REPORTABLE
CASE NO.: SA 25/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

M PUPKEWITZ & SONS (PTY) LTD t/a PUPKEWITZ MEGABUILD **APPELLANT**

and

WALTER AUGUST KURZ **RESPONDENT**

CORAM: MARITZ, J.A., GIBSON, A.J.A *et* DAMASEB, A.J.A

Heard on: 19.10.2006

Delivered on: 14.07.2008

APPEAL JUDGMENT

DAMASEB, A. J. A.: [1] The appellant sued three defendants in the Magistrate's Court for the district of Walvis Bay: the respondent and two of his brothers, Rudolph Kurz and Heinrich Kurz. Default judgment was obtained against Rudolph and Heinrich. The respondent (who was the first defendant in the summons) defended the action which led to the trial from which the present appeal arises. On 14 March 2002 the said district Magistrate's Court granted absolution from the instance at the end of the trial. The appellant's appeal and thereafter application for leave to appeal to the High Court (*Court a quo)* were both refused and a petition to the Chief Justice was allowed – hence

the present appeal. Mr Strydom appeared on behalf of the appellant while Mr Obbes appeared on behalf of the respondent.

[2] When this appeal was called, the respondent raised two points *in limine*. The one point was that the appellant's heads of argument were filed one day late and condonation was not sought therefor; secondly, that the appeal was not prosecuted within the time periods provided for in the Rules of this Court and that no condonation was sought. Both in the answering affidavit deposed to in opposition to an application for condonation brought by the appellant after it had been given notice of the points *in limine,* and in the heads of argument subsequently filed of record, the point taken by the respondent is that in terms of Rule 5(5)(b) the record of the proceedings of the Court whose decision is being appealed against should have been lodged within three months after the application for leave to appeal was granted by the Supreme Court. The relevant parts of Rule 5 read as follows:

> "*Procedure on appeal*
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> 5. (1) Every appellant in a civil case who has a right of appeal[1] shall lodge notice of appeal with the registrar, the registrar of the court appealed from and the respondent or his or her attorney within 21 days, or such longer period as may on good cause be allowed, after –
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> > (a) the judgment or order appealed against (including a judgment or order of the income Tax Special Court in terms of the Income Tax Act, 1981 (Act 24 of 1981) has been pronounced; or

[1]S 18(2)(a) of the High Court Act, 16 of 1990 provides:

> "(a)in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required."

(b) in any case where leave to appeal is required[2], an order for leave to appeal has been granted; or

(c) a direction of the High Court has been set aside,

and any order granting the leave referred to in paragraph (b) shall be lodged with the registrar simultaneously with the notice of appeal.

…

(5) After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice –

(a) in cases where the order appealed against was given on an exception or an application to strike out, within six weeks after the date of the said order or, in cases where leave is required, within six weeks after the date of an order granting leave to appeal;

(b) in all other cases within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required within three months after an order granting such leave;

(c) within such further period as may be agreed to in writing by the respondent, lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary…

(6) (a) …

(b) I If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his or her attorney for consent to an extension thereof and given notice to the registrar that he or she has so applied, he or she shall be deemed to have withdrawn his or her appeal."

(My underlining)

The respondent maintains that Rule 5 applies to the present matter.

[3] The backdrop to the above point is that the appellant averred in its application for condonation, that its failure to speedily prosecute the appeal was brought about by the fact that the order of this Court dated 13 April 2004 granting leave to appeal (following

[2]S 18(2)(b) of the High Court Act provides:

"(b)in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court."

the refusal of leave to appeal by the Court *a quo*) did not give directions in terms of Rule 3(6) which states as follows:

> "*Application for leave to appeal*
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> 3. (1) (a) Whenever in terms of the Act any person is entitled to petition the Chief Justice for any leave to appeal[3], such petition shall, together with a verifying affidavit and two copies of such petition and affidavit, be delivered to the registrar.
>
> …
>
> (6) Whenever the Supreme Court grants leave to appeal it shall at the same time make an order fixing the time within which the record shall be lodged with the registrar, and where applicable, it may order the appellant to find security for the costs of appeal in such an amount as may be determined by the registrar and may fix the time within which such security shall be found." (My underlining)

It is worthy of note that the underlined function of the Court in sub-rule (6) is couched in peremptory terms.

[4] It was advanced on behalf of the appellant that its legal advisors took the view that this Court's failure to give a direction as to the time within which the record was to be lodged made it difficult to decide what course to take and therefore it was decided to have recourse to Rule 5. It is common cause that the terms of that Rule had not been complied with in terms of lodging the record - assuming the period began to run from the date on which the appellant's legal advisors say they had notice of the order. Based on this it is submitted on behalf of the respondent in paras 4 and 5 of their heads of argument that:

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[3]S 14(6)(a) of the Supreme Court Act, 15 of 1990 provides:

"6(a)An application for leave to appeal under subsection (3) shall be submitted by petition addressed to the Chief Justice within 21 days, (or such longer period as may on good cause be allowed), after the leave of the court against whose decision the appeal in question is to be made, was refused."

> "Sub- rule 5(5) of the Rules provides in peremptory terms that after an appeal is noted in a civil case the appellant is required to, within 3 (three) months of the order granting leave to appeal, lodge with the Registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary. Sub- rule 3(6) of the Rules provides that the Supreme Court, when granting leave to appeal, shall make an order fixing the time within which the record shall be lodged with the registrar. In the present instance the Supreme Court, when granting leave to appeal, did not fix the time within which the record was to be lodged with the Registrar. It is respectfully submitted that in this circumstance, and taking into account the fact that appellant filed its notice of appeal in terms of Rule 5(2) of the Rules of Court, the provisions of sub-rule 5(5) are of application. Interpreting the Rules to the contrary would result in an absurdity and may well result in manifest injustice to respondents in appeals to this Court in such circumstances. It is further submitted that, having regard to the provisions of sub-rule 5(6), and generally the inordinate and unexplained delay in prosecuting this matter, this appeal is, alternatively should be, deemed to have been withdrawn. This appeal is thus not properly before this Court. The matter is further aggravated by appellant's late filing of its heads of argument."

[5] As must be obvious, the debate on this preliminary point stems from the respondent's stance that the appeal in this matter was governed by both Rule 3 (as quoted above) and Rule 5 (also as quoted above) and not least because of the election made by the appellant to proceed under that Rule. In my view, once that misunderstanding is addressed the matter lends itself to ready resolution.

[6] Appeals to this Court against judgments or orders of the High Court in civil matters are subject to the provisions of s18 of the High Court Act and s14 of the Supreme Court Act. Appeals of that nature are generally brought to this Court along one of three avenues: as of right; by leave obtained from the High Court or pursuant to leave obtained from this Court. When sitting as a court of first instance in civil matters other than those contemplated in s18(3) and (7) of the High Court Act, an appeal against an order or judgment of the High Court lies as of right to this Court. This, however, is not

the case where the High Court sat as a court of appeal or has made an order of the kind referred to in s18(3) of the High Court Act. Those judgments or orders are not appealable as of right. This right must first be sought and obtained by applying to the High Court for leave to appeal to the Supreme Court. Whether an appellant appeals as of right or pursuant to leave having been granted by the High Court, the resultant vesting of the right in the appellant occurs without the knowledge of or intervention by this Court. It is only informed of the exercise and prosecution when a Notice of Appeal is filed (with the accompanying order for leave to appeal, if required) with the registrar of this Court. The initial steps to be taken in such instances are expressly regulated by Rule 5(1) to (6) of the Supreme Court Rules. To that end Rule 5 refers to the dates on which the judgement or order appealed against has been pronounced or leave to appeal has been granted as the starting date for the calculation of periods set for notices and records of appeal to be lodged. The reference in Rule 5(1)(b) to “cases where leave to appeal is required, an order for leave to appeal has been granted” as a means to calculate the period within which a notice of appeal must be filed and the reference in similar terms to the date with which the record of appeal must be lodged in Rule 5(5)(b) is, therefore, a reference to an application for leave to appeal an order made by the High Court.

[7] If, however, leave to appeal is denied by the High Court, a prospective appellant has one further (and final) avenue open: to seek and obtain leave to appeal by petitioning the Supreme Court as envisaged by s18(2)(b) of the High Court Act and s14(3) of the Supreme Court Act. The procedure to be followed in petitioning this Court

is prescribed by Rule 3 of the Supreme Court Rules. If the Chief Justice or (the Judge designated by him or her to consider the petition) requires the record of proceedings in the High Court to decide on the petition, it may direct that the record be lodged. Rule 3(1)(b) requires of the petitioner in such instance to lodge four typed copies of the record with the registrar, one of which shall be certified by the registrar of the Court *a quo*. If leave to appeal is granted, it may well be unnecessary to lodge further copies of the record. This is but one illustration why Rule 5(5) does not apply to applications for leave to appeal by petition. Moreover, s14 of the Supreme Court Act provides that this Court may grant leave to appeal "subject to such conditions as may be determined" by it. That power not only refers to conditions bearing on the substance of the appeal but also the procedure to be followed in the prosecution thereof. One of the procedural aspects which the Court is required in terms of Rule 3(6) to address, is fixing the "time within which the record of appeal shall be lodged". This requirement is yet another indication that the provisions of Rule 5(5) do not have bearing on the period within which the record of appeal must be lodged once a petition for leave to appeal is granted.

[8] If the suggestion is that Rule 5(5)(b) applies by default in circumstances where this Court omits to direct the time within which the record is to be lodged, that would run contrary to the use of the word "shall" in Rule 3(6). Such an interpretation would make Rule 3(6) superfluous and the Legislature could not have intended such a result as it is trite that no enactment contains invalid or purposeless provisions. The order granted on 13 April 2004 gave no directions as to when the record was to be lodged with the

registrar of this Court in tandem with sub-rule (6) of Rule 3. That was the origin of the problem and not the fact that the appellant chose to proceed under Rule 5. It is understandable therefore that the appellant's legal advisors were confused what was to happen once they established that leave was granted without the direction as aforesaid. There is merit in the respondent's submission that even if that were accepted, the appellant had the duty to seek appropriate directions from this Court's Registrar so that the matter was resolved - and not sit back and delay prosecuting the appeal.

[9] It is common cause that when this Court granted leave to appeal it was not announced in open Court and the appellant stated under oath that it did not get notice of the order immediately after it was issued. In an affidavit filed in support of an application for condonation of the late prosecution of the appeal it was alleged that the appellant's legal practitioners had notice of the order granting leave only "some time during 2005". Instructed counsel was, it is said, presented with it in February 2005, and the record of appeal was only lodged on 09 June 2006, whereafter a date was assigned for the hearing of the appeal. Based on the above, we can assume that the appellant's legal advisors had knowledge of the order either in January or February 2005. I accept that the appellant failed to seek directions from the Registrar after becoming aware of the order granting leave to appeal, but the root of the problem was the deficient order emanating from this Court. It is all very well to say that the appellant should have actively pursued the appeal, but against what yardstick is its inaction to be measured? In all the circumstances, therefore, I take the view that it would not be fair to penalise the appellants, particularly in view of the favourable prospects of success on appeal.

For the latter reason too, the late filing of the heads of argument by one day, must be condoned. The points *in limine* must therefore fail. We want to warn, however, that practitioners must in future take steps if they become aware that the order does not comply with Rule 6(3) to obtain directions from the registrar. I will now turn to the merits of the case.

[10] The appellant is the supplier of building material. The respondent is one of three brothers who, together, constituted themselves into a partnership in 1998 under the name and style of R W Kurz Bouers (Builders) in order to carry on the business of building contractors. The partnership thus constituted applied for and was granted credit facilities by the appellant's Walvis Bay Branch in terms of a written agreement between the appellant and the partnership which set the credit limit at N$15 000.

[11] As was required by the appellant, the respondent and his two brothers executed suretyships in favour of the appellant in respect of the credit facility operated by the partnership at the appellant. It is on the strength of the suretyships that the appellant instituted a claim against the respondent and the two brothers in the Walvis Bay Magistrates' Court for goods sold and delivered during April – September 1999, claiming payment of the principal debt of N$71 715.73 plus N$11 789.03 as interest. Interest was calculated at 26% *per annum* in terms of an acknowledgement of debt dated 15 November 1999. During the course of the trial the amount claimed was confirmed to be N$71 715.73. It is important to bear in mind that the "application for credit facilities" which also constitutes the written agreement between the parties is in the name of the

partnership RW Kurz Bouers and was signed only by one of the brothers (Rudolph Kurz). He in that document agreed on behalf of the other partners to the following terms, amongst others: *"We shall not exceed the credit limits* ***without prior arrangement.*** *We accept interest charges of 2.25% per month on the arrear amount."* (My emphasis*)*

[12] The deed of suretyship executed by the respondent in favour of the appellant on 6 August 1998 records, in part, as follows:

> "I agree and declare that it will always be **in the absolute discretion of the COMPANY**, without notice to me, to determine the extent, nature and duration of any credit facilities, to grant time or other **indulgences** to the DEBTOR, to delay the date of repayment or vary the terms of any obligation to increase the rate of interest payable thereon, to release the whole or any portion of any security, or **to release any co-principal debtor or co-surety**, to compound or make any arrangements with the DEBTOR.
>
> **All admissions and acknowledgements of indebtedness by the DEBTOR will be binding on me.** In the event of insolvency, liquidation, assignment or compromising, no dividends or payments, which the COMPANY may receive from the DEBTOR, will prejudice the rights of the COMPANY to recover from me to the full extent of this guarantee, any sum which after the receipt of such payments or dividends, may remain owing to the said DEBTOR, provided this clause will in no way oblige the COMPANY to excuss the principal DEBTOR before proceedings against me and any action by the COMPANY under this clause may be taken without reference to me and such action will in no way effect, limit or prejudice any liability hereunder.
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> Additionally, the respondent bound himself as surety in *solidum* and as principal debtor for the debts of the partnership in favour of the respondent for ''each and every sum or sums of money or other debts or obligations which may at any time be or become owing by or claimable from the partnership 'by the appellant' from any cause or debt". (Emphasis and underlining are mine)

The "debtor" (as we know)is the RW Kurz Bouers partnership which, in law (subject to certain exceptions or quasi-exceptions not relevant for purposes of this judgment[4]), is

[4] Compare: *The Law of South Africa*, Vol 19, par288

not a legal entity or person separate from its members[5]. The rights and duties of the partnership are therefore the rights and duties of the partners. The word "debtor" in the acknowledgement of debt is therefore in effect a reference to the partners jointly and severally. It is also clear from the credit agreement that the partnership could, if arrangement was made with the appellant, exceed the credit limit of N$15 000. That certainly would be an "indulgence" by the creditor and permissible by the acknowledgement of debt.

[13] In his plea the respondent denied that he purchased or received any goods from the appellant to the value claimed in the summons. He pleaded that a partnership known as RW Kurz Bouers under which he traded with his two brothers ceased to exist when a Close Corporation by the name of Brothers Kurz Builders Namibia CC (the Close Corporation) was registered in March 1999 to take over the partnership's credit facility at the appellant. He pleaded that that was in keeping with an agreement reached by the partners following his withdrawal from the partnership. The respondent further pleaded that as at 27 April 1999 all debts standing against the partnership's credit account with the appellant were settled and the remaining partners continued to trade in the name of the Close Corporation and that any debt incurred thereafter on the credit facility with the appellant was the responsibility of the Close Corporation.

[14] The respondent's plea led to a replication by the appellant raising estoppel (representation by silence) against the respondent as follows:

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[5] See: *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service*, 2005 (3) SA 1 (SCA) at 13D; *Strydom v Protea Eiendomsagente* 1979 (2) SA 206 (T) at 209C and *Kaplan v Turner*, 1941 SWA 29 at 33.

> "1.2 Without derogating from the generality of the aforesaid denial the Plaintiff expressly denies that it was aware of the fact the RW Kurz Builder ceased to exist and/or that it was incorporated into a close corporation and respectfully avers the following:
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> a) At all relevant times hereto the First, Second and Third Defendants conducted business with the Plaintiff under the name and style of RW Kurz Bouers;
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> b) The first Defendant signed a deed of suretyship in favour of the Plaintiff in respect of all debts or obligations which may at any time be due or become owing by or claimable from RW Kurz Builders to the Plaintiff…".
>
> c) At no time did the First Defendant and/or Third Defendant inform the Plaintiff that RW Kurz Builders has been converted and incorporated as a close corporation of which on the Second and Third Defendants are members of; alternatively at no time did the First Defendant inform the Plaintiff that he was no longer part of the business called RW Kurz Builders or did he make any attempts to have his deed of suretyship cancelled to give effect to the change that RW Kurz Builders underwent. (My underlining)

[15] The Court *a quo* correctly interpreted this replication as a plea of estoppel intended to defeat the respondent's defence that he was not liable for the payment of the goods sold and delivered. The Court also correctly held that the appellant bore the *onus* to prove the estoppel. To support its reasoning the Court *a quo* relied on the following passage from Rabie's *The Law of Estoppel in South Africa*, pp39 - 40:

> "For a representation made by silence to be capable of founding a plea of estoppel, it is essential that the silence should have occurred when there was a duty on the person whom It Is sought to estop (the representor) to speak or act… As to when such a duty exists, the law appears to be that the duty arises when the person whom it is sought to estop should reasonably have expected, in the light of the relationship existing between himself and the other party concerned and of all the other relevant facts of the case, that his failure to speak or act could mislead and cause prejudice to the other party." (My underlining)

[16] The Court *a quo* correctly found that:

> "there was a duty on the respondent to bring it to the attention of the appellant that the credit account previously operated by the partnership would in future be operated by the close corporation. The change in identity of the customer to whom it was giving credit was obviously of importance to the appellant and could cause it prejudice. The crucial question at the trial was whether the appellant had established that the respondent did not bring that change in the state of affairs to its attention."

[17] The appellant's version was to the following effect. Its Walvis Bay Branch Manager at the time that the partnership RW Kurz Bouers opened a credit facility at that Branch was one Herbert Brummer. Brummer said he received the partnership's application for a credit facility and forwarded it to appellant's Head Office in Windhoek for approval. According to Brummer, the respondent's credit-worthiness was a decisive factor in the credit facility (with a limit of N$15 000) being approved for the partnership. Brummer added that if the partnership's credit facility was to be taken over by the new Close Corporation as alleged by the respondent - not only would it have had to be sent to Windhoek for approval in keeping with appellant's policy - but it would have been refused as the respondent's credit-worthiness was the basis on which the facility was granted. Brummer denied that he was informed at any stage by any of the partners of RW Kurz Bouers that the Close Corporation had been formed to substitute the partnership. Brummer testified that: ''*When a person wants to be released from suretyship, one has to apply in writing and must set out reasons why wants to be released. It will not be enough to supply / hand a founding statement of business e.g. if one wanted to change RW Kurz Builders to Bros Kurz Builders Namibia CC. A formal application would have been submitted if one of them needed to be released from suretyship".* Brummer also testified, as regards the N$15 000 credit limit, that the Branch Manager had the authority to override an account (i.e. to exceed the credit limit). He added: *"This is done when promises to pay have been made by client or client*

needs materials to proceed with construction till certain stage in order to get payment." Brummer left the appellant's employ in mid September 1999 and was replaced as Branch Manager by one Volker Hans Otto.

[18] Otto testified that upon assuming office, he sent out invoices on a weekly basis to the partnership RW Kurz Bouers (not the Close Corporation) for the debt outstanding against it in the appellant's books. Otto testified that on 15 November 1999 two of the partners of RW Bouers (excluding the respondent) executed a written acknowledgement of debt on behalf of the partnership covering the amount of N$79 947.63 plus interest at 26% then outstanding against the partnership. The debt evidenced by the acknowledgement of debt was not paid in terms of the instrument in question and the appellant therefore sued the three brothers, including the respondent, as each had bound himself as surety and co-principal debtor for the payment of the debts of the partnership. According to Otto no-one had ever informed him of the conversion of the partnership into the Close Corporation which was to substitute the partnership as debtor in respect of the credit facility held with the appellant. Otto testified that when he was made aware of the existence of the Close Corporation he enquired from Brummer who denied knowledge of such an arrangement. Otto admitted that as at 27 April 1999 the partnership had no debt owing to the appellant on the credit account.

[19] The respondent testified in his defence that in 1999 he decided to withdraw from the partnership and informed his co-partners to that effect whereupon they decided that

a Close Corporation would be formed (with only Rudolph and Heinrich as members) to carry on the business previously conducted by the partnership. When the partnership was in existence, the respondent concerned himself mainly with its administration. According to the respondent, in July 1999 he was transferred by his employer to from Walvis Bay to Oshakati and stopped having any dealings with the partnership. The respondent testified that the partnership's bankers were then told of this new development as was the partnership's bookkeeper, Mr C R Van Wyk, who was tasked to inform all partnership's suppliers of the changed circumstances. (Mr Van Wyk was never called as a witness.) This is how the matter was canvassed in evidence on cross-examination of the respondent:

> "A: I deny that liability. Plaintiff was informed timeously about the changes in question; someone will come to testify to that effect.
> Q: You had time to discover documents pertaining to purchases in name Brothers Kurz Builders Namibia CC?
> Q: I put it to you that no letter or document was received pertaining to such a CC?
> A. There are documents to that effect**. Letters were sent to Bank by C.R. Van Wyk Accountant**. Defendant 2 confirm to me that copy was handed to Mr. Brummer (previous Manager)." (Emphasis provided)

The letters allegedly sent by C R van Wyk were not adduced in evidence.

[20] The respondent maintained that as at the end of April 1999 all amounts due and owing on the credit account had been settled and thereafter he had nothing further to do with the partnership which then was dissolved and its business taken over by the Close Corporation. He also maintained that his indebtedness to the appellant was limited to the N$15 000 which was the credit limit on the credit account when he signed suretyship. The respondent testified that he had agreed with his brother Heinrich Kurz that the latter would inform the appellant of the changed circumstances and that

Heinrich subsequently informed him that he had done so. He persisted that the invoices sent by the appellant should have been in the name of the Close Corporation and not the partnership. The respondent admitted that he at no stage personally informed the appellant about the conversion of the partnership into the Close Corporation which was to substitute the partnership in respect of the credit facility held at the appellant's Walvis Bay Branch.

[21] The steps allegedly taken by the respondent were confirmed under oath by Heinrich Kurz. He testified that when the respondent communicated his decision to withdraw from the partnership, Rudolph and he approached an accountant, C R van Wyk, who on 10 March 1999 helped them register the Close Corporation. They then went ahead and opened a bank account in the name of the Close Corporation and he informed the appellant's Brummer of the changed circumstances in the presence of Mouton. Heinrich testified that he went to the appellant's Walvis Bay Branch and informed Brummer about the conversion and that the respondent would no longer be part of the partnership - a fact he later confirmed to the respondent. He testified that he also handed to Brummer the new Close Corporation's certificate of registration. In respect of the invoices and statements allegedly sent on a weekly basis to the partners, he testified that, upon receiving the invoices and statements, he went to Brummer and enquired why this was the case whereupon Brummer called in one Mouton, the Credit Manager, for an explanation. Mouton allegedly attributed the matter to computer problems and promised that it would be rectified. Heinrich testified that it was he who arranged for an increase of the credit facility from N$15 000 upwards with Brummer's

approval in the presence of Mouton as they had been successful with a tender at the time. Heinrich also testified that when Volker Otto took over from Brummer in September 1999 he called the two remaining partners about the outstanding accounts. Heinrich also confirmed that all purchases during September 1999 were paid for either in cash or by cheque. As I understand his evidence, after the account had shot up from N$15 000 to about N$71 000, Rudolph and he continued to make purchases from the appellant in the name of the Close Corporation and paid for the deliveries either in cash or with the cheques of the Close Corporation. The evidence is not to the effect that the credit account at the appellant was paid for with cheques drawn on the Close Corporation.

[22] Neither party called Mouton to testify who, at the time of the trial, was no longer in the employ of the appellant - and it is common cause that between April and September 1999 the appellant sent a substantial number of invoices all addressed to the partnership.

[23] The trial Court granted absolution from the instance at the end of the trial reasoning, chiefly, that the appellant failed to discharge the burden of proof. That Court took the view that, after hearing both sides, it was unable to tell who was telling the truth. On appeal the Court *a quo* came to the conclusion that the trial Court correctly found against the appellant. The Court *a quo* reasoned that the fact that the acknowledgement of debt had been executed by only two of the brothers and not the respondent and the fact that the credit limit on the account had been exceeded were

considerations adverse to the appellant. In my view, the Court *a quo* erred in that regard. As I already pointed out, the credit agreement was signed by only one of the brothers on behalf of the partnership. It was not strange therefore for one partner not to have signed the acknowledgement of debt. The surety signed by the respondent specifically records that the respondent would be bound by acknowledgements executed by the "debtor" and the suretyship did not limit the respondent's exposure to N$15 000. Besides, by its express terms the credit agreement did not exclude the limit being exceeded, provided there was prior arrangement with the appellant.

[24] The respondent's assertion that the Close Corporation, with the knowledge of the appellant, substituted the partnership as debtor is contradicted by the fact that the respondent's co-partners in November 1999 executed an acknowledgement of debt in the name of the very partnership which, the respondent alleges, ceased to exist in March 1999. The fact that the appellant's Otto sent out invoices on a weekly basis to the partnership is also inconsistent with knowledge on the appellant's part that the Close Corporation, not the partnership, was now the new debtor in respect of the credit facility for which the respondent stood surety. In addition, sight should not be lost of the fact that the respondent admitted that he did not personally inform the appellant of his withdrawal from the partnership and the new reality of the Close Corporation.

[25] The acknowledgement of debt on which the appellant relies as the principal causa of its action is, on the face thereof, a liquid document regularly executed in the name and on behalf of the partnership of which the respondent, admittedly, had been a

partner. In addition to liability *in solidum* which might normally have arisen for the respondent *qua* partner vis-à-vis the appellant as a result, the appellant's claim is further secured by the execution of the suretyship under the respondent's signature in which he expressly bound himself to "admissions and acknowledgements of indebtedness" by the partnership. The respondent bore the evidential burden to lead sufficient evidence that the partnership had been dissolved; that he communicated the dissolution of the partnership to the appellant and that he had obtained release from the suretyship which he had executed in favour of the appellant. The duty is not simply to inform, it is to seek and obtain from the creditor release from the suretyship obligations. As the court *a quo* correctly found, the duty to communicate the dissolution of the partnership rested on the respondent. (I only need add to that duty the duty to seek and obtain release from the surety and the duty to secure the substitution of the Close Corporation as creditor). What are the probabilities that a *diligens paterfamilias,* who has decided to withdraw from an actively trading partnership and wants to be released from his suretyship obligations towards a credit grantor, would not personally or in writing inform the credit giver and obtain release from a suretyship obligation? The question only needs to be put to be answered.

[26] Considering the respondent's duty to communicate his withdrawal to the appellant and the accompanying duty to seek and obtain release from the suretyship obligations, I find it significant that the respondent opted not to call as a witness the bookkeeper who allegedly was mandated to inform all suppliers of the changed circumstances brought about by his withdrawal and the consequent substitution of a new debtor in respect of

the credit account. The letters reportedly written contemporaneously with the withdrawal to inform the partnership's suppliers were also not adduced in evidence. When one considers these failures, the fact that the Close Corporation opened a new bank account in its own name - a factor found to be crucial by the Court *a quo* - really does not take the respondent's defence against the appellant's claim very far. The Court *a quo* also appeared to find as factors adverse to the appellant that no effort had been made for the respondent to be traced so as to co-sign the acknowledgement of debt of 15 November 1999 and that the credit limit of N$15 000 was exceeded. Mr Obbes for the respondent also relied on the latter factor to submit that the appellant, in allowing an increase of the credit facility to above N$15 000, acted to the prejudice of the respondent and that he was, as a result, discharged from his suretyship obligations. The conclusion that the appellant should have obtained the respondent's signature cannot be sustained if one has regard to the fact that one partner *qua* partner has authority to contract on behalf of the partnership by reason of the partnership relationship[6] and that the respondent is liable jointly and severally for the partnership's debts. The appellant was entitled to rely on that fact. In any event, even the credit agreement was signed by only one of the partners and was still binding on all. Besides, the appellant would have derived comfort from the fact that the surety executed by the respondent in its favour (by the use of the word "debtor") makes allowance for debts to be incurred by persons other than the respondent but for which he would be liable. Similarly, for the respondent to argue that because he no longer was part of a partnership, a suretyship validly given no longer existed is a serious misunderstanding of the law on suretyship: it ignores the reality that one can be surety for a debt of

[6] *Potchefstroom Dairies & Industries Co Ltd v Standard Fresh Milk Supply Co*, 1913 TPD 506 at 512

another person for something from which one derives no financial benefit. (See: Manfred Nathan, *The Common Law Of South Africa* (1904) vol.2 at 901 para 984).

[27] Did the appellant act to the respondent's prejudice in allowing the credit facility to exceed N$15 000. In *ABSA Bank Ltd v Davidson* 2000 (1) SA 1117 (A) at 1124 I – J, Oliver JA recognised that "prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship." [7] I am satisfied that the increase in the credit facility was authorised by the credit agreement and foreshadowed in the deed of suretyship. Moreover, as far as the appellant was concerned, it was on behalf of and in the interest of the partnership for the debts of which the respondent was in any event jointly and severally liable. Therefore, there can be no complaint of prejudice. The acknowledgement of debt executed on 15 November 1999 by Heinrich and Rudolph was therefore binding on the respondent.

[28] In dismissing the appeal the Court *a quo* said the following:

> "When pondering the probabilities and improbabilities arising from the evidence one question which has to be asked is why the respondent's two brothers went to the trouble and expense of forming a close corporation and opening a bank account in its name? The answer can only be so as to use it as a vehicle for their business venture. Having set it up it would, I think, be only natural for them to have informed their suppliers of its existence. What it comes to is that probabilities on the one side are met by probabilities on the other. In all the circumstances I can well understand the magistrate's decision. I am not persuaded that it was wrong."

[7] See also: *Di Giulio v First National Bank of South Africa Ltd,* 2002 (6) SA 281 (C)

[29] I have come to a different conclusion. The material allegations on behalf of the appellant are supported by documentary *prima facie* proof and objectively ascertainable facts[8] with a strong bearing on the probabilities of the case, whereas the allegations on behalf of the respondent, constituting his defence, are not. In material respects, the version of the appellant is also corroborated by the very actions or omissions of the respondent and his witnesses.[9] The probabilities which the Court *a quo* found to favour the respondent are considerably weaker (and not more plausible) than those favouring the appellant if one considers the following: Exceeding the credit limit was not prohibited; on the contrary, it was expressly foreshadowed as a possibility; in the absence of proof that the appellant bore knowledge that the new debtor was the Close Corporation, the fact that it was formed is neither here nor there - especially when it is conceded that release from the suretyship was not specifically sought and granted; that release from the suretyship was allegedly granted is undermined by the respondent's failure to do so personally or in writing without some explanation why he made no effort to act personally in such an important matter as would a *diligens paterfamilias*; the fact that on 15 November 1999 Rudolph and Heinrich executed an acknowledgement of debt on behalf of a partnership they say did not exist, considering it was executed against the backdrop of allegedly erroneous invoices being sent to the partnership and the fact they say they complained about that to the appellant.

[30] In the words of Selke, J in *Goran v Skidmore* 1952 (1) SA 732 to 734 A-D:

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[8]Vide the acknowledgement of debt of 15 November 2005 and the fact the invoices were sent to the partnership and not the Close Corporation.

[9]Vide the failure by the respondent to personally communicate his withdrawal, and the failure to call CR Van Wyk and or to lead into evidence the letters he allegedly wrote to suppliers.

> "Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court my go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt … for, in finding facts or making inferences in a civil case, it seems to me that one may … by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."

This *dictum* of Selke J was cited with approval by the South African Supreme Court of Appeal in *Jordaan v Bloemfontein Transitional Local Authority* 2004 (3) SA 371 (SCA) at 379 I - J; *Hülse-Renter v Gödde* 2001(4) SA 336 (SCA) 1344 D - E; *Minister of Safety v Jordaan* 2000(4) SA 21 (SCA) 26 G, *Cooper and Another NNO v Merchant Trade Finance Ltd,* 2000(3) SA 1009 (SCA) at 1028 C - D. Needless to say that Selke J's *dictum* represents the law in Namibia.

[31] Considering that the plaintiff's version is supported by verifiable proof (as opposed to mere say-so) and is not inherently improbable and is satisfactory in material respects, could it be credibly argued that the probabilities were even and that the appellant had failed to discharge the burden of proof? I think not. The respondent's *ipssisima verba* could only refute the otherwise strong and satisfactory corroborated evidence of the appellant if the respondent's evidence showed that the reasonable possibility that the appellant's version is true did not exist: Compare *Mapota v Santamversekerings-maatskappy Bpk,* 1977(4) SA 515 (A) at 515 G - H et 516 E - H. If one adds to the probabilities favouring the appellant the uncontroverted evidence that the credit facility was only possible because the respondent was a partner and surety and that any substitution would have had to be approved in Windhoek and in any event would not have been granted if the respondent was no longer a surety, it becomes difficult to see how the probabilities could be even as found by both the trial Court and the Court *a quo*.

Moreover, given the appellant's credit policy as evidenced by the terms of the application for credit facilities and the requirement that deeds of suretyship be signed for the debts and obligations of the debtor, one must question how probable it would be that the appellant would have agreed to grant credit to the Close Corporation without a credit agreement and sureties in place? The appellant's version that it was because of the credit-worthiness of the respondent that the credit facility of the partnership was granted in the first place is corroborated by the respondent's evidence at the trial as follows:

> **"2nd Deft was unemployed, 3rd Deft was not satisfied with customers at his workplace**. Our father was builder for 28 years. We decided to do something to help ourselves. **I secured a Credit Facilities at Bank.** We started operating under name R.W. Kurz Builders. I was partner."

[32] In my view all these circumstances produce the result that the version attested to by the appellant is so significantly more plausible and more probable than that of the respondent that the conclusions of the trial court and the Court *a quo* cannot be sustained. Heinrich's version that he informed the appellant about the changed circumstances and remonstrated with the appellant that the invoices should be sent to the Close Corporation is seriously undermined by the fact that he went on to sign an acknowledgement of debt in the name of the very partnership whose existence after 17 March 1999 is denied.

[33] I am satisfied that on a conspectus of the evidence the appellant had succeeded in establishing that it is more probable than not that the respondent did not inform it that he in March 1999 withdrew from the partnership RW Kurz Bouers and that the latter's credit account with the appellant was from that point on the liability of the Close

Corporation formed for that purpose. In any event, the appellant proved on a preponderance of probabilities that the respondent had not been duly released from his obligations under the surety he executed on 6 August 1998 in the appellant's favour for the payment of the partnership's debts.

[34] In the result I make the following orders:

1. The points *in limine* are dismissed.
2. The appeal succeeds with costs including costs occasioned by the employment of one instructing and one instructed counsel.
3. The order of the High Court is set aside and the following order is substituted:

> "The appeal succeeds with costs, and the order of the Magistrate's Court, Walvis Bay, granting absolution from the instance is set aside and judgment is entered for the plaintiff in the amount of N$ 71 115.73 plus interest at the rate of 26% per annum.".

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DAMASEB, A.J.A.

I agree.

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MARITZ, J.A.

I agree.

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GIBSON, A.J.A.

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