126/55.

I.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellant .... Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

SOLOMON SULSKI .... Appellant,

versus

L. FELDMAN LTD. .... Respondent.

Appellant's Attorney / *Prokureur vir Appellant* ...... *Respondent's Attorney* / *Prokureur vir Respondent* ......

Appellant's Advocate / *Advokaat vir Appellant* ...... *Respondent's Advocate* / *Advokaat vir Respondent* ......

Set down for hearing on / *Op die rol geplaas vir verhoor op* Mon + Tue, 21 & 22 Nov, 1955

9.45 – 12.55.

2.15 – 3.20 CAV.

— Appeal ...

...

...155

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

SOLOMON SULSKI Appellant

and

L. FELDMAN, LIMITED
Respondent

Coram:- Van den Heever, Fagan, Steyn, de Beer et Reynolds, JJ.A.

Heard:- 22nd November, 1955. Delivered:- 5/12/1955.

VAN DEN HEEVER, J.A. JUDGMENT.

In this case there is no dispute as to the facts nor as to the law. What is contested is the proper interpretation to be put upon a clause in the guarantee to which I refer later. Although the matter to be decided lies within a very narrow compass, it presents a problem which is by no means easy to solve.

Isaac Colman and members of his family were the holders of one-half of the issued shares in a company known as "Colman Pipes (Proprietary) Limited". I henceforth refer to this Company as "the company". The remaining issued shares were held by one Townsend.

2/ During .....

During November, 1950, (the exact date is not material) the respondent company, having negotiated for ~~Townsend's~~ the purchase of Townsend's shareholding in the company, entered into a written agreement with Colman containing the following clauses:

"6. The parties agree and undertake:-

(a) That they will jointly and severally sign and complete such guarantees as may be required by the Company's bankers and/or shippers and/or other parties as may be required for the purpose of financing the Company in its business, provided however that the aggregate amount of such guarantees shall not exceed the sum of £6,000 (Six Thousand Pounds) unless the parties mutually agree to increase such amount, and provided further that ~~xh~~ such guarantees shall endure for a period of ~~2~~ (two) years.

(b) That they will reciprocally make good to each other any losses incurred by either of them in the granting of the guarantees aforesaid, or of any loans by either ~~Kompany~~ party to the Company, the intention being that the parties will share equally all losses suffered by reason of the granting of the guarantees and /or loans aforesaid.

7. Colman shall be obliged to furnish forthwith to the Feldman Company" (that is respondent) "acceptable guarantees for the due fulfilment of

3/ the .....

the obligations to be undertaken by him pursuant to the preceding paragraph hereof, such guarantees to be for a period of 2 (two) years from the date hereof and to be for an aggregate amount of £3,000."

In the agreement respondent intimates that such a guarantee i.a. by Sulski (i.e. appellant) would be acceptable.

On the 2nd November, 1950, appellant executed a document entitled "Guarantee". It recites that respondent company and Colman have jointly and severally undertaken to grant guarantees on behalf of "the company" to the company's bankers, shippers or other parties; that respondent and Colman have undertaken to make good to each other any losses incurred by either of them in granting the said guarantees and that Colman has undertaken further to furnish to the respondent guarantees of other parties for the due fulfilment of other obligations undertaken by him, i.e. to make good the said losses to respondent.

Then comes the cardinal clause upon which this dispute turns:-

"Now therefore, I, Solomon Sulski, of Johannesburg,

> do hereby bind myself as surety and co-principal debtor unto and in favour of the Feldman Company for the due and punctual payment by Colman of all such amounts as he may become obliged to pay to the Feldman Company in pursuance of the obligations undertaken by him as herein before set out, provided however that my liability hereunder shall endure for a period of 2 (two) years and shall not exceed the sum of £1,500."

For the rest the document contains a renunciation of legal benefits and a provision that extention of time for payment granted by respondent to Colman or a release of securities held shall not vitiate the guarantee. These provisions are of no consequence save (~~perhaps~~) that in which appellant says:

> "my liability hereunder shall be a continuing liability until Colman has performed each and every of his obligations as aforesaid."

Upon these documents respondent instituted an action against appellant in the Witwatersrand Local Division. The declaration after referring to the documents (they were annexed) averred that upon the default of the company in about June, 1952, "the plaintiff became obliged to pay the whole of the amounts so guaranteed, being a sum of £8,193.5.5 in all". This liability

was reduced by dividends received after liquidation of the company and in the result, calculated on the aggregate limit of £6,000, respondent's loss was reduced to £3,493.15.0, which he paid under the guarantees to the creditors concerned. Colman under his agreement, it is averred, became obliged to make good to respondent the sum of £1746.17.6, but notwithstanding demand failed to pay. Consequently appellant is liable in terms of his guarantee to pay respondent £1,500 which he claimed.

Appellant excepted to respondent's declaration on the ground that it did not disclose a cause of action. The matter came before Roper,J., who dismissed the exception with costs. Thereafter the parties went to trial before Hill,J., The issues were the same as those raised on exception. The learned Judge gave judgment in respondent's favour for £1,500 with mora interest and costs. From that judgment appellant now appeals and also - with the leave of the Court a quo - from the judgment of Roper,J., on the exception.

The nature of the dispute will emerge from a statement of the arguments advanced. Legal authorities and decided

cases were cited at the Bar, but in my opinion they cannot assist us. The law applicable to this case is clear and what it is, is common cause.

Mr. Colman, for appellant, contended that it was not proved at the trial (or issually averred in the declaration) that on or before the 1st November, 1952, Colman became indebted to respondent in an amount covered by the preamble to appellant's undertaking, - i.e. that Colman became liable to make good to the respondent a loss incurred by respondent in granting the guarantees there referred to. As I understand Mr. Colman's submission, it rests on the following basis. After the execution of the agreements and within the two year period mentioned therein, the company became indebted to the shippers and the bank in amounts exceeding £3,000 and £6,000 respectively. Respondent and Colman were contingently liable for these amounts by virtue of guarantees furnished by respondent and Colman jointly and severally. Their liability to the bankers and shippers is, however, no concern of appellant; it is entirely disconnected ~~with~~ from the only liability which is his

concern, namely one which may arise as a result of the reciprocal undertaking given by respondent and Colman:

> "That they will reciprocally make good to each other any losses incurred by either of them in the granting of the guarantees aforesaid ..... the intention being that the parties will share equally all losses suffered by reason of the granting of the guarantees ..... aforesaid."

As between these two and them alone appellant bound himself as co-principal debtor with, and surety for Colman, namely "for the due and punctual payment by Colman of all such amounts as he may become obliged to pay" to respondent "in pursuance of the obligations undertaken by him as herein ~~beefe~~ before set out" - the ~~appellant~~ appellant's liability to be limited as to time to two years and as to amount to £1,500.

Now this reciprocal undertaking as between Colman and respondent, the argument goes, cannot render either of them obliged to pay or to make good to the other before and unless one of them has suffered more than his moiety of their common loss. The cause of debt inter se is not the losses they suffered but the

8/ inequal .....

inequal measure in which their common loss has become incident upon them. It is not sufficient therefore that the losses have occurred during the two years period; if they had met these losses in equal shares, there could have been no amount which Colman was obliged to pay to respondent and no obligation in respect of which appellant could be surety or co-principal debtor. In other words, unless the inequality of incidence to which I have referred occurs within the two year period, appellant is absolved. Now although the company defaulted on bills held by the shippers in June, 1952, within the two year period, the bank did not press their claims. The company was placed under provisional liquidation on the 6th November, 1952, and respondent paid the bank and the shippers under its guarantee well after the two year period had elapsed. Only then could the inequal incidence of the loss arise and with it respondent's claim for adjustment which appellant underwrote.

There is a degree of niceness in this argument which appeals yet at the same time sounds a warning that closer scrutiny is called for.

A litigant is of course not bound

by admissions on points of law made by his Counsel during argument. However, Mr. Colman made an admission which, to my mind, helps to uncover the fallacy in his argument. He admits that if the company had been forced into liquidation early during the currency of the two year period, if it had no resources from which a dividend might be expected and if respondent alone had been called upon to pay the guaranteed debts before the expiry of the two years - or if it had become apparent that it would inevitably be so called upon - appellant would have been liable on his guarantee even if the amount of Colman's indebtedness to respondent was ascertained and respondent was called upon to pay more than its moiety only after that period had elapsed. He argued that there is nothing on the papers to show that at any stage during the two years was it <u>known</u> that the company would not meet its obligations or that respondent would be called upon to pay one penny more than Colman.

I agree with appellant's Counsel that appellant's guarantee cannot be extensively interpreted

by invoking terms of an agreement between respondent and Colman. But appellant's guarantee refers to some incidents of the latter. It recites the fact that respondent and Colman have undertaken to make good to each other any losses incurred by either of them in granting the said guarantees. Now a man suffers a loss when passiva without the accrual of corresponding activa become incident upon his estate, whether or not he is aware of it. The fact of the loss and its extent may be ascertained subsequently. Here it is clear that respondent jointly with Colman suffered such a loss during the currency of the two years. The expressed object of their agreement was that such loss would be distributed equally between them. Appellant's guarantee was intended to support Colman's credit in this regard vis-a-vis respondent. It is against this background that we must interpret the words "for the due and punctual payment by Colman of all such amounts as he may become obliged to pay to the Feldman Company in pursuance of the obligations undertaken by him as herein before set out".

To my mind the words "become obliged" have no temporal significance. Those words are used merely because the parties were underwriting each other's credit for a continuous period lying in the future. As far as *dies cedit* or *dies venit* are concerned those words are perfectly neutral. Just as in the case of the losses I have referred to, it may emerge only *ex post facto* that Colman has become obliged to pay. Suppose that at the end of the second year, it becomes clear that respondent and Colman jointly had been incurring steadily increasing losses although, relying upon respondent's credit, the bank and the shippers had not called for payment, and suppose at the time Colman and the company are both hopelessly bankrupt; can it be said that appellant gets off scot-free merely because the losses had not been ascertained and respondent had consequently not called upon Colman to share them equally? I think not. The interpretation of a document must be conformable to its object. In my opinion the words "*as he may become obliged to pay*" following upon the words "such amounts" serve merely as a demonstration of the difference (or differences, if ascertained periodically) between the share of the joint losses incurred during that period which respondent had to bear and the share which

Colman had to or could bear. When the fact was ascertained that losses had been suffered or that they were inequal in their incidence, seems to me immaterial.

I am confirmed in this opinion by the words of the contracts. In the preamble to his guarantee appellant recites the reciprocal undertakings of respondent and Colman. He must be presumed, therefore, to have been acquainted with its terms. The clause containing those undertakings, which I have quoted above, contains no time limit, nor a stipulation as to when the parties would make good to each other any losses incurred by them in granting the guarantees to the shippers and bankers, which guarantees, on the contrary, were limited in time to two years. As between respondent and Colman, therefore, one party who, after that period, has paid more than a half share of the losses incurred by them during that period, would be entitled to claim adjustment from the other. Over and above referring to "all such amounts as he (Colman) shall become obliged to pay to the Feldman Company in pursuance of the obligations undertaken by him as herein before set out", appellant's guarantee

13/ specifically .....

specifically provides that "my liability hereunder shall be a continuing liability until Colman has performed each and every of his obligations as aforesaid". In clear and explicit terms these phrases embody an undertaking to be liable as surety for, and co-principal with, Colman also if under the reciprocal undertaking Colman becomes liable to respondent by reason of a payment made by the latter after the expiration of the two years period.

It follows that, but for the words "my liability hereunder shall endure for a period of (2) two years" occurring in appellant's guarantee, the position would have been clear and appellant would have had no defence.

The question then arises whether these words negative the clear meaning of the phrases I have cited with the effect that appellant's liability is excluded if Colman does not become liable by a payment made by respondent within that period.

Now the words "my liability hereunder shall endure for a period of (2) two years" cannot mean that appellant's liability is discharged by effluxion of time. That would be inconsistent with the stipulation

14/ that .....

that the liability shall be continuing until Colman has performed each and every obligation. The words cannot therefore be interpreted literally. If in their context they appear to be ambiguous, that meaning will naturally have to be ascribed to them, which will not be repugnant to the other clearly expressed intentions of the author.

The clue lies, I think, in the preamble to appellant's guarantee. It contains a triple renvoi: (1) to Colman's undertaking to grant guarantees to the company's shippers and bankers; (2) to the reciprocal undertaking by respondent and Colman and (3) to Colman's undertaking to furnish respondent with guarantees of other parties in respect of his obligations under (2). (1) and (3) contain time clauses in identical terms. (2) contains no time clause. It would do no violence to the words as used in appellant's guarantee if they are read to express a meaning corresponding to that which obviously they bear in (1), i.e. that appellant would be liable only if the amount, giving rise to Colman's liability, becomes owing to the shippers or bankers within the period covered by the guarantees to those shippers or bankers. I cannot give any other rational interpretation to those

words in their context. That is the sense in which they were probably intended to be understood and which they should be held to convey.

The appeal is dismissed with costs.

J.V.D. Heever

Fagan, J.A.
Steyn, J.A.
de Beer, J.A.
Reynolds, J.A. } concurred.