15-12-70

159/70

G.P.-S.43575—1969-70—2,000

J 219

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

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

SOUTH AFRICAN WAREHOUSING SERVICES & 6 OTHERS *Appellant,*

versus

SOUTH BRITISH INSURANCE LIMITED *Respondent*

Appellant's Attorney
Prokureur vir Appellant ~~McIntyre & v.d.Post~~

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate J.M.Didcott, S.C.,
Advokaat vir Appellant B.Law

Respondent's Advocate D.C. Shaw QC
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op 9 - 3 - 1971

3.4.6.7.9

Holmes Jansen JJ.A. Diemont, Miller, et Kotzé A JJ.A.

(D.C.L.D.) 9.45 am -- 11.00 am
11.15 am — 12.00 noon
C. a. V.

Diemont A.JA:- Appeal dismissed with costs, such costs to include the fees consequent upon the employment of two counsel.

REGISTRAR.
26.3.1971

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SOUTH AFRICAN WAREHOUSING SERVICES (PROPRIETARY) LIMITED AND OTHERS .... APPELLANTS

AND

THE SOUTH BRITISH INSURANCE COMPANY LTD ... RESPONDENT

Coram: Holmes, Jansen, JJ.A., Diemont, Miller *et* Kotzé, A.JJ.A.

Heard: 9th March, 1971

Delivered: 26th March, 1971

JUDGMENT

DIEMONT, A.J.A. :-

This is an appeal against a decision of the Durban and Coast Local Division dismissing an exception to respondent's declaration. The respondent, an insurance company, issued a summons in which it claimed from the seven

appellants.. /2

appellants payment of the sum of R5,764.27 and interest thereon *a tempore morae*.

Paragraphs 10, 11 and 12 of the declaration read as follows:-

"10. On the 9th August, 1963 and pursuant to an oral agreement concluded between the Plaintiff and the First Defendant therefor, and at Durban, the Plaintiff, represented by I. AYLWARD, executed a document, which is hereinafter referred to as "the said written undertaking" addressed to MEALIE INDUSTRY CONTROL BOARD, Pretoria, Transvaal.

11. A true copy of the said written undertaking is annexed hereto, marked "A".

12. At all material times hereto the said written undertaking has been of full force and effect."

In respect of paragraph 10, the appellants requested further particulars, and I set out the relevant portion of the request made and the reply given.

Request:

"(1) Does the Plaintiff rely, for the purposes of its present cause of action against the Defendants and as an element thereof, upon any of the terms of the said oral agreement?"

Reply: No.

Request: "(3) With regard to the language and to the effect of the said written undertaking (of which a copy is Annexure "A" to the Declaration):

(a) Does the Plaintiff contend that, according to the correct interpretation thereof, the obligation which it thereby incurred was to pay to the Mealie Industry Control Board the amount stipulated therein, in the events that such amount had in fact become payable in terms of the storage agreement referred to therein, and that the said Board were to have notified its Pretoria branch in writing that such amount had become so payable? or

(b) does the Plaintiff contend that, according to the correct interpretation thereof, the obligation which it thereby incurred was to pay to the said Board the amount stipulated therein, merely in the event that the said Board were to have notified its Pretoria branch in writing that such amount had become payable in terms of the storage agreement referred to therein, and irrespective of whether or not such amount had in fact become so payable?"

Reply: (a) No.
(b) Yes.

Paragraphs 13, 14 and 15 read as follows:-

"13. At Durban on the 20th June, 1962, a document was executed:

(a) on behalf of the First Defendant;
(b) by the Second, Third, Fourth and Fifth Defendants.

14. A true copy of the said document is annexed hereto, marked "B", and is hereinafter referred to as "the first counter guarantee and indemnity".

15. On or about the 20th June, 1962 the Plaintiff accepted the aforesaid first counter guarantee and indemnity."

Paragraphs 16, 17 and 18 are in identical terms save that they refer to a second counter guarantee and indemnity (annexure "C") which was executed by the sixth and seventh appellants on the 17th September, 1968.

Paragraphs 19, 20, 21 and 22 read:-

"19. During July 1969 the said MEALIE INDUSTRY CONTROL BOARD, then represented by the State Attorney, Pretoria, advised the Plaintiff's Pretoria Branch in writing that there was :

(a) an amount of R4,405.63;
(b) interest thereon calculated at the rate of six per centum per annum from May 1964;

payable by the First Defendant to the MEALIE INDUSTRY CONTROL BOARD in terms of Storage Agreement No. 62/21 and demanded that the Plaintiff pay to it the said amounts in terms of the said written undertaking.

20. Pursuant to such demand and in terms of the said written undertaking the Plaintiff paid to the said MEALIE INDUSTRY CONTROL BOARD:

(a) the said amount of R4,405.63 on the 18th July 1969;

(b) .... /5

(b) the sum of R1,358.64 being interest thereon calculated at the rate of six per centum per annum from the 1st June, 1964 to the 21st July, 1969, on the 21st July, 1969.

21. As a consequence of having effected such payment the Plaintiff claims that :

(a) the First Defendant is liable in terms of the first and second counter guarantee and indemnity;

(b) the Second, Third, Fourth and Fifth Defendants are liable in terms of the first counter guarantee and indemnity;

(c) the Sixth and Seventh Defendants are liable in terms of the second counter guarantee and indemnity;

to pay to the Plaintiff the total amount of R5,764.27 jointly and severally, the one paying the others to be absolved.

22. The Defendants have failed to do so."

Further particulars to these paragraphs were requested; again I give the requests and replies which were relevant:-

Request: "(1) With regard to the Plaintiff's said payments to the said Board:

(a) does the Plaintiff allege, for the purposes of its present cause of action against the Defendants and as an element thereof, that:

(i) it was obliged to effect them?
(ii) such obligation was incurred by it, solely by reason of the provisions of the said written undertaking (of which a copy is Annexure "A" to the Declaration) and the circumstances alleged in paragraph 19 of the Declaration?"

Reply: (i) Yes.
(ii) Yes.

Request: "(b) does the Plaintiff allege, for the purposes of its present cause of action against the Defendants and as an element thereof, that:

(i) immediately before the said payments were effected, the said sum of R4,405.63 and the said interest were in fact payable by the First Defendant to the said Board in terms of the said storage agreement?
(ii) immediately before the said payments were effected, the First Defendant was otherwise indebted to the said Board, or was otherwise obliged to pay any sum to it?
(iii) the purpose of the said payments was entirely or partially to discharge any debt or any obligation owed by the First Defendant to the said Board?
(iv) the effect of the said payments was entirely or partially to discharge any debt or any obligation owed by the First Defendant to the said Board?"

Reply: (i) No.
(ii) No.
(iii) No.
(iv) No.

Request: ..../7

Request: "(c) does the Plaintiff contend that the Defendants are liable to pay to it the said sum of R4,405.63 and the said interest:

(i) irrespective of whether or not any of the circumstances prevailed, which have been referred to in sub-paragraphs (b) (i), (b) (ii), (b) (iii) and (b) (iv) hereof?

(ii) solely by reason of the circumstances alleged in paragraphs 19, 20 and 22 of the Declaration, as read with those alleged in paragraphs 10 to 18 thereof?"

Reply: (i) Yes.
(ii) Yes.

The document which is referred to in paragraph 10 of the declaration as "the said written undertaking" and which is annexure "A" to the declaration, is in the form of a letter dated the 9th August, 1963, addressed to the manager of the Mealie Industry Control Board and reads as follows:-

"Dear Sir,

At the request of S.A. WAREHOUSING SERVICES (PTY) LTD. we advise that we hold at the disposal of your Board the sum of R20,000.00 (TWENTY THOUSAND RAND) (amount in words).

In .... /8

In terms of their instructions, this amount, or such lesser sum as may be claimed by you, will be paid to you at our PRETORIA branch free of commission, upon receipt by that branch of advice in writing from you, that the amount is payable in terms of Storage Agreement No. 62/21 entered into between yourselves and S.A. WAREHOUSING SERVICES (PTY) LTD. of Corner Davey and Johnstone Roads, MAYDON WHARF, Durban, Natal.

It is understood that the total amount available under this letter does not exceed R20,000.00 (TWENTY THOUSAND RAND) and we undertake to give your Board 30 days written notice of our intention to withdraw from or to effect cancellation of, this letter of advice, which is neither negotiable nor transferable. This letter must be returned to our PRETORIA branch upon payment of the full amount mentioned, or if cancelled in terms of this clause.

Yours faithfully,

For and on behalf of:
THE SOUTH BRITISH INSURANCE CO. LTD.

"J.A."

MANAGER

The document referred to in paragraphs 13 and 14 of the declaration as "the first counter guarantee and indemnity" and which is annexure "B" to the declaration, is

signed by the first, second, third, fourth and fifth appellants and in in the following terms:

"COUNTER GUARANTEE AND INDEMNITY.

(1) WHEREAS the SOUTH BRITISH INSURANCE COMPANY LIMITED, a Company duly incorporated under the Companies Act of New Zealand having its head office at Auckland, New Zealand, and which Insurance Company is registered under Act No. 27 of 1943 with its chief office in Natal at No. 39 Field Street, Durban (hereinafter called "the Company"), has issued and may in future continue to issue guarantees or other instruments whereby the Company either intercedes as guarantors on behalf of

SOUTH AFRICAN WAREHOUSING SERVICES (PTY) LTD.

or undertakes liability contingent or direct for the fulfilment of any obligation by or on behalf of

SOUTH AFRICAN WAREHOUSING SERVICES (PTY) LTD.

(2) AND WHEREAS the Company desires to be indemnified for and in respect of any liability or obligation which it may be called upon to pay or discharge on behalf of

SOUTH AFRICAN WAREHOUSING SERVICES (PTY) LTD.

and arising from any cause whatever:

(3) NOW THEREFORE I/WE,

(1) SOUTH AFRICAN WAREHOUSING SERVICES (Pty) Ltd. of No. 30 McBride Road Maydon Wharf, Durban, Natal.

(2) THOMAS JOSEPH le BRETON
of No. 173 Currie Road, Durban, Natal.
(3) ROBERT THOMY de CHARMOY
of No. 24 Burleigh Crescent, Durban North, Natal.
(4) VERNON MARKS of Woodward Drive, Pinetown, Natal.
(5) MICHAL S. ZAKRZEWSKI of 1404 Sanlam Buildings, Smith Street, Durban, Natal

do hereby indemnify the Company for and in respect of any amounts which it may be called upon to pay or may pay in terms of or pursuant or incidental to any undertaking or obligation of any nature whatsoever on behalf of

SOUTH AFRICAN WAREHOUSING SERVICES (PTY) LTD.

(4) This undertaking shall be governed by the following provisions :

(i) Our liability (in the case of more than one guarantor) shall be joint and several and in all respects similar to that of sureties and co-principal debtors in solidum.

(ii) I/We choose <u>domicilium citandi et executandi</u> at the addresses set opposite our names above and any notices that may be required to be given shall be sent to me/us at the same addresses.

(iii) I/We indemnify the Company against all and any loss whatsoever including any costs, expenses or other outgoings which the Company may incur arising out of the fulfilment of any obligation above contemplated and to pay forthwith

upon .... /11

upon demand every sum which the Company may have paid or may be called upon to pay.

(iv) I/We shall be responsible to reimburse the Company in respect of any expenses whatever which it may be called upon to meet including costs as between Attorney and Client in connection with any matter contemplated above.

(v) My/our liability shall in no way be affected by any variation, addition, compromise, indulgence, release, default or other similar action on the part of the Company in respect of its fulfilment of any obligation contemplated above or the enforcement by the Company of any right flowing therefrom.

(vi) This indemnity shall in no way affect any security which I/We may have agreed to furnish to the Company at any time for or in respect of any obligation present, future or contingent.

(vii) I/We agree that action may be taken upon this indemnity against me/us for the whole or part of any amount or amounts which may be claimable by the Company hereunder at any time, and a certificate signed by the Company or a duly authorised agent of the Company showing the amount owing by me/us to the Company in respect of any amount recoverable under this indemnity shall be sufficient and satisfactory proof for the purpose of obtaining provisional sentence or other judgment on this indemnity."

I ..../12

I have divided annexure "B" into paragraphs numbered 1 to 4 to facilitate reference thereto.

The "second counter guarantee and indemnity" (incorrectly described in paragraph 18 of the declaration as the "first counter guarantee and indemnity") is annexure "C" to the declaration and is in terms identical to annexure "B", save that it was executed by or on behalf of the first, sixth and seventh appellants.

Appellants excepted to the declaration, as amplified by the further particulars, on the following grounds:-

"1. (a) The Plaintiff's cause of action against the Defendants, which has been pleaded in the Declaration as thus amplified, depends upon the proposition that the effect of the provisions of the written undertaking (of which Annexure "A" to the Declaration is a copy) was to have obliged the Plaintiff to pay to the Mealie Industry Control Board the sum and the interest which, according to the allegations contained in the Declaration, were in fact so paid.

(b) According to the correct interpretation of its language, the effect of the provisions of the said written undertaking would have been to oblige the Plaintiff to pay to the said Board the said sum and the said interest, only if:

(i) the said sum and the said .... /13

said interest had in fact been then payable by the First Defendant to the said Board in terms of the storage agreement referred to therein; and

(ii) the said Board were to have notified the Plaintiff's Pretoria branch in writing of that circumstance.

(c) The Declaration as thus amplified contains no allegation to the effect that, immediately before the Plaintiff paid to the said Board the said sum and the said interest or at any other relevant time, the said sum and the said interest, or any other amounts, were in fact payable by the First Defendant to the said Board in terms of the said storage Agreement.

2. (a) The Plaintiff's cause of action against the Defendants, which has been pleaded in the Declaration as thus amplified, depends furthermore upon the proposition that the effect of the provisions of the counter-guarantees and indemnities (of which Annexures "B" and "C" to the Declaration are copies, subject to the deletion from Annexure "B" thereto of the handwritten words "for the benefit of") is to oblige the Defendants to pay to the Plaintiff the sum and the interest which, according to the allegations contained in the Declaration, were in fact paid by it to the Mealie Industry Control Board.

(b) The effect of the provisions of the said counter-guarantees and indemnities would have been to oblige the Defendants to pay to the Plaintiff the said sum and the said interest, only if the Plaintiff had paid or had been called upon to pay them to the said Board "in terms of or pursuant or incidental to any undertaking or obligation of any nature whatsoever on behalf of"

the .... /14

the First Defendant.

(c) The Declaration as thus amplified contains no allegation to the effect that the Plaintiff's payment to the said Board of the said sum and the said interest was one which it effected or had been called upon to effect "in terms of or pursuant or incidental to any undertaking or obligation or any nature whatsoever on behalf of" the First Defendant.

(d) The Declaration as thus amplified therefore lacks an averment necessary to sustain the Plaintiff's cause of action against the Defendants which has been pleaded therein."

Appellants accordingly asked for the exception to be allowed or, alternatively, for the declaration to be struck out, with costs.

The respondent's cause of action is based on the three documents which form the annexures to the declaration. Mr. Didcott, who appeared for the appellants, said at the outset of his argument, that the answer to the issues raised in the exception depended on the interpretation to be placed on these documents. He stated that no surrounding circumstances had been pleaded, that the documents must be construed by reference solely to the language used in them, and that the matter could properly be decided on exception. This statement was not

challenged.

The first exception turns on the interpretation to be given to the letter described as "the said written undertaking" (annexure "A"). This document is not a guarantee; it is an unconditional promise to pay a sum of money on the occurrence of a specified event. (See Hazis v. Transvaal and Delagoa Bay Investment Co. Ltd, 1939 A.D. 372 at p.384). The money, a sum of R20,000.00, or such lesser sum as may be claimed, is held by the respondent and is to be paid to the Mealie Industry Control Board (hereinafter referred to as the Board). The sole question is - what is the event upon the occurrence of which the respondent will make such payment? The answer to that question must be found in the following words:

> "......... this amount .... will be paid to you .... upon receipt .... of advice in writing from you, that the amount is payable in terms of storage agreement No. 62/21 ...."

These words make it clear that the respondent undertakes to make payment when it is advised by the addressee of the letter that the amount is payable in terms of the storage agreement.

In .... /16

In brief the obligation to pay arises on the receipt of advice.

Mr. Didcott contended that in this context the word "advice" must be interpreted to mean, not an opinion or belief, but a notification. Moreover, it did not mean any notification but only a notification of "that which was in fact true". Put in another way the contention was that respondent was not called on to pay on receipt of any written notification, regardless of whether it was based on fact or fiction; before it paid the money must have been due and payable in terms of the storage agreement and the respondent must have been notified of that circumstance.

I find no merit in this contention.

It seems to me that in order to have an understanding of what the event is upon which payment depends it is not enough to single out the word "advice" and look at it in isolation. The document as a whole must be examined and the intention of the parties gathered from the language used. When that is done I apprehend that the clear intention is to make an arrangement which will facilitate prompt and

easy payment. There is no suggestion in the letter that the Board must, as a pre-requisite to payment, furnish proof that the money is "in fact payable"; nor is there any suggestion that the respondent must conduct some sort of an enquiry to decide whether money is owing by the appellants, and if so, how much is owing, and whether or not it is owing in terms of Storage Agreement No. 62/21. I find nothing in the language used to indicate, or even suggest, that the undertaking to pay on receipt of the advice is a qualified undertaking: on the contrary the intention that the undertaking should be regarded as unqualified is underlined by the statement made in the first sentence of the letter - "we hold at the <u>disposal</u> of your Board the sum of R20,000.00". The use of the word "disposal" is significant. In its ordinary connotation one of the meanings of the word is "the power or right to make use of or deal with as one pleases" (Oxford English Dictionary, Vol. III, p.219). It is within the power of the Board to make use of or deal with the R20,000.00 at any time when it is pleased to present the necessary document to the respondent.

I have regard also the the use of the word "available" in the penultimate sentence of the letter which serves to reinforce the use of the word disposal.

Mr. Didcott argued further that if the Court were not prepared to accept the appellants' interpretation, based on a linguistic approach, it would be legitimate and justifiable in this case to depart from the literal meaning of the words used. The submission was that it was an accepted rule of construction that a contract must be read so as to give it business sense, and if necessary, it must be redrafted to give it efficacy. The words of Salmon L.J. sitting in the Court of Appeal were cited:

> "The Courts usually construe a contract so as to give it ordinary business efficacy. This is because the Courts recognise that people do not normally enter into a contract with the intention that it shall make no business sense."

(A.L. Wilkinson, Ltd v. Brown & Another, (1966) I All ER. 509 at p. 515).

This rule however, like so many rules of construction, must be applied with circumspection. A business

contract is no different from any other contract; it has no special virtue and no presumptions or suppositions to distinguish it from any other contract. (See John H. Pritchard & Associates v. Thorny Park Estates, 1967 (2) S.A. 511 at p.515). Moreover a Court of law must necessarily hesitate to set itself up as an arbiter of business efficacy. It may well be that a contract on the face of it appears foolish, but the parties may have information which throws a different light on the transaction. They may be prepared to take risks which to the uninitiated appear unwarranted; there may be factors of which the Court has no knowledge and which, if known, would discourage it from criticising the contract. There is also a further qualification to this rule of construction and that is that even if the bargain does appear to be foolish the Court will give effect to the intention of the parties, without attempting to redraft the agreement so as to render it less foolish, provided it is satisfied that that was their agreement:

> "There are, however, contracts, although I think very few, in which the parties use clear and unambiguous language which plainly means that the parties intend to enter into a ridiculous bargain. In such cases the

Courts ..... /20

> Courts will give effect to the expressed intention of the parties, however absurd the consequences may be."

(per Salmon L.J. in A.L. Wilkinson Ltd v. Brown supra at p.514). Mr. Didcott developed his argument as follows: He said that the interpretation given to the document by the respondent resulted in several anomalies; these anomalies were so grave that the contract lost all business efficacy. It was therefore the duty of the Court to come to the rescue of the parties by redrafting the document under consideration.

I find this argument to be unsound for two reasons. In the first place, if the parties have stated their intention in clear and unambiguous language, as I think they have, there can be no question of modifying the agreement to give it a greater business efficacy, even though the bargain be a foolish one. In the second place I am not persuaded that the criticism directed against the undertaking is justified. In my view the anomalies on which counsel laid so much stress are exaggerated. He claimed that the appellant would be left without redress if the money were paid to the

Board by mistake or as a result of a misapprehension. He argued that an even more difficult situation might arise if payment took place when money was not due and it was "positively known both to the respondent and to the Board" that nothing was payable. In these circumstances the appellant would be without remedy as it would be difficult, if not impossible, to proceed by way of a condictio indebiti or to sue in delict. I disagree. I see no good reason why the appellants should not found an action in delict, but even if the recovery of the money from the Board presents procedural problems, it may well be that the parties were content to take that risk - if they ever gave the matter any thought - when concluding their arrangements.

I have accordingly come to the conclusion that there can be no question of a modification or redrafting of the written undertaking to make it "less anomalous and more efficacious". I think that the intention with which the letter was written is clear and that effect must be given to that intention. The first exception was therefore rightly dismissed.

The second exception involves the interpretation to be placed on the documents which are annexures "B" and "C" to the declaration and which are described as counter guarantees and indemnities. The two documents are, as I have said, in identical terms and consequently it is necessary for me to refer only to the first counter guarantee and indemnity.

Counsel pointed out that the operative words in annexure "B" were contained in the paragraph numbered 3 which reads:

> "Now therefore we .... do hereby indemnify the Company for and in respect of any amounts which it may be called upon to pay or may pay in terms of or pursuant or incidental to any undertaking or obligation of any nature whatsoever on behalf of South African Warehousing Services (Pty) Ltd."

He contended that the respondent's cause of action, as pleaded in the declaration, depended on the proposition that the effect of annexure "B" was to oblige the appellants to pay to the respondent the sum and the interest "which were in fact paid by it to the Mealie Industry Control Board". This proposition he challenged on the ground that

on .... /23

on a proper construction of the operative words cited appellants were obliged to pay respondent the sum and interest claimed only if the respondent had been called on to pay them to the Board "in terms of or pursuant or incidental to any undertaking or obligation of any nature whatsoever on behalf of" the appellants. He pointed out that the declaration contained no allegation to this effect.

Counsel were agreed that the operative words, which I have referred to, were open to more than one interpretation, and debated whether it was the payment of an amount or "any undertaking or obligation" which was governed by the phrase "on behalf of". Mr. Didcott argued that these words - "on behalf of" - were used in this context in the strict legal sense as referring to some one who acted as an agent for another. That being so the respondent would be acting as an agent and it must therefore follow that it was the appellants' undertaking or obligation which was to be discharged. In other words the reference to any undertaking or obligation was intended as an allusion only to an undertaking or obligation of the appellants.

But, ... /24

But, as Mr. Shaw, for the respondent, pointed out, to read the words "on behalf of" as meaning, "as agent of" was to rob them of all sensible meaning. If the payments were to be made by respondent in its capacity as appellants' agent it would not be liable at all and the need for a counter guarantee and indemnity would fall away.

The words "on behalf of" can, and I think in this case should, be given a wider meaning. A distinguished Full Bench in the Transvaal Supreme Court was called on to consider what meaning should be given to similar, but not identical, words where they were used in a statute dealing with electoral practices. Innes C.J. posed the question: "What is meant by the words 'on his behalf'"? and proceeded to answer it as follows:

> "The popular meaning of those words is that everything done for a man's benefit or in his interest or to his advantage is a thing done on his behalf. On the other hand, the more legal view is that they mean something done by a man's representative or agent. The counsel who have so ably argued this case appeared 'on behalf' of their respective clients, as their representatives or agents. If A signs a bill for and on behalf of B, he signs that bill purporting and having the power to represent B, and that is as B's

agent. ..... /25

> agent. The question remains, In what sense are the words 'on his behalf' to be taken here - in the wide and general sense, or in the narrow and legal sense?"

De Visser v. Fitzpatrick, 1907 T.S. 355 at p.363, - a case cited with approval in Lind v. Spicer Bros. (Africa) Ltd., 1917 A.D. 147 at p.151.

When the wider, and in this instance more acceptable, meaning is given to the phrase "on behalf of", the operative words in annexure "B" may be read to mean that the appellants indemnify the respondent for any amount which it may pay pursuant to any undertaking given by it in the interests of, or for the benefit of, the appellants.

Annexure "A" is, ex facie the document, such an undertaking. The first sentence of that undertaking records that R20,000.00 is being held by respondent "at the request of" appellants. The next sentence goes on to record that this money will be paid "in terms of (appellants') instructions" to the Board on receipt of advice that the money is payable in terms of a storage agreement between the Board and the appellants. In each case the words italicised show why

and on whose behalf the promise is made. If then, the money is paid in terms of this undertaking to the Board it is undoubtedly an amount which is being paid pursuant to an undertaking, given in the interests of, or for the benefit of, the appellants.

The fact that none of the appellants was a signatory to the undertaking is of no consequence. The only question is whether it appears that the sum paid was paid pursuant to an undertaking given in the interest of or to the advantage of appellants. In Hazis v. Transvaal and Delagoa Bay Investment Co. Ltd. (supra) the Court was called on to consider the effect of such a payment. In that case a bank had given a written undertaking in words very similar to those used in annexure "A"; it bound itself to hold a sum of money at the disposal of a lessor and to pay on receipt of written advice that a lease had been cancelled. The lessee was not a signatory to the undertaking but Stratford C.J. held that there was no doubt at all that the bank's promise to pay the money was made for the benefit of the lessee.

I .... /27

I have made no reference to the preamble on which reliance was placed by both Counsel. In my view the preamble adds very little to the argument, one way or the other, and I can therefore see no good purpose in discussing it.

An additional fact referred to in argument was the allegation in paragraph 10 of the declaration: that the undertaking was given pursuant to an oral agreement concluded between the respondent and the appellants. Mr. Didcott contended that the learned Judge in the Court a quo had erred in placing any reliance on this oral agreement since, in reply to a request for further particulars, respondent specifically stated that it did not rely on any of the terms of the oral agreement.

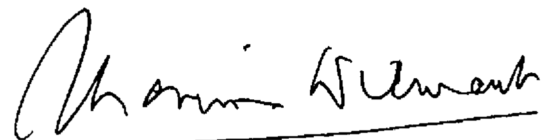
The terms of the agreement were not pleaded and the agreement is referred to in the declaration only to establish the reason why the respondent came to give an undertaking to the Board. The fact that such an agreement was made is, it seems to me, relevant although its

terms ..... /28

terms are not germane to this enquiry. However, even if the oral agreement be ignored, the provisions of annexure "B" speak for themselves and sufficiently indicate that respondent was acting in the interests of, and for the benefit of, the appellants and would thus on discharging the obligation be entitled to be indemnified.

I therefore come to the conclusion that the second exception was also rightly disallowed.

The appeal is accordingly dismissed with costs, such costs to include the fees consequent upon the employment of two counsel.



M.A. DIEMONT

ACTING JUDGE OF APPEAL

Holmes, J.A.)
Jansen, J.A.) Concurred
Miller, A.J.A.)
Kotzé, A.J.A.)