of Nevada South Africa (Pty) Ltd supra* at 1075 H-1076 B.

<sup>10</sup> *Netherlands Bank of South Africa v Stern, N.O., and Another*, 1955 (1) SA 667 (W) at 672 D-E.

sureties does not specify that the linking sureties must be unlimited. The implication of unlimited contract of suretyship for the first defendant is that she is liable to, in addition to the home loan, any debt which her husband might then or from time to time thereafter owe to the plaintiff, from whatsoever cause and whatsoever arising, whether as principal debtor, guarantor or otherwise.

[73] The first defendant stated in no uncertain terms that she had no intention of accepting liability for future debt of her husband arising from his business. One should not lose sight of the fact that being a client of the plaintiff, she was first and foremost an employee of the plaintiff for many years and from that the court can accept that she knew the consequences of a suretyship.

[74] From reading the letter granting the loan it is clear that other than requiring linking sureties the plaintiff did not give specific instructions as to the form of suretyship. If the court accept that Mrs Mouton had no authority to extend a meaning to the 'linking sureties' to the defendants then one must expect that the interpretation is limited to the document that gave rise to the condition of 'linking sureties', ie the letter granting the loan, and if proper consideration is given to the said document it would appear that the suretyship is limited to home loan contrary to a suretyship covering all of the second defendant's debts owing to the plaintiff from whatever cause and howsoever arising.

[75] If one considers the meaning of linking sureties it must be done in its context. The purpose of the suretyship in the context of the grant of loan letter was to serve as security for the home loan and not for the debts of the second defendant. I say this for the following reasons: The evidence of the first defendant is that her husband was at that stage only in the process of starting a new business and in reality it would not make sense to include an unlimited surety in respect of the second defendant's debt and by implication that of his new business venture, if the second defendant signed his unlimited suretyship in respect of Fiscon only in September 2014.

[76] There is nothing in the wording of 'linking sureties' that would cause this court to interpret it as being unlimited suretyship in respect of all the second defendant's debt, over and above his debt to the plaintiff in respect of the home loan.

[77] I must agree therefore with counsel for the first defendant's argument that the suretyship as it currently stands does not reflect the common continuing intention of the parties to the grant of loan letter/agreement because it is not limited to the second defendant's indebtedness to the plaintiff in terms of the home loan but extended it to all the second defendant's debts, including the Fiscon debt.

*Mistake in the drafting of the document*

[78] The plaintiff's counsel maintained that the first defendant has failed (apart from the terms of an antecedent agreement [oral or written] giving rise to the agreement) to allege and prove a (*bona fide* mutual error) mistake (or the common intention) on the part of plaintiff in the drafting of the agreement.

[79] The first defendant has pleaded that there was *bona fide* mistake common to the parties and counsel for the defendant argued that that mistake was sufficiently pleaded by the first defendant.

[80] The one person who would have been able to set the record straight as to what happened during the course of the transaction and as to the conditions set by the bank would be Ms Beukes. She would have been the person to call, as a crucial witness, to show that there was no mistake common to the parties. She was the one who prepared the application for the loan and was apparently the one who ultimately sent the instructions through to ENSAfrica|Namibia. She had the telephonic conversation with the first defendant, wherein according to the first defendant, no mention was made of limited or unlimited suretyship.

[81] In *Offit Enterprizes*<sup>11</sup> and *Others v Knysna Development Co and Others*<sup>12</sup> Burger J referred as follows to the concept of common error:

‘The error is fully described by saying what is recorded and what is alleged should have been recorded and that it was a result of common error. It is to be noted, however, that the requirement of ‘common error’ can be misleading - this aspect is fully discussed by Professor De Vos in the book *Essays in Honour of Ben Beinart* in the article ‘Mistake in Contract’. At 187 he correctly points out that one of the parties may never have been under a misapprehension; when one speaks of a common error one really, assumes that both parties genuinely failed to realise at the time that the document is incorrect.’

[82] He continues to say the following:

‘The conclusion that the plaintiff need allege no more than that the document to be rectified is incorrect because of an error, is also arrived at along a different route. Take for example the case where a defendant, when signing the agreement that is sought to be rectified, is not interested in the part to be rectified and in fact does not even read that part. Or on reading it prior to signing he may have a doubt whether this reflects the actual agreement between the parties, yet he signs because his attitude is that if plaintiff is satisfied why should he concern himself-? It may also be that the defendant, on reading the agreement before signing, is mistaken as to the meaning thereof; such a mistake again can arise in a variety of ways, eg misunderstanding of the language used or because of what his agent tells him. When the plaintiff seeks rectification of the agreement, one can hardly expect him to prove how the defendant came to make the mistake. In fact the mechanics of the mistake are irrelevant, so also whether it is a reasonable error or not. Whatever happened, once the Court is satisfied that the agreement recorded is not the same as the actual agreement arrived at the Court will grant the rectification.’

[83] It is however important to note that the only common error which can be rectified is when the agreement as recorded does not reflect the common intention of the parties.

---

<sup>11</sup> Supra foot note 11.

<sup>12</sup> 1987 (4) SA p24 (C) at 26.

The court in the *Offit Enterprises*<sup>13</sup> matter referred to the following passage from *Williston on Contracts*<sup>14</sup> para 1549 in this regard:

'To justify reformation on the ground of mistake, the mistake must have been in the drawing of the instrument and not in the making of the contract which it evidences. A mistake as to the existing situation, which leads either one or both of the parties to enter into a contract which they would not have entered into had they been apprised of the actual facts, will not justify reformation. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were-, see the very full and informative discussion by Prof De Vos in the article quoted above.'

[84] The court held in the *Offit Enterprises*<sup>15</sup> matter that particulars of the mechanics of how the error in recording came about are irrelevant. And further held

'In cross-examination, when the object is to prove that there was no error, a witness may of course be questioned about the mechanics of how the error came about, but that is a different matter. So, also, the fact that an error is reasonable or not may bear on the credibility of the party concerned, but as pointed out by Professor De Vos (supra) whether the error is reasonable or not is really irrelevant. It follows that the enquiry in the pleadings into the mechanics of the error in order to ascertain whether it is reasonable is equally irrelevant.'

---

<sup>13</sup> Supra Footnote 11 p 27-28.

<sup>14</sup> S. Williston: *Williston on Contracts*, 3rd Ed.

<sup>15</sup> Supra at 28.

[85] On the basis of the authority of the *Offit Enterprises* matter as well as the *Otto v Heymans*<sup>16</sup> matter the court must analyze the allegation of 'bona fide mistake common to the parties' on two separate allegations:

- (a) That plaintiff mistakenly believed that, on proper construction of the suretyship, it was limited to the second defendant's indebtedness owing to the plaintiff in terms of the home loan; and
- (b) The first defendant mistakenly believed that, on proper construction of the suretyship, it was limited to the second defendant's indebtedness owing to the plaintiff in terms of the home loan.

[86] On the issue of the plaintiff's mistaken belief: one must assume that it was the decision of the credit manager to set the conditions set out in the letter granting the loan. As discussed above the plaintiff intended to embody in the contract of suretyship the common intention of both surety and creditor. The conditions as set out in Schedule B of this letter of grant of loan followed on an instruction by the plaintiff and as discussed these conditions do not require unlimited surety.

---

<sup>16</sup> 1971 (4) SA 148 (T) at 156 D-H: Wat (ii) betref - of "mutual error" altyd aanwesig moet wees E - skyn dit meer 'n geval van logiese afleiding as van feitelike bewys te wees. As daar eenmaal bewys is dat albei partye 'n volgehoute bedoeling of verstandhouding gehad het (vgl. Meyer v Merchants' Trust Ltd., 1942 AD 244) om 'n ander ooreenkoms te sluit as wat in die geskrewe stuk deur hulle beliggaam is, moet 'n afleiding van foutiewe F teboekstelling prima facie gemaak word. Hoe die fout ontstaan het - deur 'n error calculi, 'n vergissing ten opsigte van name, verkeerde identifikasie, bedrog of wat ook - verg 'n afsonderlike ondersoek, nes die vraag of die Hof een of ander party regshulp moet verleen. "Mutual error", soos dit in die betrokke gewysdes voorkom, skyn my niks meer te wees as 'n samevatting van die onderliggende begrip van 'n volgehoute opset G wat nie in die geskrewe kontrak volledige of juiste uiting gevind het nie. Prinsipiële is 'n ander opvatting ook nie moontlik waar die grondslag van die rektifikasie uiteindelik blyk verwant te wees aan die exceptio doli nie; by bedrieglike optrede van 'n party kan daar uiteraard geen gemeenskaplikheid van dwaling wees nie.

**Free translation:** 'Regarding (ii) – whether "mutual error" must always be present – it appears to be more a case of logical inference than of factual proof. Once it has been proven that both parties had a continuing intention of understanding (Cf. Meyer v Merchants' Trust Ltd. 1942 AD 244) to conclude another agreement as the one which is incorporated by them in the written document, an inference of the defencative recording must prima facie be made. How the mistake occurred - by an error calculi, a mistake in respect of names, wrong identification, fraud or whatever - require, as the question whether the court could grant a remedy to the one or the other party. "Mutual error", as it appears from the decided cases concerned, appears to be nothing more than a recapitulation of the underlying concepts of a continuing intention which did not find full or correct expression in the written document. Fundamentally another view is also not possible as the foundation of rectification ultimately appears to be related to the exception doli; in fraudulent conduct of a party there can be by the nature of thing not be commonality of mistakes.'



[87] However, it would appear that upon generating this standard document the Mrs Mouton deleted 'limited to' by drawing a line through it and the word 'UNLIMITED' remained as the applicable term of the suretyship. Hereafter the contract of suretyship was printed and presented for signature. Mrs Mouton did not say that she obtained instructions from the plaintiff that the suretyship should be unlimited in terms of the causes of the second defendant's indebtedness to the plaintiff yet it appears that Mrs Mouton drafted contracts of suretyship which is not a true reflection of the 'linking sureties' as required in the letter granting the loan to the parties and therefore not a true reflection of the common continuing intention of the parties.

[88] Accordingly and as a matter of probabilities, the plaintiff mistakenly believed that the suretyship correctly recorded the agreement between the parties in respect of the linking sureties in terms of the letter granting the loan to the parties.

*First defendant's mistaken belief*

[89] Even if the court rules out the explanation that was allegedly offered by Mrs Mouton to the defendants it is still the evidence that the first defendant read the contract of suretyship as well as the letter granting the loan and the power of attorney and her evidence that all these documents led her to belief that the suretyship is limited to the home loan cannot be rejected.

[90] The first defendant's mistake would then lie in the fact that she believed by virtue of the documents presented to her and the explanation advanced by Mses Mouton and Isaaks that the suretyship is limited to the home loan, and more specifically that it would be unlimited on the home loan amount with the interest that is calculated.

*The actual wording of the agreement as rectified*

[91] Having considered all the evidence before me I am satisfied that the first defendant has discharged the onus on her of showing on a balance of probabilities that

the second defendant's liability as surety for the Fiscon judgment debt falls outside the scope of the suretyship rectified as claimed. I am further satisfied that the contract of suretyship as it currently stands is not a true reflection of the terms agreed upon prior to the execution of the written instruments and that by *bona fide* mutual error the terms were in correctly recorded as 'UNLIMITED'. The defence of rectification of the suretyship raised by the first defendant must therefore succeed.

[92] In light of my aforementioned finding, the contract of suretyship should be rectified to read as follows:

2. Notwithstanding anything to the contrary therein contained, the amount recoverable from me/us shall be **the amount of the Debtor's liability in terms of his home loan with you.**

[93] Once the specific term of the contract of suretyship has been rectified, as it was done by this court, I am entitled to adjudicate this matter on the basis of the contract of suretyship as it stands to be corrected<sup>17</sup>.

[94] The consequences of the rectification is that the first defendant's liability to the plaintiff for the second defendant's liability as surety for the Fiscon debt would fall away. It is my understanding that the first defendant has thus complied with her liabilities to the plaintiff arising from the home loan as the home loan is up to date.

[95] As the plaintiff has no claim against the first defendant arising from the contract of suretyship as rectified, my order is as follows:

1. The Plaintiff's claim is dismissed with costs.
2. Such costs to include one instructed and one instructing Counsel.

---

<sup>17</sup> See *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A).

---

JS Prinsloo  
Judge

APPEARANCES:

FOR THE PLAINTIFF:

T Muhongo

Instructed by ENS|Africa

FOR THE DEFENDANT:

H Steyn

Instructed by Hohne & Co