CASE NO.: SA 08/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JOHANNA ADRIANA ROSSOUW **APPELLANT**

And

COMMERCIAL BANK OF NAMIBIA LIMITED **RESPONDENT**

CORAM: Mtambanengwe, A.C.J., O'Linn, A.J.A., Chomba, A.J.A.

HEARD ON: 09/04/2003

DELIVERED ON: 08/07/2003

APPEAL JUDGMENT

MTAMBANENGWE, A.C.J.: This is an appeal against the judgment of Hoff, J, in which he dismissed the application by appellant for an order, *inter alia*, that the judgment granted against appellant in the High Court on 31 March 2000 be rescinded and or set aside and that she be granted leave to defend the action.

The summons commencing the action which appellant seeks leave to defend recites her as second defendant and states in paragraph 11 of the particulars of claim thereof:

”On 16 March 1993 and at Windhoek the Second Defendant bound herself as surety in *solidum* for and as co-principal debtor jointly and severally with the First Defendant for the due payment of all monies which the First Defendant may from time to time thereafter owe to the Plaintiff from whatsoever cause and howsoever arising, subject thereto in that the amount recoverable in terms of the Second Defendant's aforesaid suretyship shall be limited to N$250 000,00 plus interest on the aforesaid amount and such charges and costs as may from time to time, and howsoever arising, become due and payable by the First Defendant to the Plaintiff. A copy of the Deed of Suretyship is attached hereto marked Annexure ‘C’.”

Prayers 1, 2 and 4 thereof state:

“1. Payment of the amount of N$864 314,76, subject thereto that second defendant’s total liability shall be limited to N$250 000,00 excluding interests and costs;

2. Interest on the amount of N$864 314,76 at the plaintiff’s prime lending rate from time to time, which is currently 16,5% per annum calculated on the daily outstanding balance from time to time, from September 1999 until date of payment;

3. …..;

4. Costs of such on a scale as between attorney and own client.”

Appellant was sued, as second defendant, jointly with her son-in-law, Bernardus Johannes Herlé (Herlé) as First Defendant, and two other parties who, like appellant, stood surety to loans advanced or later to be advanced to Herlé by respondent (plaintiff).

Appellant entered appearance to defend the action. She states in her founding affidavit in the application:

> "12. Immediately to my executing the Deed of Suretyship in favour of the First Respondent and in particular during the time when the negotiations between the First Respondent and Herlé were conducted, the First Respondent as represented by a certain Mr. K.W. Long, the Assistant Manager: Corporate Banking Division and G. Küschka, the Manager: Corporate Banking Division, Herlé and I expressly agreed that:
>
> (a) my liability in terms of the Deed of Suretyship so to be executed by me would be limited to N$250 000-00;
>
> (b) I would not be held liable for any amount whatsoever other than the capital amount of N$250 000-00;
>
> (c) The Deed of Suretyship to be executed would serve as security for the amounts advanced at that time and only those amounts."

She states with regard to the summons she received in the action against her, *inter alia*:

> "19. In endeavouring to make sense of the lengthy documents served on me I established that in terms of paragraph 11 of the Particulars of Claim it was *inter alia* alleged that:
>
> > '… Second Defendant's aforesaid suretyship shall be limited to N$250 000-00 plus interest on the aforesaid amount and such charges and costs as may from time to time and howsoever arising become due and payable by the First Defendant to the Plaintiff.'
>
> 20. On the basis of what I have stated in paragraph 12 aforegoing, I forthwith instructed my legal practitioners of record to file a Notice of Intention to Defend the action. At the time I also handed the copy of the summons served upon me to the practitioner."

She goes on to say:

> "21. At this juncture I wish to make it clear that at the time when I instructed my former legal practitioner to defend the action I acted under the *bona fide* belief that the First Respondent's claim against Herlé related to the amounts which the First Respondent had advanced Herlé during 1993. I will hereinafter deal with this in more detail."

That was in reference to the fact that apart from the amount advanced to Herlé in 1993 plaintiff's claim, in addition, included a loan advanced by it to Herlé in 1995.

Following entry of appearance to defend, plaintiff [respondent herein and in the Court a quo (respondent henceforth)] on 23 November 1999 applied for summary judgment against appellant and the other three parties. Prayers 1, 2 and 4 of that application, like prayers 1, 2 and 4 of the summons, read:

> "1. Payment of the amount of N$864 317-76 subject thereto that second defendant's liability shall be limited to N$250 000,00 excluding interest and costs;
>
> 2. Interest on the amount of N$864 317,76 at the plaintiff's prime lending rate from time to time, which is currently 16,5% per annum calculated on the daily outstanding from time to time from 18 September 1999 until date of payment;
>
> 3. .....
>
> 4. Costs of suit on a scale as between attorney and own client."

Lastly the affidavit in support of the application for summary judgment sworn to by respondent's Salomon Petrus van der Wath states in paragraph 2:

> "2. I can and do hereby swear positively to the facts as set out in the Summons regarding the cause of action and confirm that the First, Second, Third and Fourth Defendants are indebted,

jointly and severally, and to the extend that one of them pays, the other to be absolved from payment, to the Plaintiff for the amount and on the grounds set out in the Plaintiff's Summons herein, together with interest and costs of suit as claimed therein." (Emphasis added.)

The essential provisions of the deed of suretyships appellant signed on 16 March 1993 are correctly stated in respondent's answering affidavit as follows:

"11.2.1 Applicant bound herself as surety in *solidum* and as co- principal debtor jointly and severally with Herlé for the due payment to the Bank of 'all or any moneys which the Debtor (Herlé) may now or from time to time '- hereafter owe to you ("the Bank") from whatsoever cause and howsoever arising .....Provided that the amount recoverable hereunder shall be limited to R250 000,00 (TWO HUNDRED AND FIFTY THOUSAND RAND) plus such further sums for interest on that amount, charges and costs as may from time to time, and howsoever arising, become due and payable to the Debtor, ... all costs including legal costs as between attorney and his own client which are incurred in the successful enforcement or defence by you of any action or application or other legal process against or by the Debtor or against or by myself/ourselves under or arising or in respect of this

suretyship ... (such total amount being referred to herein as 'the Indebtedness')' (my underlining)

11.2.2 The suretyship 'is to be a continuing security for the Indebtedness, notwithstanding any intermediate settlement of account. It shall remain in force until receipt by you of notice in writing determining same and until the sum or sums due or to become due ... at the date of receipt of such notice shall have been paid.' (my underlining)

11.2.3 The provisions of the Deed of Suretyship 'comprise the entire terms of this suretyship given by me/us to you, and it is agreed that no cancellation, amendment, addition or alteration to the provisions hereof shall be of force and effect unless such cancellation, amendment, addition or alteration is reduced to writing and signed by you and me/us, as the case may be.' (my underlining)."

Events subsequent to entry of appearance to defend are partly stated in the Court *a quo's* judgment as follows:

"On 28 March 2000 applicant legal representatives at that stage informed the legal practitioner of first respondent in writing that opposition to the application for summary judgment had been

withdrawn and that first respondent may proceed with its application for summary judgment.

On 31 March 2000 summary judgment was granted against applicant and second, third and fourth respondents as follows:

1. Summary judgment in the amount of N$864 314.76 subject that second respondent's (i.e. applicant's) liability shall be limited to N$250 000.00 excluding interest and costs.

2. Interest on the amount of N$864 314.76 at the Plaintiff s (first respondent's) prime lending rate from time to time, which is currently 16,5% per annum calculated on the daily outstanding balance from time to time, from 18 September 1999 until date of payment.

3. Costs of suit on a scale as between attorney and own client.

4. An order to declare certain property owned by second respondent executable in terms of certain mortgage bonds.

It is the rescission or variation of this order which forms the subject matter of this application.

Subsequent to the summary judgment as part of settlement negotiations correspondence passed between the legal

practitioners for the first respondent and the legal practitioner acting for second respondent. In a letter dated 12 July 2000 first respondent requested *inter alia* payment of the amount of N$250 000 00 plus N$36 000.00 interest due by the surety, i.e. the applicant, before the close of business on 24 July 2000.

In a letter dated 27 September 2000 addressed to the legal practitioner for first respondent by the legal practitioner for applicant, applicant confirmed being indebted in the amount of N$250 000.00 but denies being liable for interest and costs and tendered to pay the amount of N$250 000.00 in the full and final settlement.

This offer was confirmed in various subsequent letters addressed to first respondent on behalf of applicant."

Following the obtaining of summary judgment the following events took place:

(a) On April 19, 2000 a writ of execution was issued on behalf of respondent in terms of the summary judgment stating *inter alia*:

> "Second Defendant's liability shall be limited to N$250 000-00 excluding interest and costs, <u>together</u> with interest on the amount of N$864 317,76 at <u>Plaintiff's</u> prime lending rate from time to time which is currently 16.5% per annum <u>calculated on the outstanding</u> balance from time to time from 18th September 1999 until date of payment..."

It will be noted that as on that date appellant would still have been represented by her former legal practitioner.

(b) Early in July 2000 appellant engaged the services of her present legal practitioner to whom on 12 July respondent's practitioners wrote a letter agreeing to a sale of certain properties of appellant's Co defendant's on certain conditions one of which being:

> "2. Our client receives payment of the amount due by the surety, Mrs. Rossouw, being N$250 000,00 plus N$36 000,00 interest before the close of business on 24 July 2000, alternatively Mr. Herlé and/or Rossouw furnishes our client before the close of business on 24 July 2000 with a bank guarantee and/or any other documentation which would secure payment of the amount of N$286 000,00 to our client within one month from date hereof, i.e. payment of the aforesaid amount must be guaranteed to reach our client before 12 August 2000."

(c) Appellant's legal practitioner's letter of 27 September 2000, tendering N$250 000,00 "in full and final settlement of all claims of whatever nature your client might have against mine", refers to "the judgment obtained by you on behalf of your client against my client on 31st March 2000 … states that her liability is limited to N$250 000,00 excluding interest and costs" … and goes on to say:

> "I am not sure on what basis you believe you are entitled to claim more than N$250 000,00 as the documents certainly do not provide for any liability over N$250 000,00." (My underlining.)

The said documents must necessarily include the deed of suretyship, the summons, the summary judgment and the writ of execution.

(d) On the same date, 27 September 2000, appellants filed an application to sequestrate Herlé and the estate of Brockmann & Kries (Appellant's co-defendants): her supporting affidavit to the notice of motion in that application relies on the deed of suretyship she signed and the summary judgment obtained against her as the basis of her *locus standi*.

(e) On 20th October 2000 respondents legal practitioners wrote to appellant's legal practitioner as follows:

> "RE: THE COMMERCIAL BANK OF NAMIBIA LIMITED//GUARANTEE BY MRS. A.J. ROSSOUW FOR THE LIABILITIES OF B.J. HERLE
>
> Your telefaxes of 27 September and 17 October 2000 refers.
>
> We attached hereto a copy of the suretyship from which it is clear hat your client's liability is limited to 'R250 000,00, plus

such further sum or sums for interest on that amount, charges and costs as may from time to time, and howsoever arising become due and payable to you by the debtor, including, without prejudice to the generality of the aforegoing, interest, discount, commission, stamps and all costs including legal costs as between attorney and his own client which are incurred in the successful enforcement or defence by you of any action, application or other legal process against or by the debtor or against or by myself/ourselves under or arising or in respect of this suretyship or any claim there under, together with all other necessary and usual charges and expenses (such total amount being referred to as 'the indebtedness').

Mrs. Rossouw's total indebtedness in respect of the Deed of Suretyship is thus N$250 000,00, plus interest on N$250 000,00 at 16,5% per annum calculated on the daily outstanding balance from time to time from 18 September 1999 until date of payment, plus costs on a scale as between attorney and own client.

Our attorney and own client costs amounts to N$22 820,60.

The interest calculated until 17 October 2000 amounts to N$44 527,40.

Your client's total liability in terms of the Deed of Suretyship and the Judgment obtained against your client is thus N$317 348,00."

(f) On 23rd October the reply to the above was sent; it reads:

"I have received your fax of 20th October 2000 under the above heading and can do no better than express surprise at the contents thereof.

It would appear that your client has failed to inform you of the full background of the matter and in particular the assurances given to my client by Mr. Kuschka and Mr. Long as (at the time) Manager and Assistant manager of the Corporate Banking Division of your client bank.

I repeat: Messrs Kuschka and Long expressively confirmed to my client and to Mr. Herlé that the liability of Mrs. Rossouw was limited to N$250,000-00.

In the circumstances I repeat:

1. My client hereby tenders payment to yours in the amount of N$250,OOO-00.

2. This amount will be paid to your client within seven days of receipt by me of your client's acceptance thereof and the conditions herein set out.

3. On receipt of the monies your client will confirm that the bank has no further claim of whatsoever nature against my client.

4. Your client will immediately release the insurance policy on my client's life at present in the bank's possession.

5. There will be no interest charged on this amount to the home loan bond account of Mr. Herlé from the 17th October 2000.

6. The capital of N$250,OOO-00 will be applied entirely to the reduction of the home loan bond account of Mr. Herle with your client.

Finally - I repeat - should your client not accept the foregoing conditions and at the same time accept payment of the capital amount of N$250,OOO-00 within a period of ten days from date hereof, application will be made to Court to have the Judgment obtained against my client on the 31st March 2000 amended to limit her liability to N$250,OOO-OO and in

this particular regard to apply to have the costs awarded to my client on an attorney and own client basis."

(g) The reply to the above was sent on 24th October 2000, reading as follows:

> "RE: THE COMMERCIAL BANK OF NAMIBIA LIMITED *//* GUARANTEE BY MRS. A.J. ROSSOUW FOR THE LIABILITIES OF B.J. HERLE
>
> We acknowledge receipt of your telefax of 23 October 2000.
>
> If you want interest to stop accruing on the amount of N$250 000.00, you should immediately effect payment of the amount of N$250 000.00 to ourselves.
>
> If you thereafter want to bring an Application to amend the Judgment, you are more than welcome to do so.
>
> We give an undertaking that we shall not proceed with execution for the outstanding balance currently due in terms of the Judgment obtained against your client between the date on which you have effected payment of the amount of N$250 000.00 and the Court's ruling in respect of any application/action which you may consider to bring provided that you serve your application/action on us within 7 (seven) days from date hereof.

> Since your client signed surety for Mr Herle, it goes without saying that any amount recovered from your client will reduce Mr Herle's liability with our client.
>
> We do not agree with your contention that our client is not entitled to interest on the capital sum of the judgment, simply by virtue of the fact that your client has made an offer to partly pay the Judgment Debt due to our client. As stated hereinbefore, if your client wants interest to stop accruing on the capital amount due by her, she should effect payment of the capital sum at least."

(h) On 27 November 2000 a writ of attachment of appellant's movable goods was issued and the said goods were attached.

This fact is not revealed in appellant's affidavits.

(i) The above seems finally to have precipitated action as on 28th November 2000 the rescission application was filed – some eight months after the said summary judgment was granted.

Hoff, J, summed up appellant's contentions as follows:

> "The applicant in her founding affidavit stated that she is not liable for interest and costs because prior to the execution of the deed of suretyship it was orally agreed between two employees acting on

behalf of first respondent and herself that her liability would be limited to the capital amount of N$250 000,00 only and only for amounts advanced during 1993 and no other amounts whatsoever.

Applicant contends that the deed of suretyship does not correctly record the terms of the agreement between herself and first respondent because standard form documents had been utilized which were not adapted to correctly reflect what had orally been agreed upon."

He correctly stated that:

(a) Applicant may rely on Rule 44(1)(a) of the High Court Rules or on the Common law. Rule 44(1)(a) provides:

> "1. The Court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary –
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

and that

(b) in an application in terms of Rule 44(1) the applicant must prove that the judgment was

(i) erroneously sought or erroneously granted;

(ii) the judgment was granted in the absence of the party affected thereby

The learned Judge found that:

> "Regarding the absence of the applicant in this matter although it appears as if she had not been in court when the summary judgment was granted she was aware of the fact that it would be granted against her and abided by it.
>
> Thus even though applicant was absent she acquiesced to the granting of the summary judgment."

Stressing the important requirement that "applicant must show that a judgment was sought or granted erroneously Hoff, J. stated:

> "Mr. Schickerling who appeared on behalf of applicant submitted *inter alia* that applicant after having received respondent's summons noticed that in terms of the particulars of claim she was also liable for costs and interest on the amount of N$250 000,00. Acting on the belief that she was not liable for interests and costs she instructed her legal practitioner to file a notice of intention to defend.

It is common cause that applicant did not file any opposing affidavit in opposition to the application for summary judgment."

Hoff, J. then referred to appellant's stated reason for withdrawing her opposition to the application for summary judgment namely the fact that "following a consultation with her legal practitioners she came to the conclusion that the words 'excluding interest and costs' in prayer one of the summons meant that she would not be liable for costs (and interest) and as such instructed her legal practitioners to withdraw her opposition to the application for summary judgment." Appellant's own words need to be quoted in full. She said the following in this regard:

"23. Subsequent thereto and on 23 November 1999 the First Respondent served and filed an application for summary judgment which was set down for Friday, 21 January 2000 (Annexure "F"). Following agreement between the parties this application was on 21 January 2000 postponed *sine die.* Subsequent thereto and by further agreement between the parties the application was set down for hearing on Friday, 31 March 2000. A Notice of Set Down to this effect was thereafter served on my former legal practitioner by the First Respondent's legal practitioners on 29 February 2000.

24. Subsequent thereto and in <u>particular when I was requested to provide instructions for the purpose *of* drawing opposing affidavits</u>: (Emphasis supplied.)

a. I acted under the *bona fide* belief that the sum of N$250,OOO-OO which was claimed from me in terms of the summons, related only to my suretyship for the amounts lent and advanced by the First Respondent to Herlé during 1993 only; and

b. At that time I noticed the wording of prayer 1 of the prayers. I interpreted the words '*excluding interest and costs*' contained in prayer 1 of the First Respondent's particulars of claim to mean that I would not be liable for the interest and the costs as formulated in prayers 2 and 4 of the First Respondent's particulars of claim.

25. After consultation with my former legal practitioner I believed that the First Respondent's prayers and in paragraph 11 thereof meant that:

a. The Deed of Suretyship did not correctly reflect the common intention of the parties because standard forms had been used which had not been amended to reflect what had in fact been orally agreed upon between the parties prior to the completion of the form;

b. As such the Deed of Suretyship had to be rectified to reflect the common and continuing intention of the parties;

c. In addition paragraph 11 of the First Respondent's particulars of claim was an incorrect version of what had actually been orally agreed upon between the parties prior to the completion of the Deed of Suretyship; and

d. Notwithstanding the fact that the Deed of Suretyship did not correctly reflect the common intention prayer 1 of the First Respondent's claim was in fact intended to mean that the interest and costs as prayed for in prayers 2 and 4 of the First Respondent's particulars of claim were to be so excluded from the claim against me.

26. In particular I came to the conclusion that the words *"excluding interest and costs"* as contained in prayer 1 were intended to mean that all or any interest and/or costs would be excluded from my liability and this as was initially agreed upon.

27. For this reason and on 29 March 2000 I instructed my former legal practitioners to file a notice of withdrawal of my

opposition to the application for summary judgment (Annexure “G”).”

Annexure “G” is a notice of withdrawal jointly filed on behalf of all the defendants cited in plaintiffs summons.

In her replying affidavit the reason is stated differently. I again quote in full what she said:

“5.6 I admit that at that time settlement negotiations were conducted between my legal practitioners of record and those acting for the First Respondent.

5.7 The purpose of those negotiations was to find a mutually agreeable method for the realization of the assets of the Third Respondent at the best possible price.

5.8 I point out that at the time all the parties concerned contemplated that the assets of the Second, Third and Fourth Respondents would realise sufficient to ultimately absolve me from my liability of N$250,OOO-OO in terms of the deed of suretyship. As such and at that time the defences which I might have had were never an issue and were never discussed.

5.9 This is also a reason why a sale in execution was indicated as a last resort (see Annexure "S2")

5.10 For this reason and as I verily and truly believed that my liability (if any) would be extinguished, my legal practitioners of record withdrew the opposition to the summary judgment. I therefore reiterate and confirm the allegations contained in paragraphs 12, 15, 19,20, 24(b), 25 to 27 and 31 of my founding affidavit.

5.11 I therefore state that the withdrawal of my defence was done solely on the basis of 5.8 and 5.10 *supra*. I also reiterate the contents of paragraph 21 *of* my founding affidavit in the context hereof.

5.12 It was on this basis that the First Respondent ultimately obtained judgment against me, in my absence on 31 March 2000. …"

The paragraphs 12, 15, 19, 20, 24(b) and 25 of appellant's founding affidavit have already been quoted in this judgment. For completeness paragraphs 27 – 31 read as follows:

"27. For this reason and on 29 March 2000 I instructed my former legal practitioners to file a notice of withdrawal of my opposition to the application for summary judgment (Annexure "G").

28. Following this and on the 31 March 2000 summary judgment was entered against Herlé, Third and Fourth Respondents and myself in terms of Annexure "A' hereto. "

29. Shortly thereafter negotiations proceeded between Herlé (as represented by my current attorney of record) and the legal practitioners for the First Respondent in an effort to settle the liabilities of Herlé and the Third and Fourth Respondents in terms of the judgment granted in favour of the First Respondent.

30. At the time I was given the assurance by Herlé that the outcome of such negotiations would have the effect of releasing me from my total indebtedness towards the First Respondent. Acting under the *bona fide* belief that this would indeed be the case I did not pursue the matter further but anxiously awaited the outcome of such negotiations.

31. As part of the settlement negotiations, correspondence passed between the legal practitioners for the First Respondent and the attorney acting for Herlé. In a letter of 12 July 2000 the attorney for the First Respondent claimed that I was liable to the First Respondent not only for the sum of N$250 000-00, but also for the interest thereon…"

From all the passages extracted from appellant's affidavits there appears to be a deliberate vagueness in her narration of events, particularly as regards-

(a) The nature of the consultation with her legal practitioners, how, for example, she arrived at the interpretation the phrase “excluding interest and costs” in prayer 1 of the particulars of claim and the summary judgment application meant that she would not be liable for the interest and costs as formulated in prayers 2 and 4 of the First Respondent’s particulars of claim;

(b) what was her true reason for withdrawing her opposition to the application for summary judgment.

It is common cause that at the relevant time she was represented by three legal practitioners, including counsel briefed on her behalf. As she says, it was “after consultation with my former legal practitioner I believed first respondent’s prayers in paragraph 11 thereof meant that:

(a) The Deed of Suretyship did not correctly reflect the common intention of the parties because standard forms had been used which had not been amended to reflect what had in fact been orally agreed upon between the parties prior to the completion of the form” et. Etc. (para 25 of her affidavit).

The reason she gives in her replying affidavit, which accords with the evidence of her legal practitioners, seems to be the true reason why appellant allowed the summary judgment to be taken against her without taking any further steps to appose. This inference is irresistible when regard is had to the facts

as stated by her. I refer to such facts as that there was, according to her, no misunderstanding on her part what was being claimed against her in the summons, the summary judgment application and her contention in paragraph 15 of her supporting affidavit where she state:

> "15. At the time I executed the Deed of Suretyship in favour of the First Respondent, Küschka and Long particularly pointed out the wording 'provided that the amount recoverable hereunder shall be limited to R250 000-00 (two hundred and fifty thousand rand) only' as appeared in the Deed of Suretyship. As such I accepted that the amount for which I was to be liable as inserted in the standard Deed of Suretyship would be limited to N$250 000-00 only. Furthermore, and acting on the assurances of Küschka and Long I accepted that the Deed of Suretyship reflected the true and correct intention and/or prior oral agreement."

Hoff, J. remarked that it was not clear whether she had been advised by her former legal practitioners or whether she concluded herself that the words "excluding interest and costs" meant that she would not be liable for such costs, and that the only supporting affidavits from her former legal practitioners were attached to her replying affidavit which "confirmatory affidavits" do not take the matter any further on this point … "the applicant must make out her case on her founding affidavit." Hoff, J. enumerated the circumstances under which it has been decided that a judgment is granted erroneously; pertinent for present purposes, these include:

> "(c) if there existed at the time of its issue a fact which the judge was unaware of which would have induced the judge, if he had been aware of it, not to grant the judgment. Nyingwa v Moolman N.O. 1993(2) SA 508."

The other circumstances are not relied on by appellant. The judge concluded:

> "I am of the view that if one has regard to the procedures which culminated in the granting of the summary judgment that that judgment was neither sought erroneously nor granted erroneously for purposes of an application under the provisions of Rule 44(1)(a) of the Rules of this Court."

Among the wide ranging errors the learned judge *a quo* is said in the notice of appeal to have committed is ground 2, namely:

> "2. The Honourable Judge further erred in failing to arrive at the conclusion that the Summary Judgment was granted erroneously and this based on the facts set out in the founding and supporting papers."

The facts set out in her founding affidavit clearly show that –

> (a) At all times after receipt of summons appellant was legally represented;

(b) On receipt of the summons appellant appreciated that not only the amount of N$250 000-00 was being claimed against her but also interest and costs, hence her instructions to her legal practitioners to enter appearance to defend;

(c) That when summary judgment was applied for, she consulted with her legal practitioners; but she is silent and vague as to whether she revealed to them the nature of her defence; and, if not, why not;

(d) That she doesn't say whether, when she decided to instruct her legal practitioner to withdraw her opposition to the application for summary judgment, the conclusion she had reached as to the meaning of plaintiff's particulars of claim, especially the words "not including interest" was as a result of advice from the legal practitioners or was her independent conclusion and if so, why in the face of the claim by plaintiff, repeated several times in the papers, for interest and costs;

(e) All in all and on her own version of events she would have been quite aware as to the extent of the claim against her but took a deliberate step to withdraw her opposition to summary judgment;

(f) Appellant did not give instructions to her legal practitioners to file an opposing affidavit to the summary judgment and no such opposing affidavit was filed and her so called defence was not discussed with nor revealed to her former legal practitioners. The

supporting papers would admittedly include confirmatory affidavits of her former legal practitioners which were only forthcoming when she filed her replying affidavit. And if one has regard to those affidavits one finds that they reveal that:

(i) Kruger's:

(i)(a) He apparently represented appellant only on express instruction to reach a settlement "which would result in the said Rossouw being released from her liability (if any) in terms of the deed of suretyship signed by her in favour of said Commercial Bank of Namibia Ltd."

(i)(b) "at no particular stage (during the negotiations) were any defences which the said Rossouw might have had discussed or dealt with …"

(ii) Metcalfe's:

(ii)(a) He instructed Kruger to enter appearance to defend for appellant.

(ii)(b) He took part in the negotiations for a settlement on instructions of Herlé.

(ii)(c) Oppositions to summary judgment of all four defendants were withdrawn during the settlement negotiations.

(ii)(d) Para. 7 and 8 of his affidavit states:

> "7. At the time when such oppositions were withdrawn, it was in the contemplation of all parties concerned that the effect of the method of liquidation of the assets of the two companies and Herlé, would realize an amount which would be sufficient to ultimately extinguish any liability (if any) of the said Rossouw.
>
> 8. In the premises the opposition of Rossouw in particular, was withdrawn under the bona fide belief that the method of liquidation would in fact extinguish her liability (if any) in terms of the deed of suretyship and no further legal action was as such, contemplated to be continued

against her." (My emphasis added.)

Such instruction to withdraw the opposition to the application for summary judgment was also in the face of or despite the prayer to that application already referred to above, and the supporting affidavit thereto which, to repeat, reads:

> "2. I can and do hereby swear positively to the facts as set out in the Summons regarding the cause of action and confirm that the First, Second, Third and Fourth Defendants are indebted, jointly and severally, and to the extent that one of them pays, the other to be absolved from payment, to the Plaintiff for the amount and on the grounds set out in the Plaintiff's Summons herein, together with interest and costs of suit as claimed therein." (My emphasis.)

In her founding affidavit appellant states that she only discovered in November 2000 that "first respondent claim related to the loan agreement entered into in 1995", she had not been advised of this at any stage nor was her permission sought "prior to Herlé entering into same". (see paragraphs 42 – 48). She continues:

> "49. I state that as a result of such an agreement and in particular considering the increased burden which such an agreement could place on me, that such an agreement substantially prejudices me. The First Respondent in entering into such an

agreement with Herlé either by its actions substantially prejudiced me, alternatively novated the initial cause of action and as such I am released from my obligations in terms of the Deed of Suretyship.

50. I therefore respectfully submit that the judgment granted by the above Honourable Court on 31 March 2000 stands to be rescinded in that such judgment had been erroneously sought or erroneously granted in the absence of myself. In particular and in addition the Deed of Suretyship does not reflect the true intention of the parties and stands to be rectified.

51. Alternatively and in the event of the above Honourable Court finding that I am liable for the amount of N$250 000-00 by virtue of the admissions made in the correspondence between the legal advisors for the parties, then and in such event I submit that the order dated 31 March 2000 by the above Honourable Court in any event stands to be varied in that:

a. at all material times hereto it was the common continuing intention of the parties that I bound myself for N$250 000-00 only;

b. the Deed of Suretyship does not correctly reflect this common intention;

c. such failure to reflect the common continuing intention of the parties can be ascribed to the fact that the standard form documents had been used, which were not adapted to record correctly what had been orally agreed before they were completed and signed;

d. considering in particular the letter dated 5 May 1993 (Annexure "N") by the First Respondent, the First Respondent by instituting action on the strict wording of the Deed of Suretyship had erroneously sought judgment against me alternatively the judgment granted is a result of a mistake common to the parties."

Mr. Trisk for the appellant submitted that the enquiry must be to establish whether or not there existed at the time (the summary judgment was granted) a fact of which the judge was unaware which would have precluded the granting of the judgment. That fact, it would appear, is the allegations by appellant (repeated in various paragraphs of her founding affidavit. See record p.8, line 22, p.9 line 14, p.9 lines 15 – 20, p.10 lines 1 – 12, p.19 lines 24 – 30 (par. 39 of her founding affidavit) and Herlé's confirmatory affidavit record p. 67.) that

"she expressly agreed with a certain Mr. K.W. Long ('Long') and G. Küscha ('Küscha'), representatives of the respondent, that the

> execution by her of a deed of suretyship in favour of the respondent for purposes of securing a loan which her son-in-law (Herlé) sought to secure from the first respondent would be subject to the condition that her liability would be limited to the sum of N$250 000-00, that she would not be held liable for any amount other than the aforesaid sum and that the suretyship would serve as security for the amounts advanced at that time and only those amounts."

Basing his argument on the fact that these allegations were not contradicted (because affidavits could not be obtained from Long and Küscha) he concludes that "The answer to the enquiry can only ultimately be tested by the trial Court. It is the only Court that can afford the appellant an opportunity of ventilating her defence and adjudicate it on its merits". One answer to this is that the Court *a quo* was not and this Court is not dealing with an application for summary judgment. The principles applicable to the two applications are different. In my view all the facts referred to above fully justify the conclusion reached by Hoff, J. that the summary judgment "was neither sought erroneously nor granted erroneously for the purposes of an application under the provisions of Rule 44(1)(a) of the Rules of this Court. Furthermore the inference drawn in respondent's submission in its answering affidavit to the rescission application is inescapable, namely:

> "… the present allegation of applicant is nothing but a recent fabrication of a false defence to an already conceded and admitted liability."

Furthermore on the facts properly considered and in the absence of any confirmatory explanation by her erstwhile legal practitioners the inference that the defence was never broached to them because it was not true is irresistible.

In Tshabalala and Another v Peer, 1979(4) SA 27 (TPD), Eloff, J. considered an application for rescission of a default judgment, based inter alia, under the provisions of Rule 42(1)(a). The learned judge concluded at p. 30F – 31A:

> "I cannot however accept the submission that the order of Margo, J was 'erroneously sought or erroneously granted'. The plaintiff was fully within his rights in pressing for judgment at the hearing. He had done all that the procedural Rules required of him. Even if defendants had changed their attorneys (a matter on which I share the doubts entertained by Kriegler, AJ), plaintiff was entitled to adopt the attitude that, until there was compliance with Rule 16, service of the notice of trial on Geffen and Belnick was adequate. They in fact did more, they notified attorney Oosthuizen of the date of hearing. Mr Serrurier argued that with the knowledge that Geffen and Belnick and Oosthuizen had possibly not notified defendants of the date of trial they should have caused plaintiff's counsel to inform Margo, J that defendants were possibly unaware of the fact that the matter had been enrolled for trial. And he contended that had Margo, J been so informed he would possibly have adjourned or postponed the trial until defendants were notified thereof. In my view, however, Geffen and Belnick had good reason to believe that defendants had been told of the trial and had chosen not to appear. And, even if Margo, J had been informed that defendants were possibly unaware of the enrolment of the matter, he would in my judgment have acted correctly had he nevertheless proceeded with the hearing of the matter. He may possibly have required some sort of notification to be given the defendants, but had he done so it would not have been due to legal compunction but an extravagance of fairness.
>
> In the judgment in the De Wet case, *supra* at 10 TRENGOVE, AJA seems to postulate proof of an irregularity as a prerequisite for the conclusion that a judgment was erroneously sought or granted. I do not believe that any irregularity was committed. The appeal is dismissed with costs."

Trengove, A.J.A., had dealt on appeal with a similar application in De Wet and Others v Western Bank Ltd, 1979(2) SA 1031 AD where the learned judge of appeal said the following at p. 1038:

> In the Supreme Court an application for the rescission of a default judgment can be based on the provisions of Rule 31 (2) (b) or Rule 42 (1), or on common law principles, depending on the circumstances of the particular case. It is common cause that in the present instance the appellants cannot rely on the provisions of Rule 31 (2) (b). Counsel for the appellants presented his argument under two main heads. Firstly he contended that the Court of first instance should have rescinded the judgments and orders in question under the provisions of Rule 42 (1) (a) as being judgments and orders 'erroneously sought and erroneously granted' against the appellants, in their absence. A number of arguments were advanced in support of this proposition. Counsel for the appellants referred, in the first instance, to the fact that, in withdrawing as attorney for the appellants, Lebos had failed to comply with the provisions of Rule 16 (4) in at least two respects. This is common cause. The formal notification to the Registrar did not specify the date when, the parties to whom, and the manner in which notification was sent to all parties concerned, and it was not accompanied by a copy of last-mentioned notification. It was, accordingly, contended that the proceedings before VAN REENEN J were irregular and that the judgments against the appellants had been erroneously sought and granted. In my view there is no substance whatever in this contention. The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16 (4). There is no question of any irregularity on the part of the respondent. At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial Court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before VAN REENEN J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39 (3) in respect of the appellants' claims and to move for judgment against the appellants under Rule 39 (1) on the counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42 (1) (a)."

Dealing with a similar application under Rule 42(1)(a) a White, J. in Nyingwa v Moolman N.O., 1993 SA 508 came to the same conclusion when he said at 510H – 511A:

> *"In casu* it was manifest to the presiding Judge that the defendant's attorneys had been aware of the application for summary judgment from its inception, and that the defendant had been represented by counsel at the first hearing of the application. Under these circumstances the Judge was fully justified in accepting that the defendant was a wilful defaulter, and that summary judgment should be granted. In view of the on-going efforts to defend the application by the attorneys, to whom the defendant had entrusted the defence of his case, it is difficult to envisage circumstances in which the judgment was erroneously granted. The Court would have to be satisfied that the defendant is absolved from blame for his ignorance of the application, and that the attorneys were solely to blame for not having informed him of the application and for their late withdrawal from the case. There is no evidence on the papers to substantiate such findings, but, to the contrary, the Court has found, as is set out later in this judgment, that the defendant was grossly negligent in not keeping in contact with his attorneys and also not advising them fully of the nature of his defence. In my opinion, therefore, summary judgment was not granted erroneously and the application cannot be brought under Rule 42(1)(a)."

Rule 44(1)(a) of the High Court Rules is worded in exact terms as the South African Rule 42(1)(a). The scenario in the present case is such that I am compelled to the same conclusion reached in the above cases. The deliberateness of appellant's action in withdrawing her apposition to summary judgment is clearly stated by her and her former legal practitioners. There were absolutely no unwarranted steps taken by respondents in obtaining the summary judgment.

Hoff, J. then went on to consider the application under the common law and came to the conclusion that:

(a) appellant had not shown that there is some reasonable and acceptable explanation why the judgment was allowed to go by default …;

(b) she had failed to show that she had a *bona fide* defence to plaintiff's claim;

(c) it was unlikely that the phrase prayer one in the application for summary judgment "N$250 000-00 excluding interest and costs" could have been interpreted that interest and costs were not claimed by the plaintiff;

(d) the application for rescission was not brought within a reasonable time.

He concluded that "in the circumstances he was not persuaded that applicant had shown that she was entitled to the relief sought.

It would be superfluous to repeat the reasoning that led the learned Judge *a quo* to his conclusions on each point. Suffice it to say, I can find no fault in his reasoning based on the facts he found and stated in the judgment. In my opinion he applied the proper approach to applications for rescission under the common law namely that the applicant should comply with the following requirements in order to show good case:

(a) he must give a reasonable explanation of his/her default;

(b) the application must be *bona fide*;

(c) he must show that he has a *bona fide* defence to the plaintiff's claim.

See HDS Construction (Pty) Ltd v Wait,1979(2) SA 298 (E) at 300F – 301C.

Although in dealing with each point the learned judge indicated that he would dismiss the application on that ground alone, he came to his overall conclusion after a consideration of all the facts and circumstances (De Witts Auto Body Repairs (Pty) Ltd v Fedgan Insurance Co. Ltd., 1994(4) SA 705 9ECD) at 711 D – F. In other words he exercised his discretion judicially and I find that this court is not at liberty to upset his decision. (De Witt's case, *supra*, at 709 F)

Because of the view I take of the matter I think it is necessary only to consider the *bona fides* and the merits of appellant's proposed defence. In Smith v Saambou Bank Ltd, 2002(6) SA 346 Jones, J. had to consider the strength of a defence of applicants for rescission of a default judgment in circumstances where the applications were out of time. The learned judge restated the principles applicable as follows at 349 C – F:

> "Both applications are out of time and the applicants seek condonation. The explanation for the delay in each case is weak. So also the explanation of each applicant for allowing judgment to be taken against him in the first place, which affects the *bona fides* of the applications for rescission (Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O); HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E) at 300F - 301C; De Witts Auto Body Repairs (Pty) Ltd v Fedgen

> Insurance Co Ltd 1994 (4) SA 705 (E)). In these circumstances the strength of the applicants' defence on the merits of the case becomes crucial. Condonation will be granted and rescission will be ordered only if the applicants can satisfy me that the defence they wish to raise on the merits if the matter goes to trial has reasonable prospects of success. If it is a weak defence the applications have little chance of succeeding. See, for example, Zealand v Milborough 1991 (4) SA 836 (SE) at 838D - E where the following guideline appears:
>
> > '. . . (A) measure of flexibility is required in the exercise of the Court's discretion [to grant rescission]. An apparently good defence may compensate for a poor explanation (Harms Civil Procedure in the Supreme Court 313 (K6)), and *vice versa*.'
>
> The question, then, is whether I am realistically able to conclude that the applicants have 'an apparently good defence'."

For the reasons which I have already stated and for the reasons stated by him I agree with Hoff, J. who said that "applicant has not shown that there is some reasonable explanation why the judgment was allowed to go by default. In that context Hoff, J. referred to a passage in Maujean t/a Audio Agencies v Standard Bank of SA Ltd, 1994(3) SA 801 (c) at 804 B – E:

> "It is clear on authority that a defendant who knows that default judgment is to be taken against him and does not demur but allows the plaintiff to take his course, is presumed to be in wilful default and is not entitled to rescission of the judgment."

Mr. Coetzee for the respondent referred us to a number of decisions in which the word "willful" has been interpreted as meaning "intentional", or "deliberate".

> See: Neuman (Pty) Ltd v Marks, 1960(2) SA 170 (SR) at 173; Hendricks v Allen, 1928 CPD 519 at 521; Chetburn v Barkett, 1931 CPD 421 at 423; Mwaami (Pty) Ltd v Standard Finance Limited, 1977(1) SA 860 (R)

at 862; Van Zyl v Kiln Non Marine Syndicate NO 510 of Lloyds London, 2003(2) SA 440 at 453 (para 33).

To mention but a few, the most telling factor against the *bone fides* of appellant's defence in the present matter is that she kept it close to her chest and did not reveal it to her former legal practitioner, including counsel briefed on her behalf. If she genuinely thought she had such a defence it is surprising she did not reveal it to them when notice of set down of the application for summary judgment was served and she "was requested to provide instructions for the purpose of drawing up opposing affidavits". (See para 23 and 24 of her founding affidavit pp. 12 – 13 of the record.) In the absence of any evidence that she was advised to reach the interpretation or "belief that the words excluding interest and costs" meant "'that she would not be liable for the interest and the costs as formulated in prayers 2 and 4 of First Respondent's particulars of claim", it must be presumed that she would have come to that interpretation or belief unaided. That action begs the question for a person who is "not at all eloquent in the English language" as she said in par 9 of her replying affidavit (p. 151 of the record) which was in reply to the following submission in respondent's answering affidavit:

"11.3 I respectfully submit that it is significant that the Applicant does not allege:

11.3.1 that she did not read the deed of suretyship prior to executing same;

11.3.2 that she did not understand any of the other terms and conditions of the Suretyship or that the same was not explained to her prior to executing the Deed of Suretyship;

11.3.3 that any of the other terms of the Deed of Suretyship, apart from those referred to in her paragraphs 12(a), (b) and (c), do not to correctly reflect the agreement between the parties."

Her action also begs the question for a person about whom Mr. Trisk, appearing for her in this appeal, said in paragraph 60 of his written submission:

> "The respondent's protestations in regard to the appellant's version are predicated on an understanding of the law and a legal construction. This is not an understanding which the appellant ought to be found to have had an nor ought it to be found that she would necessarily have received the education that she ought to have received at the hand of her erstwhile legal practitioners. …"

In this regard I find the submissions in the rest of paragraph 60 and 16 of Mr. Trisk's submissions startling and to have no substance at all if it is sought to conclude that appellant acted on advice from her legal erstwhile practitioners:

> At paragraph 60 "… The appellant, it is conceded by the respondent, enjoyed legal representation

(whether it was good or bad) and acted, it must be assumed and accepted, in conformity with advice received from the legal practitioners appointed by her. The appellant, on this version, was not 'on a frolic of her own' and nor was she 'disdainful' of the Rules." (My underlining.)

At paragraph 16 "What the respondent does not do, however, is volunteer any explanation as to the basis upon which the appellant would, on any version other than her own, conduct her affairs (that is, instruct the withdrawal of her opposition to the respondent's application for summary judgment) in such a manner as to suggest a degree of mental and intellectual infirmity which is redolent of a mind crazed either by alcohol or drugs. So bizarre would the appellant's conduct in withdrawing her opposition to the respondent's application for summary judgment otherwise be that it can only attributed to the version postulated by her and to nothing else."

As regards the rest of paragraph 60, there is no evidence on which to make the proposed assumption let alone to conclude that it should be accepted. On the contrary the evidence is that she acted on her own in assuming that the words "excluding interest and costs" meant she would not be liable thereto, an assumption which, may it be noted, she was not justified to make when she had every opportunity to be properly advised or to have the phrase interpreted for her by her legal practitioners at the time of the consultation with them she admits she had before making it.

As regards what Mr. Trisk submits in paragraph 16 of his heads of argument, apart from the fact that respondent had no onus to explain appellant's actions, the explanation is furnished in appellant's own replying affidavit (paras 5.6 – 5.12) and indeed in her erstwhile legal practitioners' so called "confirmatory" affidavits (pp 161 – 166 of the record). There is nothing bizarre or crazed in appellant abandoning her defence (assuming it was genuine) in the hope or belief that her liability in terms of the deed of suretyship would be liquidated by the settlement which was being negotiated.

I now turn to the consideration of appellant's allegations as to what Küschka and Long orally agreed with her and the assurance she says they gave to her as to the extent of her liability.

According to her she executed the deed of suretyship on 16 March 1993 (para 11 of the founding affidavit) but

> "12. Immediately prior to my executing the Deed of Suretyship in favour of the First Respondent and in particular during the

time when the negotiations between the First Respondent and Herlé were conducted, the First Respondent as represented by a certain Mr. K.W. Long, the Assistant Manager: Corporate Banking Division and G. Küschka, the Manager: Corporate Banking Division, Herlé and I expressly agreed that:

a. my liability in terms of the Deed of Suretyship so to be executed by me would be limited to N$250 000-00;

b. I would not be held liable for any amount whatsoever other than the capital amount of N$250 000-00;

c. The Deed of Suretyship to be executed would serve as security for the amounts advanced at that time and only those amounts.

13. Subsequent thereto and particularly on 16 March 1993 when I executed the Deed of Suretyship I was again assured by both Küschka and Long in the presence of Herlé that my total liability in terms of the Deed of Suretyship would be as set out in the sub-paragraphs as aforegoing."

She says further:

"15. at the time when I executed the Deed of Suretyship in favour of the First Respondent, Küschka and Long particularly

> pointed out the wording 'provided that the amount recoverable hereunder shall be limited to R250 000-00 (two hundred and fifty thousand Rand) only' as appeared in the Deed of Suretyship. As such I accepted that the amount for which I was to be liable as inserted in the standard Deed of Suretyship would be limited to N$250 000-00 only. Furthermore, and acting on the assurances of Küschka and Long, I accepted that the Deed of Suretyship reflected the true and correct intention and/or prior oral agreement."

It is not alleged that Kuschka and Long meant to fraudulently misrepresent to her the contents of the Deed of Suretyship, nor does she say she herself did not read the Deed or that it was not read to her in full.

In South African Railways and Harbours v National Bank of South Africa Ltd., 1924 AD 701 it was said at p 715 – 16:

> "The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract. (My underlining.)

Having regard to the deliberate abstaining by appellant from raising her defence with her former legal practitioners; the time it took, after the summary judgment was granted, to raise the proposed defence the

circumstances that ultimately led to it being raised and the ambivalent explanation why she allowed the summary judgment to be entered against her, I am satisfied that there is no reasonable prospect of appellant successfully claiming that there was a prior oral agreement with Long and Küschka which was not reflected in the Deed of Suretyship. In this connection it is interesting to note that Mr. Trisk submits in paragraph 35 of his written heads of argument:

> "35. Given:
>
> 35.1 the appellant's allegations concerning the legal input that she received at the time that the respondent's summons was served on her;
>
> [Record, pp. 11- 15: Founding Affidavit paras 20-27]
>
> and
>
> 35.2 the corroboration afforded such allegations by Metcalfe and Krüger;
>
> [Record, pp. 161-166]
>
> and
>
> 35.3 the admissibility of the appellant's evidence regarding a prior oral agreement; and
>
> 35.4 the respondent's inability to contradict such evidence; and

35.5 the largely unmotivated dismissal by the learned Judge *a quo*

[record, p. 230, lines 12-13]

of the proposition that the appellant has managed to establish a *bona fide* defence to the claim against her,

the appellant, it is submitted, has, as it were, 'done enough' to satisfy the requirement of '*good cause*' and has, in so doing, similarly '*done enough'* to satisfy this Court not only that she is *bona fide*, but that she has a *bona fide* defence.

36. The respondent, for purposes of controverting the aforegoing, places much reliance upon the express terms of the suretyship

[Record, pp. 78-79)

and the learned Judge *a quo*, in similar vein, accepted the argument of counsel appearing on behalf of the respondent in the Court *a quo* to the effect that *'...if the interests and costs were intended to be excluded the prayer would have read "N$250 000-00 including interest and costs"'*."

A clear examination of appellant's allegations in paragraphs 20 – 27 of the founding affidavit, and the affidavits of Metcalfe and Krüger, reveal that if by the above submission Mr. Trisk seriously means to say the two legal

practitioners corroborate all of those allegations he is putting an impermissible gloss over the word corroboration.

The agreement and the said assurance are said to be confirmed by a letter handed to appellant's current legal practitioner by Herlé in October 2000, it is dated 5th May 1993. The letter which was signed by Küschka and Long reads as follows:

> "LOAN ACCOUNT NUMBER 0080126364009
>
> Attached please find copy of Loan Agreement in respect of the abovementioned account.
>
> Repayment of the loan is as set out in the Agreement. Please be guided accordingly.
>
> As security we hold the following:
>
> 1. R180 000-00 First Continuing Covering Mortgage Bond over erf 400 Eros Park plus Cession of Fire Policy.
>
> 2. R200 000-00 Second Continuing Covering Mortgage Bond over erf 400, Eros Park.
>
> 3. R200 000-00 Third Continuing Covering Mortgage Bond over erf 400, Eros Park (still to be registered).
>
> 4. Cession of Book Debts.
>
> 5. Cession of 50% shareholding in– Brockmann & Kriess (Pty) Ltd.
> - Castenfelt & Co. (Pty) Ltd.
>
> 6. Unlimited Cession of Life Policies – Death Benefit
> R850 000-00 (still to be taken)
> R500 000-00.
>
> 7. R120 000-00 First Surety Bond by Mrs. J.A. Rossouw over portion of Farm Venterspost 111, Grootfontein, 71-99895 ha in extent (still to be registered).
>
> 8. Guarantee restricted to R250 000-00 by mother in law. Mrs. J. Rossouw, supported by General Cession and Pledge of FNB investment totaling R244 000-00 (Still to be registered).
>
> We thank you for your support."

It is obvious from the way the listed securities are phrased that the letter does not purport to be a complete narration of the comprehensive provisions of those securities, and the particular of the Deed of Suretyship which, from what appellant says in paragraph 15 of her founding affidavit, were pointed out to her by Long and Küschka. If indeed Kuschka and Long took the trouble to point out anything in the Deed of Suretyship it is highly improbable that the two representatives of respondent would have omitted to read or point out the rest of the essential provisions in the said Deed of Suretyship which, it must be repeated, provides as follows:

> "…for the due payment to the Bank of 'all or any moneys which the Debtor (Herlé) may now from time to time hereafter owe to you ("the Bank") from whatsoever cause and howsoever arising …. Provided that the amount recoverable hereunder shall be limited to R250 000,00 (TWO HUNDRED AND FIFTY THOUSAND RAND) plus such further sums for interest on that amount, charges and costs as may from time to time, and howsoever arising, become due and payable to you by the Debtor, including … all costs including legal costs as between attorney and his own client which are incurred in the successful enforcement or defence by you of any action or application or other legal process against or by the Debtor or against or by myself/ourselves under or arising or in respect of this suretyship … (such total amount being referred to herein as 'the Indebtedness') (my underlining).'

11.2.2 The suretyship 'is to be a continuing security for the Indebtedness, notwithstanding any intermediate settlement of account. It shall remain in force until receipt by you of notice in writing determining same and until the sum or sums due or to become due ... at the date of receipt of such notice shall have been paid.' (my underlining)

11.2.3 The provisions of the Deed of Suretyship 'comprise the entire terms of this suretyship given by me/us to you, and it is agreed that no cancellation, amendment, addition or alteration to the provisions hereof shall be of force and effect unless such cancellation, amendment, addition or

> alteration is reduced to writing and signed by you and me/us, as the case may be.' (my underlining)."

I am satisfied that appellant's proposed defence is an afterthought and was contrived long after the events leading to the granting of the summary judgment and subsequent events related to that judgment.

> "…as a general rule, decisions of fact cannot properly be founded on a consideration of probabilities, unless the Court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant there rejection merely on the papers or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits."

Per Botha, J.A., in Administrator, Transvaal and Others v Thelesane and Others, 1991(2) SA 192 (AD) at 197 A – B (and also see the cases there cited).

For reasons which I have stated above I am satisfied that the appellant's allegations about a prior oral agreement are so far-fetched as to warrant their rejection merely on the papers. In the circumstances it is not necessary to address the issue of rectification which appellant claims on the papers that she is entitled to.

To conclude, in discussions before this Court Mr. Coetzee conceded that the prayers to respondent's claim could have been more carefully phrased to remove the apparent ambiguity in prayer 1 "excluding interest can costs", but insisted the meaning was clear if the phrase (and any other apparent ambiguities in the phrasing of the respondent's claim) are read in context. I agree and refer to what Colman, J. said in Novick and Another v Comair Holdings Ltd and Others, 1979(2) SA 116 (WLD at 131 – 2):

"The lengths to which the Court will go in seeking to give effect to the intention of the parties are evidenced by many *dicta* of high authority. I quote two of those: In Gravenor v Dunswart Iron Works 1929 AD 299 Stratford JA is reported at 303 to have said this:

> 'a primary rule of construction … is that words are to be given their ordinary and natural meaning. But the qualification to that rule is equally well established, namely that, if to give words their ordinary meaning would lead to an absurdity, or to something which, from the instrument as a whole it can clearly be gathered the parties could not have intended, then a Court of law is justified in departing from the literal meaning of words so as to give effect to the true intention of the parties'.

And in Union Government v Smith 1935 AD 232 we find the following passage in the judgment of Wessels CJ:

> '… We must look at the whole document, and if from other parts of the document itself it appears that the parties did not intend the literal meaning to convey their intention, or if to give a term a literal meaning would result in an absurdity, then we must reject the literal meaning and give the words the meaning which the parties manifest intended.'."

This approach to interpretation of documents was similarly stated by Rabie CJ in University of Cape Town v Cape Bar Council 1986(4) SA 903 (A) at 913 I – 914:

"It is no doubt true, as was argued on behalf of the appellant, that it is a primary rule of interpretation that one must, in construing an Act of Parliament, adopt the ordinary, grammatical meaning of the words used by the Legislature, unless such an approach would, as it was put in Bhyat v Commissioner for Immigration 1932 AD 125 at 129, lead to 'some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a Court of law is satisfied the Legislature could not have intended'. See also Du Plessis v Joubert 1968(1) SA 585(A) at 594 in fine-595B and Ebrahim v Minister of the Interior 1977(1) SA 665(A) at 677D – 678G. I would stress at the same time, however, because of the view that I take of this appeal, that it is also a well-known rule of construction that words used in a statute should be read in the light of their context. See eg. Jaga v Dönges NO and Another; Bhana v

Dönges NO and Another 1950(4) SA 653(A) at 662G – 663A, where Schreiner JA said:

> 'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the contest", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confirming a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.'"

The aforesaid principle is also regarded as a fundamental rule of interpretation defined by Devenish as follows:

> "Words should therefore be given their ordinary grammatical meaning if such a meaning is compatible with their complete context."
> Devenish, Interpretation of Statutes, p. 288 – 289.

See also: Security for Inland Revenue v Brey 1980(1) SA 472 at 478 A – B

Jaga v Dönges, NO and Another; Bhana v Dönges No and another 1950(4) SA 653(A) at 662G - 664H.

If appellant's defence were genuine she would have been advised of that effect had she bothered to seek the assistance of her legal practitioners to enable her to understand what was being claimed against her and would not have withdrawn her apposition to the application for summary judgment.

In the result, the appeal is dismissed with costs.

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MTAMBANENGWE, A.C.J.

I agree.

_____
O'LINN, A.J.A.

I agree.

_____
CHOMBA, A.J.A.

/mv

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