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

FAIRLANDS (PTY.) LIMITED *Appellant,*

versus

INTER-CONTINENTAL MOTORS (PTY) LTD. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Israel, S. & S.

Respondent's Attorney / *Prokureur vir Respondent* [illegible]

Appellant's Advocate / *Advokaat vir Appellant*

Respondent's Advocate / *Advokaat vir Respondent*

Set down for hearing on / *Op die rol geplaas vir verhoor op* 22 — 11 1971

13.3.5.

(W.I.D.)

Ref: E.A.:- The appeal is allowed with costs, including the fees of two counsel. The order of the Court a quo is altered to read:
"The exception is dismissed with costs. Such costs to include the fees of two counsel".

REGISTRAR, APPEAL COURT
GRIFFIER, APPELHOF
BLOEMFONTEIN.

Bills Taxed—Kosterekenings Getakseer - 2 -12- 1971

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:

FAIRLANDS (PROPRIETARY) LIMITED ..... Appellant

AND

INTER-CONTINENTAL MOTORS (PROPRIETARY) LIMITED ..... Respondent

Coram: Ogilvie Thompson, C.J., et Botha, Potgieter, Jansen, Rabie, JJ.A.

Heard: 22 November 1971. Delivered: 2 December 1971.

J U D G M E N T

RABIE, J.A.:

This is an appeal against an order made by Nicholas, J., in the Witwatersrand Local Division upholding with costs an exception taken by the respondent - the defendant (excipient) in the Court a quo - to the Combined Summons of the appellant - the plaintiff (respondent) in the Court below - on the ground that it did not disclose a cause of action.

2/... The

The facts of the case, as they appear from the respondent's Particulars of Claim and certain agreements referred to therein, are set out in the next few paragraphs.

On 13 November 1969 The Finance Company for Industry in South Africa (Proprietary) Limited (hereinafter referred to as "the Finance Company") and a Company known as Bismaw Excavators (Proprietary) Limited (hereinafter called "Bismaw") entered into ten written agreements in terms whereof the Finance Company let to Bismaw, at rentals which were to be paid on the 13th. day of each month, certain motor vehicles and mechanical equipment for a period of 18 months, commencing on 13 November 1969 and terminating on 12 May 1971. It was provided in each of these agreements that in the event of Bismaw defaulting in the punctual payment of any amount payable in terms thereof, the Finance Company would be entitled, inter alia, to demand immediate payment of all amounts still to be paid in terms thereof.

On the same day - i.e., 13 November 1969 -

3/... the

the Finance Company and the respondent entered into what is called an Agreement of Recourse, with an Addendum thereto. In the Agreement of Recourse the respondent, inter alia, bound itself to the Finance Company as surety for and co-principal debtor in solidum with Bismaw for the due fulfilment by Bismaw of all its obligations under the ten agreements of lease referred to above, and warranted that Bismaw would fulfil all its obligations under the said agreements of lease, undertaking that in the event of the warranty being breached the Finance Company would be entitled to require it (the respondent) to pay immediately the full balance of all rentals owing.

The Agreement of Recourse states, in its preamble, that it is "subject to the conditions contained in the Addendum". The Addendum, in which, as in the Agreement of Recourse itself, the Finance Company is referred to as "the Supplier", provides as follows:

"IT IS AGREED AS FOLLOWS:

(a) That notwithstanding anything to the contrary which might be con-

4/... tained

tained in the said Agreement of Recourse, the liability of the Supplier shall be limited to an amount of R87 928-41 (Eighty-seven thousand, nine hundred and twenty-eight rand, forty-one cents).

(b) The liability of the Supplier shall terminate upon the registration in favour of Premier Finance Corporation (Proprietary) Limited of covering bonds on the properties and for the amounts detailed hereunder.

DESCRIPTION OF PROPERTY

1. Sub A of 51 of R2 of B Block A Cottonlands No. 1575 in extent 10890 square feet D/T278/1961.

   Covering Bond amount R13 200-00.

2. Stand No. 51 Bedfordview Extension 9 situate on the corner of Nicol and Tabiman Roads, Bedfordview with improvement thereon.

   Covering Bond amount R35 800-00."

On 14 November 1969 the Finance Company, acting in terms of an earlier agreement with Premier Finance Corporation (Proprietary) Limited (hereinafter referred to as Premier Finance), ceded all its rights against Bismaw under the aforementioned agreements of lease and all its rights against the respondent under the Agreement of Recourse and

5/... Addendum

Addendum to Premier Finance.

Bismaw failed to pay rentals as they fell due, and on 9 March 1970 Premier Finance demanded payment of the sum of R83 053-50, being the total amount then due under all the agreements of lease, from Bismaw. On 10 March 1970 Premier Finance made a similar demand on the respondent. Bismaw paid an amount of R4705-60 on 18 March 1970, but nothing thereafter. The respondent made no payment at all.

The bond referred to in paragraph 2 of the Addendum was registered in favour of Premier Finance on 23 January 1970, and the one referred to in paragraph 1 thereof on 13 April 1970.

On 15 June 1970 Premier Finance ceded all its rights against Bismaw and all its rights against the respondent to the appellant, and on 11 November 1970 the appellant issued summons against the respondent for payment of the sum of R78 347-90 (i.e., R83 053-50 less the R4 705-60 paid by Bismaw), alleging in paragraph 15 of its Particulars

of claim that -

"(a) The Defendant became liable as surety and co-principal debtor as aforesaid to pay Premier Finance the sum of R78 347-90 (being the difference between the said sum of R83 053-50 and R4 705-60);

(b) Further or alternatively to sub-paragraph (a):

The warranty given by the Defendant as aforesaid was breached and Premier Finance was entitled to require the Defendant to immediately pay the sum of R78 347-90 (being the difference between the said sum of R83 053-50 and R4 705-60)."

The respondent excepted to the appellant's combined Summons on the ground that it disclosed no cause of action, alleging that upon the registration of the bonds in favour of Premier Finance as provided for in the Addendum the "defendant's liability in terms of the said Addendum has terminated."

7/... Nicholas, J.,

Nicholas, J., in upholding the exception, held that the meaning of paragraph (b) of the Addendum was clear and unambiguous, viz., that upon registration of the bonds in favour of Premier Finance all liability whatsoever on the part of the respondent came to an end, and he rejected the contention of the appellant that the paragraph meant, or, alternatively, that it could reasonably mean, that after the registration of the bonds the respondent would incur no further liability under the Agreement of Recourse, but that any liability which had accrued during the period before such registration would remain in existence. In rejecting the appellant's contention the learned Judge said:

> "It is, in my view, clear that the parties to the agreement of recourse and the addendum intended that the terms of their contract should be discovered by reading the agreement with the addendum, and that the addendum was intended to prevail over the terms of the agreement. Compare Baragwanath v. Olifants Asbestos Co. (Pty) Ltd., 1952

(1) 251 (T) at 255 H. If the documents are so read, then in my view it is impossible to uphold the contention put forward on behalf of the plaintiff. If the addendum had provided that the agreement of recourse would terminate upon the registration of the bonds, then the legal consequence of the occurrence of that event would no doubt have been that liability which had accrued up to the date of the termination would have been enforceable. That, however, is not the case: what was provided was that the defendant's liability should be terminated. It was sought to argue on behalf of the plaintiff that the words 'the liability' referred to the contingent liability undertaken by the defendant in terms of the agreement, and did not refer to liabilities which had become enforceable. To adopt that construction would be to give an artificial and strained interpretation to the word 'liability', and it would also be at variance with the use of the word in paragraph (a) of the addendum, where it clearly means a liability to pay money.

The plaintiff's contention involves rewriting paragraph (b) of the addendum so that it would begin 'The liability of the supplier (excluding liability for amounts which have

9/... already

> already become due and payable) shall terminate ....'. In my view there is no warrant for such a course."

Rejecting the appellant's alternative contention that the words used in paragraph (b) of the Addendum are capable of bearing the meaning suggested by it (the appellant) and that, as evidence might eventually show the suggested meaning to be the correct meaning, the Court should not decide the meaning of the said paragraph on exception, the learned Judge said:

> "It was also argued on behalf of the plaintiff that the meaning of the addendum should not be finally decided on exception because extrinsic evidence might show that to give the words their ordinary meaning would lead to an absurdity. The authorities show, however, that where, as here, the meaning of the words is clear and without ambiguity, recourse to extrinsic evidence is not permissible. See Trollip v. Jordaan 1961(1) 238 A.D. at page 255 and cases there cited."

On appeal before us Mr. Schneider, who appeared for the appellant, submitted that, when using the

language they did in para. (b) of the Addendum, the contracting parties intended to provide for an agreement to be construed in conformity with the principle of law that where a time limit is set upon the duration of a suretyship, or where a suretyship may be determined by the giving of a notice of determination, the surety is released on the expiration of the term, or on the giving of the notice, as the case may be, but remains liable for any default of the principal debtor which occurred during the existence of the suretyship. See, e.g., Kalil v. Standard Bank of South Africa Ltd., 1967(4) S.A. 550 (A.) where Williamson, J.A., said the following in connection with the termination of a continuous guarantee (at p. 555 F - H):

> "No limitation was, however, stipulated as to the duration of this continuous guarantee - a common feature of guarantees taken by Banks in respect of accounts which will operate in the future on overdraft. Generally speaking a surety under such a continuous guarantee has, apart from an express or clearly

11/... inferential

> inferential provision to the contrary in his contract, a right to bring about a termination of such a continuous liability by notice duly given to the holder of the guarantee. Any such notice obviously could only relate to amounts advanced to or becoming due by the principal debtor after the notice; the surety's liability in relation to any amount due at the time of the giving of the notice would remain unaffected."

In the present case, counsel submitted, the intention of the contracting parties was that the registration of the bonds should bring about the termination of the respondent's liability in futurum, i.e., as from the date of registration, but not the extinction of debts which had accrued before the date of registration. He contended that the words in issue in fact bear this meaning, or, alternatively, that they are reasonably capable of this interpretation.

Arising from this alternative submission, it may be stated at this point that, as we are dealing with the matter at the exception stage, the question is not

12/... whether

whether the meaning contended for by the appellant is necessarily the correct one, but whether it is a reasonably possible one. If the suggested meaning is a reasonably possible one, the exception should not have been upheld (cf. Amalgamated Footwear & Leather Industries v. Jordan and Co. Ltd. 1948(2) S.A. 891 (C.), at p. 893; Lanificio Varam S.A. v. Masurel Fils (Pty) Ltd., 1952(4) S.A. 655 (A.), at p. 660 F - G).

The Court a quo found, as will appear from the first extract from its judgment quoted above, that the word "liability" in both para. (a) and para. (b) of the Addendum unambiguously means "the liability to pay". There can be no doubt, of course, that the word often has this meaning: see, e.g. Friedman v. Bond Clothing Manufacturers (Pty) Ltd. 1965(1) S 673 (T.), at p. 680 D. I am nevertheless not persuaded that the word is, as a matter of language, capable of only this meaning in para. (b) of the Addendum. A reference to standard English and legal dictionaries shows that the word "liability" is capable of various shades of meaning,

13/... depending

depending on the context in which it is used. In Read and Another v. Warren 1955(2) S.A. 370 (N.), where the Court declined to interpret the words "liability" and "liabilities" because it did not have before it the whole of the agreement in which they were used, Selke, J., said (at p. 373/4):

> "Now a reference to Stroud's Judicial Dictionary under the heads of 'liability' and 'liable' serves to show that these words are, prima facie, words of very many shades of meaning, the precise meaning to be attributed to them varying with the collocation in which they occur."

I respectfully agree with this statement. In the Oxford English Dictionary, Vol. VI, s.v. "liability", the first definition given is: "1. Law. The condition of being liable or answerable by law or equity". In Webster's Third New International Dictionary, s.v. "liability", the following is stated: "1 a: the quality or state of being liable (the — of an insurer .... 2: something for which one is liable: as ... an amount that is owed whether payable in

 money,

money, other property, or services ....". In legal language, I think, the word "liability" is often used in the primary sense given in these definitions, i.e., the condition, or state, of being bound, or answerable, under an agreement, which is a broader concept than mere liability to pay what is due. It seems to me that the word "liability" can have this meaning in para. (b) of the Addendum, and that there is no straining of language were it to be so understood. It would mean, then, in the context, that on registration of the bonds the appellant's liability, or answerability, as surety comes to an end - which is, in effect, the same thing as saying that the agreement of suretyship comes to an end. As for the word "terminate" in para. (b) of the Addendum, it seems to fit in with the suggested interpretation. Used as an intransitive verb, as in para. (b), it means, according to the Oxford English Dictionary, "to come to an end". In the context it would, therefore, signify that on the registration of the bonds the appellant's obligations as surety come to an end, without, however, extinguishing liability

15/... already

already accrued. This is, in effect, the interpretation for which the appellant contends.

There are, furthermore, certain considerations which seem to me to argue against the meaning found by the Court a quo, but which do not occasion difficulty on the interpretation for which the appellant contends. I deal with them briefly. In terms of the Agreement of Recourse the appellant undertakes full liability as guarantor and surety for all Bismaw's obligations under the agreements of lease, and for the full period thereof. The Addendum introduces some qualifications. Para. (a) thereof places an upper limit to the amount which the respondent can be called upon to pay in discharging its obligations under the Agreement of Recourse. There is no dispute about this between the parties. It is also common cause that para. (b) of the Addendum qualifies the Agreement of Recourse in so far as it provides for the release of the respondent's liability as surety as from the date of the registration of the bonds. The dispute between the parties is whether para. (b) also

16/... means

means that liability which accrued during the period before the registration of the bonds is extinguished on the registration of the bonds. If para. (b) is interpreted to mean that registration of the bonds does bring about such a result, it would constitute a further - a third - qualification of the Agreement of Recourse, which, as has been stated, provides for the respondent's full liability for all Bismaw's obligations during the whole period of the agreements of lease. It is stated in the preamble to the Agreement of Recourse that this agreement is "subject to the conditions contained in the Addendum", and it would seem to appear from the first of the above quoted extracts from the judgment of the Court a quo that the view that "the addendum was intended to prevail over the terms of the agreement" (I quote from the judgment) weighed with the learned Judge when he came to the conclusion which he did as to the meaning of para. (b) of the Addendum. As has already been stated, the Addendum was signed on the same day as the Agreement of Recourse, and reference is made to it in the preamble to the

17/... Agreement

Agreement of Recourse. It is consequently a document which, on the face of things, can reasonably be supposed to reveal the intentions of the contracting parties at the same time as when the Agreement of Recourse was signed. I think, therefore, that the two documents should be read together and that their terms should, as far as it can reasonably be done, be brought into harmony with each other. As I have indicated, it is common cause that the Addendum introduces two qualifications, and the Agreement of Recourse has, to this extent, been shown to be "subject to the conditions contained in the Addendum". The question is whether a third qualification, as contended for by the respondent, was intended.

When regard is had to the terms of the Agreement of Recourse which provide for full security for the whole period of the agreements of lease, it is somewhat difficult to understand why the contracting parties should in the Addendum have proceeded to provide that there would on the registration of the bonds be no security in respect

18/... of

of debts previously accrued. Mr. Reichman, who appeared for the respondent and supported the reasoning of the judgment of the Court a quo, submitted that it is clear from the language used in para. (b) of the Addendum that the bonds were intended to provide permanent security, and that the respondent's intervention was to provide temporary security only until the bonds were registered. This submission hardly seems to explain, however, why the parties should have been content to provide for temporary security which could be quite ineffective, especially if it be considered that the bonds provide security in a substantially lesser amount than the amount provided for in para. (a) of the Addendum. In answer to questions from the Bench on this point, Mr. Reichman submitted that the bonds were intended to serve as security for all debts, i.e., debts incurred both before and after the registration of the bonds. But there are difficulties in the way of this submission. Section 51 (1) of the Deeds Registries Act, No. 47 of 1937, provides the following (I omit what is not relevant for present purposes):

 "..... no

> "..... no mortgage bond or notarial bond attested or registered after the commencement of this Act shall be of any force or effect for the purpose of giving preference or priority in respect of any debt incurred after the registration of such bond, unless -
>
> (a) it is expressly stipulated in the bond that the bond is intended to secure future debts generally or some particular future debt described therein; and
>
> (b) a sum is fixed in the bond as an amount beyond which future debts shall not be secured by the bond."

And section 50 (4) of the same Act provides as follows:

> "If in a mortgage bond or notarial bond purporting to secure a future debt the amount of an existing debt is mentioned, such existing debt shall be deemed to be secured as part of the maximum amount intended to be secured by such bond."

See, also, Rooth & Wessels v. Benjamin's Trustee & Another 1905 T.S. 624, at p. 629/630, where Innes, C.J., said:

> "The main difference, it seems to me, between an ordinary and a covering bond, is that in the case of the latter the full amount of the debt which the bond

20/... is

> is intended to cover is not in existence at the date of execution of the instrument. ... The pledge or security is given in advance to cover a liability which the parties intend shall only be fully incurred in the future."

The Addendum contains no express provision for including debts already accrued, or any part thereof, in the amount to be secured by the covering bonds, and the intention would accordingly seem to have been to secure only post-registration debts.

On the finding of the Court a quo as to the meaning of the Addendum, it would follow, the bonds being intended to secure only future debts in an amount not exceeding R49 000-00 in all, that debts already accrued at the registration date of the bonds would become utterly unsecured. As I have said, it seems somewhat unlikely that such a result could have been intended, and, inasmuch as para. (b) of the Addendum is, for the reasons I have stated, reasonably capable of the meaning contended for by the appellant, I consider that the Court a quo should not have upheld the exception and found that the language in issue is so clear and certain as to

warrant extinction of the appellant's claim on exception.

In conclusion I may mention that in the course of his argument Mr. Reichman sought to place reliance on an agreement which was concluded on 15 June 1970 between Premier Finance and the appellant, and which contains certain provisions relating to suretyship obligations undertaken by one Bisogno and one Smith-Hillcoat. I need not state the nature of this argument - of which, I may add, no mention is made in counsel's written heads of argument - for, inasmuch as the agreement was entered into subsequently to the Agreement of Recourse and the Addendum, and between different parties, it cannot be relied on in the exception proceedings with which we are here concerned.

The appeal is upheld with costs, including the fees of two counsel. The order of the Court a quo is altered to read: "The exception is dismissed with costs. Such costs to include the fees of two counsel".

P.J. Rabie

P.J. RABIE
JUDGE OF APPEAL

Ogilvie Thompson, C.J.
Botha, J.A.
Potgieter, J.A. } Concur.
Jansen, J.A.