REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA

NORTHERN LOCAL DIVISION OSHAKATI

CASE NO: HC-NLD-CIV-ACT-CON-2019/00093

In the matter between:

DEVELOPMENT BANK OF NAMIBIA LTD **PLAINTIFF**

and

SP BRICK WAREHOUSE CC **1ST DEFENDANT**

ERWIN TAUKENI PAULUS **2ND DEFENDANT**

Neutral Citation: *Development Bank of Namibia Ltd v SP Brick Warehouse CC* (HC-NLD-CIV-ACT-CON-2019/00093) [2022] NAHCNLD 01 (05 January 2022)

CORAM: SIBEYA J
Heard: **14 October 2020 and 10 November 2020**
Order: **3 March 2021**
Reasons: **05 January 2022**

Flynote: Contracts – Suretyship – Release from surety – Can a member who terminated membership from a close corporation still be liable under the surety signed while still a member – Who has the power to release a surety from liability – One can only be released from surety obligation by the creditor and if no such approval is granted, the member remains bound by the surety – Second defendant was not released by the plaintiff from surety, thus, remains bound and liable – Plaintiffs succeeds in its onus – Rule 108(2) – If the court is

satisfied that there has been sufficient compliance with Form 24, a court may declare a primary home executable – Court held that Form 24 has been complied with and granted execution of the immovable properties.

Summary: The plaintiff claimed an amount of N$17,833,279.50 emanating from separate loan agreements entered into between the plaintiff and the first defendant. The second defendant was cited due to the deed of suretyship he executed for the benefit of the plaintiff. The first suretyship was executed on 29 November 2010 at Ongwediva, and the second one is a surety mortgage bond (B4514/2011) executed on 1 August 2011 at Windhoek. The second defendant entered further executed a covering mortgage bond (B1818/2015) on 9 April 2015. The second defendant does not dispute any of the above-mentioned agreements.

The parties presented their respective evidence from which the court deduced two principal issues for determination. The first, being whether the actions of the second defendant by entering into a sales agreement with Mr. Wyllie dissolved him from his suretyship? And secondly whether the plaintiff released the second defendant from his suretyship obligations.

Both these questions were answered in the negative as plaintiff's witness, Mr. Jacobs, does not deny that the second defendant had made a request to be released from the surety which was not granted. What he states and what was clear for the court is that despite the communications with the plaintiff, the plaintiff never gave a formal written or any response with regards to the release of second defendant from his obligations in terms of the surety.

The court held that the suretyship requires that the plaintiff can only release the second defendant from surety in writing upon the second defendant's written request.

The court held further that the sales agreement did not have the effect to release the second defendant from his surety and that the second defendant remain bound by the surety, as the only entity with the power to release the

second defendant was the plaintiff in terms of the surety agreement signed by second defendant.

The court held further that since the second defendant was not released from any of his surety obligations, inclusive of the covering mortgage bond and seeing that the plaintiff complied with Form 24 and Rule 108(2), execution of the immovable properties will be granted including the property at Erf 5270 Ongwediva (Extension 11), being his primary place of residence.

ORDER

IT IS HEREBY ORDERED THAT JUDGMENT IS GRANTED AGAINST THE SECOND DEFENDANT ON THE FOLLOWING TERMS:

1. Payment in the amount of N$17,833,279.50.

2. Interest calculated on the aforesaid amount at the fluctuating prime rate of interest plus 1% (one percent) per annum, compounded monthly, plus a default margin of 2% (two percent), as from 26 October 2018 until date of payment.

3. That the following properties are declared executable:

3.1 Erf No. 110 Engela-Omafo situated in the Town of Helao Nafidi, Registration Division "A" (Ohangwena Region) measuring 455 square metres and held by Deed of Transfer No. T237/2009;

3.2 Erf No. 111 Engela-Omafo situated in the Town of Helao Nafidi, Registration Division "A" (Ohangwena Region) measuring 455 square metres and held by Deed of Transfer No. T 237/2009;

3.3 Erf No. 112 Engela-Omafo situated in the Town of Helao Nafidi, Registration Division "A" (Ohangwena Region) measuring 455 square metres and held by Deed of Transfer No. T 237/2009;

3.4 Erf No. 5270 Ongwediva (Extension 11) situated in the Town of Ongwediva, Registration Division "A" (Oshana Region) measuring 883 square metres and held by Deed of Transfer No. T 2872/2010.

4. Costs of suit on a scale as between attorney and own client, the costs to include the costs of one instructing and one instructed counsel.

5. The matter is removed from the roll and regarded as finalised.

REASONS

SIBEYA J:

Introduction

[1] These are the reasons for the order granted by this court on 3 March 2021. This court formulates the reasons as follows.

[2] The plaintiff claimed an amount of N$17,833,279.50 emanating from separate loan agreements entered into with the first defendant. The first defendant did not defend the claim, as a result, plaintiff obtained default judgment against the first defendant in the amount of N$17,833,279.50 plus interest and costs. The second defendant defended the claim. Plaintiff pursued the claim against the second defendant. The second defendant was cited due to the deed of suretyship he executed for the benefit of the plaintiff. The first suretyship was executed on 29 November 2010 at Ongwediva. The second suretyship was a surety mortgage bond (B4514/2011) executed on 1 August

2011 at Windhoek. The second defendant entered into a further covering mortgage bond (B1818/2015) on 9 April 2015 at Windhoek.

[3] The second defendant does not dispute any of the above-mentioned agreements.

The parties

[4] The plaintiff is the Development Bank of Namibia Limited, a public company and bank, duly incorporated in terms of s 2 of the Development Bank of Namibia Act 8 of 2002 and registered in terms of laws of the Republic with registration number: 2003/189 and its principal address is No. 12 Daniel Munamava Street, Windhoek.

[5] The first defendant is S P Brick Warehouse CC, a close corporation, duly registered in terms of the laws of the Republic with registration number: CC/2006/1461 and its registered address is Erf 4473, Valombola, Ongwediva. As alluded to above, the first defendant did not enter an appearance to defend the claim.

[6] The second defendant is Mr. Erwin Taukeni Paulus, an adult male resident at Erf 4473, Valombola, Ongwediva. Where reference is made in the course of the judgment to the plaintiff and the defendants jointly, they shall be referred to as the "the parties".

[7] The plaintiff is represented by Mr. Jones instructed by Engling, Stritter & Partners, while the second defendant is represented by Mr. Ntinda.

Background

[8] The plaintiff and first defendant, duly represented by the second defendant, entered into several written loan agreements, where the first defendant loaned or restructured the loan facilities.

[9] The first loan agreement was entered into on or about 29 November 2010 and 16 February 2011 at Windhoek, in the amount of N$8,063,314. The second loan agreement was entered into on or about 5 April 2012 and 10 April 2012 at Windhoek and Ongwediva in the amount of N$1,200,000.00.

[10] On or about 14 May 2012 and 28 May 2012 at Windhoek, the plaintiff and first defendant, represented by the second defendant, concluded a written addendum to the first loan agreement in terms whereof the amount in the first loan agreement was restructured and all arrears as at 30 April 2012 recapitalised (hereinafter referred to as “the first addendum”). On or about 18 May 2014, the plaintiff and first defendant represented by the second defendant concluded a written addendum to the first loan agreement in terms whereof the amount in the first loan agreement, as amended by the first addendum, was restructured and all arrears as at 30 November 2014 recapitalised (hereinafter referred to as “second addendum”).

[11] On even date, 18 December 2014, at Windhoek, the plaintiff, on the basis of a written loan agreement entered into between the plaintiff and first defendant, represented by the second defendant, lent and advanced the amount of N$1,327,085.20 to the first defendant. The loan was by way of restructuring the amounts advanced in respect of the first loan agreement (as amended by the first and second addendums) and the second loan agreement and recapitalising all the arrears as at 30 November 2014 in respect of the aforesaid agreements which constituted the third loan agreement.

Pleadings relevant to the case

[12] It was pleaded in the particulars of claim that during the conclusion of all of the aforesaid agreements (the first, second and third loan agreements together with the first and second addendum), the plaintiff was duly represented by Mr. Dawid Nuyoma, Chief Executive Officer of the plaintiff at the time and the first defendant was duly represented by the second defendant, member of the first defendant. The second defendant, in his plea, admitted to the said averments.

[13] On or about 25 October 2017 and 02 November 2017 at Oshakati and Windhoek, the plaintiff, duly represented by Mr. Martin Inkumbi, the Chief Executive Officer at the time and the first defendant duly represented by Mr. Mark Thomas Wylie. The plaintiff and first defendant agreed to restructure the existing loans, as amended by the first and second addendums, in terms of which the plaintiff shall lend and advance an amount of N$15,373,551.48 to the first defendant (hereinafter referred to as “the final loan agreement”). The loan was by way of restructuring the amounts advanced in respect of the first loan agreement (as amended by the first and second addendums), the second loan agreement and third loan agreement and recapitalizing all the arrears constituting both capital and interest.

[14] The plaintiff claims to have complied with the terms and obligations of the final loan agreement and disbursed an amount of N$15,373,551.48 to the first defendant as agreed. The first defendant breached the final loan agreement by failing to pay the monthly installments as agreed and further failed to pay arrear interest due, resulting in the full outstanding amount due. On 25 October 2018, plaintiff’s manager issued a certificate of indebtedness wit the amount of owed being N$17,833,279.50.

[15] The second defendant alleged in his plea*, inter alia*, that: The final loan agreement was entered into by the first defendant represented by Mr. Mark Thomas Wylie (“Mr. Wylie”). He further pleads that Mr. Wylie became a member of the first defendant on the arrangement and facilitation of the plaintiff with the sole purpose of fully discharging the second defendant from all loan obligations and all indebtedness to the plaintiff.

[16] The second defendant pleads that during 2016, in view of the financial challenges faced by the first defendant at the time, the plaintiff's duly authorised employee, Ms. Sherien Podelwitz suggested to the first and second defendants that the first defendant's performance would improve if it was to be managed by someone else. With intention to relieve the second defendant from the obligations, the plaintiff's aforesaid employee suggested a certain Mr. Wylie to the first and second defendants to manage the first defendant.

[17] The second defendant pleads that with the knowledge, consent and facilitation of the plaintiff, Mr. Wylie purchased the second defendant's 100% member's interest in first defendant on 14 December 2016 and a written sale agreement was signed. He further stated that the agreement provides that he will be released from all obligations in favour of the plaintiff, including suretyship. It was the understanding between the parties that the plaintiff would then arrange and facilitate that Mr. Wylie sign all the necessary forms for purposes of transferring liability and responsibility to him and to fully discharge the second defendant of all his obligations.

[18] He concludes by stating that he has therefore been discharged from all obligations, alternatively the plaintiff is precluded from claiming any money from the him, for it is the plaintiff that caused the situation it found itself in.

[19] The second defendant further pleads that the suretyship agreement was not properly stamped in terms of s 12 of the Stamp Duties Act 1993 (Act No. 15 of 1993) and is thus inadmissible in these proceedings. He further pleads that the plaintiff acted in a manner prejudicial to him by failing to perform in terms of the oral tripartite agreement and failing to ensure that Mr. Wylie signs all the relevant documents in order to transfer obligations from the second defendant to the first defendant and Mr. Wylie.

[20] Second defendant pleads further that the property at Erf 5270 Ongwediva (Extension 11) is his primary place of residence and cannot in law

be executed, given the prejudicial conduct of the plaintiff and the fact that he is not in a position to secure another primary place of residence.

[21] Finally he pleads that in the circumstances, he is not liable for any amount in terms of the suretyship.

Issues for determination

[22] In the proposed pre-trial order compiled by the parties dated 26 July 2020, which was made an order of court on 27 July 2020, the parties listed the following factual issues to be resolved at the trial:

'1.1. Whether Mr Mark Thomas Wylie's membership in the first defendant was arranged and facilitated by the plaintiff with the purpose of fully discharging the second defendant from all loan obligations and all indebtedness to the plaintiff.

1.2. Whether when entering into the final loan agreement the first defendant was represented by Mark Thomas Wylie of the second defendant.

1.3. Whether the parties entered into any tripartite oral understanding in terms whereof the second defendant would be released from all payment obligations to the plaintiff and Mr Mark Thomas Wylie would take over all indebtedness of the first defendant.

1.4. Whether or not the plaintiff through its employee (Mrs Sherien Podelwitz) suggested to first and second defendants that first defendant's performance would improve if managed by somebody else.

1.5. Whether or not Mrs Sherien Podelwitz suggested that Mark Thomas Wylie should manage the first defendant.

1.6. Whether Mr Mark Thomas Wylie with knowledge, consent and facilitation of the plaintiff worked closely with the plaintiff with the purpose of acquiring 100% members' interest in the first defendant.

1.7. Whether during 2016 the first defendant facilitated the arrangement that Mr Mark Thomas Wylie would purchase the second defendant's 100% members' interest in the first defendant.

1.8. Whether any tripartite agreement was ever concluded between the plaintiff, first defendant, second defendant and Mr Mark Thomas Wylie,

1.9. Whether in terms of (annexure "A" to the plea) the second defendant would be released from all its obligations in favour of the plaintiff including any suretyships.

1.10. Whether or not it was an understanding between the parties that the plaintiff would arrange and facilitate for Mr Mark Thomas Wylie to sign all necessary forms for

the purpose of transferring liability and responsibility to him and by so doing fully discharge the second defendant of all its obligations.

1.11. Whether the plaintiff released the second defendant from its obligations stemming from the written surety agreement (annexure "C" to the particulars of claim) as contemplated in clause 6.1 thereof.

1.12. Whether the surety mortgage bond, (annexure “D1" to the particulars of claim), has been cancelled or whether it remains in force as provided in clause 13 of “D1".

1.13. Whether the second defendant's obligations stemming from either (annexure "C" and/or "D1" and/or "D2" to the particulars of claim) have been cancelled and are no longer enforceable.

1.14. Whether the second defendant in the circumstances of the surety agreement (annexure "C" to the particulars of claim) and as surety and co-principal debtor in favour of the plaintiff, is jointly and severally liable with the first defendant for any amounts due and owing by the first defendant to the plaintiff by virtue of any cause or debt whatsoever.

1.15. Whether the plaintiff acted to the prejudice of the second defendant thereby discharging him from suretyship obligations’.

[23] To address the above questions, it is now convenient to consider the relevant evidence led by the parties. I find it prudent to note at the inception of this judgment that the loan agreements entered into are not in dispute, save for the final loan agreement. This court is duty bound to consider the evidence presented by the parties, which I proceed to do hereunder.

Plaintiff’s case

[24] In a quest to prove its case, the plaintiff led the evidence of Mr John Jacobs and Ms. Jessich Sherien Podelwitz.

[25] Mr Jacobs’ testimony was, *inter alia*, that: He was the Senior Manager: Loan Monitoring, of the Plaintiff. From the outset, it is noteworthy that the second defendant does not deny the contents of the following documents attached to the particulars of claim and submitted into evidence by consent: the

first loan agreement;[1] the second loan agreement;[2] first addendum;[3] second addendum;[4] the third loan agreement;[5] the bank statement;[6] the certificate of indebtedness;[7] the letter of demand[8]; the Deed of suretyship;[9] the Surety Mortgage Bond B 4514/2011[10] and the Continuing Covering Mortgage Bond B 1818/2015.[11]

[26] The second defendant contend that these agreements and documents were not sufficiently stamped and are thus excluded from being handed up as evidence. The situation has since been remedied, the agreements marked Exhibit “B1” – “B5” and Exhibit “B7” – “B12”, together with Exhibit “B6” the final loan agreement have all been properly stamped and all outstanding penalties have been paid, and as such there is no impediment to these documents being received by this court as evidence.

[27] Mr Jacobs testified in relation to the disputed agreement (Exhibit “B6”) and the third loan agreement (Exhibit “B5”). He stated that on 18 December 2014, at Windhoek, the plaintiff, in terms of a written agreement lent and advanced the amount of N$1 327 085.20 to the first defendant by restructuring the amounts advanced in respect of the first loan agreement (as amended by the first and second addendums) and the second loan agreement and recapitalising all the arrears as at 30 November 2014 in respect of the aforesaid agreements.

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[1] Exhibit “B1”.

[2] Exhibit “B2”.

[3] Exhibit “B3”.

[4] Exhibit “B4”.

[5] Exhibit “B5”.

[6] Exhibit “B7”.

[7] Exhibit “B8”.

[8] Exhibit “B9”.

[9] Exhibit “B10”.

[10] Exhibit “B11”.

[11] Exhibit “B12”.

[28] Mr Jacobs testified that during the conclusion of all the aforesaid agreements, the plaintiff was duly represented by Mr. Dawid Nujoma, Chief Executive officer of the plaintiff at the time and the first defendant was duly represented by the second defendant, member of the first defendant. Both were authorised to conclude the agreements.

[29] On 25 October and 2 November 2017 at Oshakati and Windhoek respectively, the plaintiff and the first defendant concluded a final written loan agreement marked as "Exhibit B6". During the conclusion of the final loan agreement, the plaintiff was represented by Mr. Martin Inkumbi, the current Chief Executive Officer of the plaintiff and the first defendant was duly represented by Mr. Mark Thomas Wylie and/or the second defendant, members of the first defendant in turn. Both were authorised to conclude the agreements.

[30] It was his evidence that the terms of the final loan agreement included the following:

'15.1. the plaintiff shall restructure all existing facilities and recapitalise all arrears as at 31 October 2017 in respect of the first loan agreement (as amended by the first and second addendums), the second loan agreement and the third loan agreement;

15.2. The loan and the interest thereon shall be repaid in 60 (sixty) monthly instalments in arrears on the last day of the month. The first interest payment shall be due on the last business day of the month in which the restructuring takes place thereafter the first capital instalment shall be due on the last business day of the 13th (thirteenth) month from the date of restructuring;

15.3. The first defendant shall within 7 (seven) days of demand pay any increased costs (as defined) incurred by the plaintiff;

15.4. interest shall be payable on the loan at the fluctuating rate linked to the First National Bank prime rate plus 1% (one percent) per annum, calculated daily and compounded monthly;

15.5. in the event of the first defendant's failure to make payment of any amount owed timeously, such overdue amounts would bear interest or additional finance charges at the rate of 2% (two percent) per annum, compounded monthly;

15.6. A certificate signed by any manager of the plaintiff would be *prima facie* proof of the nature and extent of the first defendant's indebtedness;

15.7. in the event of the first defendant failing to comply with the terms of the final loan agreement, *inter alia*, by failing to make the payment due in terms thereof, the full amount owed would forthwith become due and payable by the first defendant;
15.8. The first defendant would pay a restructuring fee (as defined) of 0.5% (zero-point five percent) of the total restructured facility;
15.9. in the event that the plaintiff has to institute an action against the first defendant to enforce the terms and provisions of the final loan agreement or any claim thereunder, the first defendant shall be liable for all the costs incidental to such action on a scale between attorney and own client.'

[31] It was further his evidence that the plaintiff complied with all its obligations in terms of the final loan agreement and disbursed the amount of N$15 373 551.48 to the first defendant by restructuring and recapitalising all arrears as at 31 October 2017 as agreed with the first and second defendants.

[32] It was his testimony that during the conclusion of the final written loan agreement (Exhibit "B6"), all the debts and interests owed by the first defendant to the plaintiff were consolidated in the restructuring process. No payments or disbursements were made by the plaintiff to the first defendant after or on account of Exhibit "B6".

[33] Mr Jacobs testified that the first defendant breached the final loan agreement concluded between the parties, by amongst others, failing to pay equal monthly installments as agreed between the parties. Consequently, first defendant further failed to pay the arrears' interest payable by the first defendant to the plaintiff. He referred to the bank statements setting out the outstanding amount.

[34] It was his further evidence that on 25 October 2018, the plaintiff's Ms. Rozie Bezuidenhout: Manager Monitoring and collections, issued a certificate of indebtedness to reflect the amount owed by the first defendant pursuant to the aforegoing, together with interest, in the amount of N$17 833 279.50 as reflected on Exhibit "B8". He contends that despite demand the first defendant failed to effect payment.

[35] Mr Jacobs testified further that on 29 November 2010 at Ongwediva, the second defendant executed a written Deed of Suretyship marked as exhibit “B10” and of which the terms of the surety are clearly indicated therein. On 1 August 2011 and at Windhoek the second defendant duly executed a surety mortgage bond, B4514/2011, in favour of the plaintiff, which is marked as exhibit “B11”, with the terms of the surety mortgage bond are apparent therein.

[36] It was Mr Jacobs testimony that on 9 April 2015 and at Windhoek, the second defendant duly executed a mortgage bond, B1818/2015, in favour of the plaintiff, marked as exhibit “B12” and of which the terms of the mortgage bond are clearly indicated therein.

[37] His testimony was further that the second defendant bound himself as a surety and co-principal debtor in favour of the plaintiff in respect of debts due by the first defendant to the plaintiff by virtue of any cause or debts whatsoever.

[38] As a result of first defendant’s default on 3 August 2018, the plaintiff demanded payment from the defendants. The second defendant failed and still has not affected payment. The plaintiff intends to execute the properties as the second defendant hypothecated the respective properties to the plaintiff as continuing covering security for each and every sum in which the first and second defendant is or may be indebted to the plaintiff, so Mr. Jocobs testified.

[39] Mr. Jacobs explains that the second defendant and/or any lessee(s) were advised of the plaintiff’s intention to do so in terms of Rule 108(2).

[40] It was Mr Jacobs’s contention that the second defendant seemingly relies on the agreement concluded between the first defendant, the second defendant and a certain Mr. Wylie in respect to the purchase of his member’s interest in the first defendant as a ground to have been released from his surety obligations to the plaintiff.

[41] Mr. Jacobs contends that the second defendant’s obligations stem from Deed of Suretyship (Exhibits “B10”), the Surety Mortgage Bond B4514/2011

(Exhibit “B11”) and the Continuing Covering Mortgage Bond B1818/2015 (Exhibit “B12”). He states that the plaintiff never cancelled the deed of suretyship (Exhibit “B10”). Similarly, neither the surety mortgage bond nor the continuing covering mortgage bond, both of which are in favour of the plaintiff, have been cancelled.

[42] He emphasised that the plaintiff has thus not released the second defendant from his obligations stemming from Exhibit “B10” thereto as contemplated in clause 6.1 of the surety agreement. He quoted clause 12 of Exhibit “B10” which provides that:

> ‘No alterations or variation of any present or future agreement between the debtor (the second defendant) and the bank (the plaintiff) shall in any way release the second defendant from its liability herein under.’

[43] As the surety mortgage bond, Exhibit “B11”, has not been cancelled, it remains in force as provided for in clause 13 of that agreement. Further, the continuing covering mortgage bond, Exhibit “B12”, similarly remains in force and has not been cancelled by the plaintiff.

[44] Mr. Jacobs states that the plaintiff’s position is simply that in the premise, the terms and conditions of any oral tripartite understanding do not vary or amend or substitute or cancel the second defendant’s obligations in terms of the Suretyship agreement, the Surety Mortgage Bond and the Continuing Covering Mortgage Bond. He contends further that the plaintiff was never a party to the alleged agreement of the sale of member’s interests in the first defendant, which agreement was submitted into evidence as Exhibit “E2”.

[45] Mr. Jacobs made reference to clause 9 of the deed of sale marked Exhibit “E2” entered into between the first defendant (referred to in the sale agreement as “the corporation”, second defendant (referred to therein as “the seller”) and Mr. Wiley (referred to therein as “the purchaser”), regarding the release of second defendant from guarantees, which reads:

> ‘9.1. The purchaser will use his best endeavours to procure the release of the seller from all and any suretyships, guarantees or other acts of intercession given by

him on behalf of the corporation. If necessary, the purchaser shall offer his own guarantees in the seller's place.

9.2. Pending his release, the purchaser hereby indemnifies and hold the seller harmless against any claim which may be made against the seller in terms of any such suretyship, guarantee or act of intercession;

9.3. The purchaser shall be obliged to make payment under this indemnity as soon as the seller becomes obligated to make any payment in respect of any such liability.'

[46] Mr. Jacobs observed that the terms of the sale agreement between Mr. Wylie and the second defendant contemplated an indemnification in the second defendant's favour. The second defendant has, however, not enforced its rights in terms of clause 9 against Mr. Wylie by joining him as a third party and seeking an indemnification.

[47] In conclusion, Mr. Jacobs stated that on 4 May 2018, the second defendant requested the plaintiff to release him from his suretyship. The plaintiff in a letter of 3 August 2018 rejected the second defendant's request to be released from the suretyship. In respect of the sale of the members' interest, Mr. Jacobs testified that he addressed an email to the second defendant dated 8 November 2018, where he, *inter alia,* stated that:

'We are therefore still maintaining that the purchase was deemed to have been done 'unilaterally' and without the consent of the bank unless you could provide us with some explicit communications with the bank has in advance *(sic),* agreed to the takeover.'

[48] He stated that the information requested in his email was never provided by the second defendant.

[49] In furtherance of its case, the plaintiff called Ms. Jessich Sherien Podelwitz (Ms. Podelwitz) as its second witness. Her testimony was, *inter alia*, that she is the Credit Manager, in the Credit and Risk Department of the plaintiff. She, in her testimony, rejected the allegations made by the second defendant, in as far as second defendant avers that Ms. Podelwitz suggested that the first defendant should be managed by someone else and proceeded to,

allegedly, introduce Mr. Wylie with intention to relieve the second defendant from his obligations with the plaintiff. She denied that she ever told the second defendant that the performance of the first defendant would improve if it was to be managed by someone else and further denies referring second defendant to Mr. Wylie. She did not know Mr. Wylie, whom she only came to know after being mentioned by the second defendant.

[50] Ms. Podelwitz, further denied meeting with the second defendant for purposes of releasing him as surety and co-principal debtor. She contends that the only meetings convened between herself and second defendant were set up with him for purposes of discussing his companies' failure to service the debt with the Bank.

[51] She stated further that she never made any representations to the second defendant which would have resulted in him being released as a surety or which would have influenced the validity and enforceability of the loan agreements. She concludes, on her own, she does not have the authority to release a surety and co-principal debtor of the plaintiff.

The defendant’s case

[52] The second defendant took to the stand and testified as the sole witness in support of his case. He testified, *inter alia*, that: The action relates to, amongst others, the payment of N$17,833,279.50 being in respect of various written loan agreements in terms of which the plaintiff lent and advanced monies to the first defendant. The said amount is jointly and severally claimed against him as a result of the surety which he signed on behalf of the first defendant in 2010 to which he now denies any liability.

[53] It was further his testimony that during or about 2010, he started the business of SP Brick Warehouse CC, being the first defendant. He approached the plaintiff to finance and advance a loan to the first defendant. He admits that the plaintiff lent and advanced to the first defendant the amounts in the terms of the written loan agreements and addendums thereto as per Exhibits “B1”, “B2”,

“B3” “B4” and “B5”. He further admits that during the conclusion of the aforesaid agreements between 2010 and 2014, he represented the first defendant as its managing member and duly concluded the agreements. He further acknowledged that the surety signed entailed that in the event that the first defendant fails to fulfil any of its obligations to the plaintiff, such obligations would rest on him.

[54] He further testified that during 2016, the first defendant faced financial challenges, as a result thereof Ms. Podelwitz, the plaintiff's duly authorised employee, orally suggested to the first and second defendants that the first defendant's performance would improve if it was to be managed by someone else. This was intended to relieve the second defendant from his obligations with the plaintiff, and Ms. Podelwitz suggested Mr. Wylie to so take over, as plaintiff testified.

[55] He testified further that with the knowledge, consent and facilitation of the plaintiff, Mr. Wylie commenced working closely with the plaintiff to acquire 100% member's interest in the first defendant.

[56] It was his testimony further that it was a key component of the sale agreement that he be relieved from the contractual obligations with the plaintiff. It was on those bases that a deed of sale was entered into by himself and Mr. Wiley on 14 December 2016.

[57] Second defendant placed heavy reliance on clause 2.2 of the deed of sale which reads:

> ‘The risk and benefit in and to the equity shall pass to the purchaser on the effective date from which day onwards the management and control of the affairs of the corporation, and thus the business, shall vest in the purchaser.’

The above passage and numerous provisions of the deed of sale in the second defendant’s opinion relinquished him of any and all liability with the plaintiff.

[58] He further testified that on 25 October 2017 and 2 November 2017, Mr. Wiley, the plaintiff and the first defendant entered into a final loan agreement, being Exhibit “B6”. He contends that when the final loan agreement was concluded, the first defendant, with the knowledge and concurrence of the plaintiff, was duly represented by Mr. Wylie as the managing member of the first defendant by then.

[59] The second defendant denies being present at the conclusion of the final agreement, as at the time he alleges, he was no longer a member of first defendant. Second defendant thus deny that the plaintiff is entitled to the relief sought against him in respect of the final loan agreement. This is premised on the terms of the sale agreement, for which the plaintiff allegedly facilitated. The second defendant further states that he derived no benefit from the final loan agreement and therefore cannot be held liable, so his testimony went.

[60] The second defendant testified further that it was only on 16 October 2017 that he became aware that Mr. Wylie did not take the necessary steps to take over the suretyship with the plaintiff. Mr. Wylie did not sign any surety and as such, failed to release him from surety as per the sale agreement.

[61] He then made attempts to contact the plaintiff’s portfolio manager in order to remedy the situation and explain that he was no longer obligated to make any payment for the first defendant as he had no interests in the first defendant anymore. He testified that he did not have the pleasure of a response from the plaintiff.

[62] The second defendant denied the plaintiff’s contention that the deed of sale was unilateral. He stated that the plaintiff had full knowledge of the deed of sale, facilitated and suggested the sale of the members interest, and further failed to raise any objection to the said sale. He further contends that not only did the plaintiff fail to properly facilitate the release of his surety, but also failed to inform him timeously that the surety would not be released.

[63] He concluded his testimony by stating that the property at Erf 5270, Ongwediva (Extension 11) is his primary residence. As advised, he further testified that such property cannot be executed, especially in view of the prejudicial conduct of the plaintiff and further that he does not have a second place of residence, nor does he have the means to secure another primary place of residence.

Analysis of evidence

[64] It is settled law that he who allege bears the burden of proof of such allegation on a balance of probabilities to sustain his or her claim. In discussing the burden of proof and evidential burden, Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*[12] stated the following:

'[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows*:* The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

[65] It is apparent from the evidence that the version of the plaintiff and that of the second defendant on material aspects, stand in contrast to each other. The

[12] *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

proper approach to be adopted in a case similar to the present matter has been restated in several cases in this jurisdiction. It is necessary to assess the credibility and reliability of the witnesses together with the probabilities of the case and the evidence at large.[13] I proceed to do so.

[66] I find it prudent at this stage to set out facts that are common cause as agreed to between the parties, which are the following:

66.1. Plaintiff lent to the first defendant an amount of N$8,063,314.00 in terms of the first loan agreement, Exhibit “B1”.
66.2. Plaintiff lent to the first defendant an amount of N$1,200,000.00 in terms of a second loan agreement, Exhibit “B2”.
66.3. The parties concluded the first and second addendums, Exhibits “B3” and “B4” respectively.
66.4. In the second addendum, Exhibit “B4”, the parties agreed that the amounts advanced in respect of the first loan agreement (as amended by the first addendum) would be restructured and all the arrears as at 30 November 2014 would be recapitalised.
66.5. Plaintiff lent and advanced the first defendant N$1,327,085.20 in terms the third loan agreement, Exhibit “B5”.
66.6. During the conclusion of the agreements and addendums, the plaintiff was represented by Dawid Nujoma and first defendant was represented by second defendant - both of whom were authorised thereto.
66.7. Additionally, the plaintiff and first defendant concluded a final written loan agreement, Exhibit “B6”.
66.8. During the conclusion of Exhibit “B6”, Martin Inkumbi represented the plaintiff and was duly authorised.
66.9. The terms and conditions appearing in Exhibits “B1", "B2", "B3", "B4", "B5" and "B6" are common cause.

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[13] *Ngola v Veiyo* (HC-MD-CIV-ACT-DEL-2018/03499 [2021] NAHCMD 526 (16 November 2021) at para [33] – [36] Where this court dealt with the approach to resolve mutually destructive versions.

66.10. The plaintiff complied with all its obligations in terms of the final loan agreement and disbursed and amount of N$15,373,551.48 to the first defendant.

66.11. The first defendant breached the final loan agreement by failing to pay equal monthly instalments as agreed together with the payment of the arears interest.

66.12. A copy of the statement setting out the outstanding amount owed to plaintiff by first defendant, Exhibit “B7”.

66.13. An amount of N$17,833,279.50 as reflected in the certificate of indebtedness marked Exhibit "B8" is due and payable, but notwithstanding demand (Exhibit “B3”), the amount remains unpaid.

66.14. First defendant is liable to pay the plaintiff the amount of N$17,833,279.50 with interest thereon calculated at the fluctuating prime rate of interest plus 1% per annum, compounded monthly, plus a default margin of 2% as from 26 October 2018 until date of final payment.

66.15. Mark Thomas Wylie and second defendant entered into the agreement marked Exhibit “E2”, the terms and conditions of which relate to the first defendant, second defendant and Mr. Wylie are common cause.

66.16. The second defendant executed a written deed of suretyship marked Exhibit “C”. The terms and conditions contained therein are common cause.

66.17. The second defendant executed a surety mortgage bond (B4514/2011) in favour of the plaintiff, marked Exhibit “B11". The terms and conditions contained therein are common cause.

66.18. The second defendant executed a mortgage bond (B1818/2015) in favour of the plaintiff, marked Exhibit "B12". The terms and conditions therein are common cause.

[67] Thus in principle, not much is in dispute between the parties. From the evidence presented, two issues stand out for resolution by the court. The first, being whether the actions of the second defendant by entering into a sales agreement with Mr. Wyllie dissolved him from his suretyship? And secondly, whether the plaintiff released the second defendant from his suretyship obligations.

[68] The authors in Caney's *The Law of Suretyship*[14] identified and discussed the two main categories and several sub-categories to suretyship. The main categories are defined by whether the defence relates to the principal obligation or to the surety's own obligations under the suretyship agreement.

[69] Prinsloo J in *Development Bank of Namibia v Keystone Technology Solution and Others*[15] listed the following instances which would render a discharge of the surety by virtue of his or her contract:

'[17] Discharge of the surety by virtue of his contract is enumerated as follows:

17.1 Payment of the principal debt by the surety;[16]

17.2 Effluxion of time;[17]

17.3 Prejudice through a material alteration in the principal debt;[18]

17.4 Prejudice through an extension of time;[19]

17.5 Breach of contract with the surety.[20]

[70] With the above principle in mind, Prinsloo J in *Development Bank of Namibia v Keystone Technology Solution*[21] considered the question whether a creditor's actions that prejudices the debtor, releases such debtor from its surety obligations and ably stated as follows:

'There is no principle in our law that states that should a creditor's actions in respect of the principal debtor prejudice a surety, the surety can be released from its obligations under the deed of suretyship. The only instance where a surety can be released (totally or partially) is where there has been a breach of a legal duty or

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[14] *C F Forsyth & J T Pretorius* 5thEd (2018) pages 185-214.

[15] *Development Bank of Namibia v Keystone Technology Solution and Others* (I 3678-2013) [2018] NAHCMD 295 (19 September 2018) para [17].

[16] Supra page 204 footnote 5.

[17] Supra page 204.

[18] Supra page 205.

[19] Supra page 207.

[20] Supra page 209.

[21] Supra at para [19].

obligation by the creditor that was required from the creditor in terms of the principal agreement (e.g. loan agreement) and/or the deed of suretyship.'

[71] I am in agreement with the above passage as the true exposition of our law. Prejudice caused to the surety can only release the surety, totally or partially, if such prejudice emanates from a breach by the creditor of the legal duty or obligation owed in the terms of the principal agreement or the deed of suretyship.

[72] The second defendant does not deny entering into the abovementioned suretyship agreements with the plaintiff. What the second defendant is denying is its enforceability after he has sold his member's interest in the first defendant to Mr. Wylie.

[73] The second defendant, through his own admissions, acknowledged that he found out after he has signed the deed of sale that certain provisions of the deed of sale have not been complied with by Mr. Wylie, the person he had sold his member's interest to.

[74] In the surety agreement, the second defendant agreed to the following terms, as provided for in the surety agreement (Exhibit "B10"):

'74.1. To bind himself jointly as well as severally, as surety and co-principal debtor in solidum for the repayment on demand of all or any sum or sums of money which the first defendant may from time to time owe or be indebted to the plaintiff for;
74.2. To be liable to the plaintiff for all amounts owed to it by the first defendant in the event of the first defendant being insolvent;
74.3. That the plaintiff shall have the discretion to determine the extent, nature and duration of the loan;
74.4. That he would only be released from his obligations in terms of the suretyship) in the following instances:

74.4.1. Upon written notice from the second defendant to the plaintiff requesting the release from the suretyship; and

74.4.2. The plaintiff acknowledging in writing receipt of the written request; and

74.4.3. The plaintiff having in writing advised the second defendant of the amount then still outstanding and due by the first defendant, for which amount the second defendant acknowledged that he would remain liable notwithstanding such notice of termination until that amount had been paid in full by either the second defendant or the first defendant, which shall only be terminated on written notice from the plaintiff to the second defendant acknowledging that the suretyship had been terminated, but that the termination would only come into effect when the sum or sums already due or accruing at the date of receipt of the second defendant's notice (together with interest and costs thereon) have been paid; and

74.4.4. The plaintiff having advised the second defendant in writing of his release from the suretyship.'

[75] It becomes apparent from reading the provisions of the surety agreements that there should have been reciprocal written communication between the second defendant and the plaintiff regarding the release from suretyship. What is further clear is that the plaintiff ought to have issued communication in writing releasing the second defendant from his obligation if the plaintiff accepted the request for release as contemplated by the second defendant.

[76] Mr. Jacobs, for the plaintiff, does not deny that the second defendant had made a request to be released from surety. He, however, submits the plaintiff never released the second defendant from suretyship.

[77] It is as clear as day from the evidence that notwithstanding the written request by the second defendant to the plaintiff to be released from being released from suretyship, the plaintiff never gave a written response to release the second defendant from surety in terms of the suretyship agreement.

[78] The second defendant alleged that Ms. Podelwitz, who was a duly authorised employee of the plaintiff, orally facilitated the sale of the second

defendant's member interest in the first defendant to Mr. Wylie with the aim of releasing him from surety. These averments were vehemently denied by Ms. Podelwitz. Ms. Podelwitz, in her testimony, proceeded to state that she was not clothed with the authority by the plaintiff to release anybody from surety. The lack of authority to release an individual from surety was not disputed and this court has no reason to doubt such evidence. Ms. Podelwitz testified in a forthright manner and was consistent in her evidence and same in cross examination. She fared well as a witness to be relied on. Mr. Jacobs, a retired employee of the plaintiff, was also a credible witness who had nothing to gain for tendering false evidence. To the contrary, the second defendant did not do well in cross examination. He contradicted established facts, *inter alia*, when he alleged that he was orally released from suretyship, when the agreement which he signed only provides for such release to be made in writing; when he avers that Ms. Podelwitz facilitated his release from surety when Ms. Podelwitz testified undisputedly that she had no such authority. I find that his evidence, where it conflicts with the evidence of Ms. Podelwitz and Mr. Jacobs, is unreliable and stands to be rejected.

[79] This court is fully aware of the deed of sale entered into between the second defendant and Mr. Wylie. What is however unfortunate is that this deed of sale does not automatically release the second defendant from his obligation with the plaintiff in terms of the surety agreements. Mr. Jacobs stated that for the second defendant to have been released from surety and thus substituted with Mr. Wylie, Mr. Wylie ought to have actively provided the plaintiff with security. Mr. Wylie further should have written to the plaintiff to take over the liability of the first defendant or actually signing surety in his own capacity. However, all this is just wishful thinking as none occurred, leaving the second defendant to continue to carry the weight of the surety and consequently, carry the liability of first defendant. The main thorn in the second defendant's flesh remain that the plaintiff did not release him from surety in writing.

[80] I find it inevitable that the second defendant was not released from the suretyship agreement and neither can be said that the plaintiff's actions

prejudiced the second defendant to the extent that it can be said that the second defendant was released from surety.

Conclusion

[81] On a preponderance of probabilities, coupled with the credibility findings, I find that the evidence led on behalf of the plaintiff by Mr. Jacobs and Ms. Podelwitz is highly probable and reliable. In the premises of the above conclusions and findings, this court accepts the version of the plaintiff to be probably true and rejects that of the second defendant as being highly improbable, where it contradicts the evidence of the plaintiff's witnesses. Thus, the plaintiff's case succeeds on a balance of probabilities.

Declaration of immovable properties executable

[82] The second defendant secured his indebtedness to the plaintiff with a surety mortgage bond (B 4514/2011), Exhibit "B11" registered over Erf 110, 111, and 112, Engela-Omafo, as stated herein above, limited to a maximum amount of N$820,000 in respect of the capital plus interest owed by the first defendant and N$205,000 regarding costs or charges incurred by the plaintiff to recover payment. The above immovable properties will be declared executable.

[83] In respect of Erf 5270, Ongwediva (Extension 11), the second defendant secured his indebtedness to the plaintiff with a continuing covering mortgage bond registered under (B 1818/2015), Exhibit "B12". The said bond over Erf 5270 is limited to a maximum amount of N$1,000,000 in respect of the capital plus interest owed by the first defendant and N$250,000 for costs or charges incurred by plaintiff to recover payment.

[84] This court takes cognisance of the primary residence of persons and that same must be protected. In *casu*, Erf 5270 is the primary residence of the second defendant. What worsens the situation is the fact that the second defendant has no secondary place of residence. He further states that he also does not have sufficient means to acquire another place of residence.

[85] This is an unfortunate situation and the court does not make this decision lightly. It is therefore with a heavy heart that I record that the odds are all stacked against the second defendant. In the matter of *Standard Bank Namibia Ltd v Shipala and others,*[22] the Supreme Court held that Rule 108 did not take away a creditor's substantive right to foreclosure on a bond, and went on to say that:

> 'Where the immovable property is the primary home of the judgment debtor, substantial compliance with Form 24 would suffice, whereafter a court may or may not order the immovable property specifically executable, having considered all the relevant circumstances including less drastic measures than a sale in execution.'

[86] The second defendant signed a covering mortgage bond (B1818/2015) on 9 April 2015 in which he bonded Erf 5720, Ongwediva, Extension 11 to the debt owed to the plaintiff. This court is satisfied that Rule 108(2) has been complied with to the letter by the plaintiff and as a consequence thereof, the plaintiff is entitled to execute this immovable property despite it being the primary home of the second defendant.

[87] The debt currently owed to the plaintiff which the second defendant is jointly liable for is substantial, being N$17,833,279.50. Had the debt not been this huge, the court would have allowed for the execution of the immovable properties at Helao Nafidi to be executed alone, however that is not the case.

[88] It is thus with difficulty that this court is left with no other option but to have the immovable properties declared specifically executable.

Costs

[89] No cogent reasons were placed before this court why costs should not follow the event. The court could also not find compelling reasons to deviate from the said established principle. Resultantly, the plaintiff is awarded costs.

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[22] (69 of 2015), *Standard Bank Namibia Ltd v Shipala and others* [2018] NASC 395 (06 July 2018) para [68].

Order

[90] In the circumstances, I make the following order:

IT IS HEREBY ORDERED THAT JUDGMENT IS GRANTED AGAINST THE SECOND DEFENDANT IN THE FOLLOWING TERMS:

1. Payment in the amount of N$17,833,279.50;

2. Interest calculated on the aforesaid amount at the fluctuating prime rate of interest plus 1% (one percent) per annum, compounded monthly, plus a default margin of 2% (two percent), as from 26 October 2018 until date of payment.

3. That the following properties are declared executable:

   3.1 Erf No. 110 Engela-Omafo situated in the Town of Helao Nafidi, Registration Division "A" (Ohangwena Region) measuring 455 square metres and held by Deed of Transfer No. T237/2009;

   3.2 Erf No. 111 Engela-Omafo situated in the Town of Helao Nafidi, Division "A" (Ohangwena Region) measuring 455 square metres and held by Deed of Transfer No. T 237/2009;

   3.3 Erf No. 112 Engela-Omafo situated in the Town of Helao Nafidi, Registration Division "A" (Ohangwena Region) measuring 455 square metres and held by Deed of Transfer No. T 237/2009;

   3.4 Erf No. 5270 Ongwediva (Extension 11) situated in the Town of Ongwediva, Registration Division "A" (Oshana Region) measuring 883 square metres and held by Deed of Transfer No. T 2872/2010.

4. Costs of suit on a scale as between attorney and own client, the costs to include the costs of one instructing and one instructed counsel.

5. The matter is removed from the roll and regarded as finalised.

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O S SIBEYA

JUDGE

APPEARANCES:

PLAINTIFF:	Mr JP Jones instructed by Engling, Stritter & Partners, Windhoek
SECOND DEFENDANT:	Mr M. Ntinda Of Sisa Namandje and Co.Inc, Windhoek