27-10-72

G.P.-S.43575—1969-70—2,000

J 219

139/72

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

JOSEPH HENRY NELSON *Appellant,*

versus

HODGETTS TIMBERS (EAST LONDON) (PTY) LTD. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Siebert & Honey

Respondent's Attorney / *Prokureur vir Respondent* Webber and Newdigate

Appellant's Advocate / *Advokaat vir Appellant* T. W. Mullins S.C.

Respondent's Advocate / *Advokaat vir Respondent* J. W. Smallberger S.C.

Set down for hearing on / *Op die rol geplaas vir verhoor op* 1.2/3/73

3.6.8.10.11

Coram: Rumpff, Wessels, Jansen, Rabie et Miller JJ.A.

(E.C.D.)

9.45 a.m. —— 11.00 a.m.
11.15 a.m. —— 12.45 p.m.
2.15 p.m. —— 3.30 p.m.
3.45 p.m. —— 5.20 p.m.

C.A.V.

22.3.73. Rumpff J.A.: Appeal allowed w/c Order as per Judgment. Costs to be paid by Respondent.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOSEPH HENRY NELSON Appellant

and

HODGETTS TIMBERS (EAST LONDON)

(PROPRIETARY) LIMITED Respondent

CORAM: RUMPFF, WESSELS, JANSEN, RABIE et MULLER, JJ.A.

HEARD: 1.3.1973. DELIVERED: 23.3.1973.

J U D G M E N T

RUMPFF, J.A. :

This is an appeal against an order issued in the Eastern Cape Division in terms of which the second defendant, now the appellant, is to pay, with costs, an amount which the trial Court awarded to the plaintiff, now the respondent, pursuant to a claim based on a deed of suretyship which the second defendant had signed and in terms of which he had undertaken to bind himself as surety, together with one Van der Merwe, for amounts due to the plaintiff by H.B.C. Properties (Pty.) Ltd. At the trial

a/.....

a plea involving the validity of the deed of suretyship was raised by the second defendant and also a plea involving the existence of a condition precedent and, alternatively, an/ implied agreement. The trial Court ruled against the second defendant on the issue of the validity of the deed and also decided against the second defendant on the other issues. The judgment of the Court a quo is reported under Hodgetts Timbers (East London) (Pty.) Ltd. v. H.B.C. Properties (Pty.) Ltd. and Another, 1972 (4) S.A. 208 (E.C.). The report i.a. contains that part of the judgment which sets out the issues between the plaintiff and the second defendant and the decision on the validity of the deed and on the alleged implied agreement, but does not contain that part of the judgment which deals with the evidence concerning the alleged condition precedent. It also refers to certain proceedings for summary judgment and contains the order for costs in respect thereof. As the first defendant had not entered an appearance and judgment had been obtained against it by default, the trial Court referred to the second defendant as "the defendant" and I shall continue to do so. Before this Court it was argued that the order made

by/.....

by the trial Court was wrong in that the Court had erred on all the issues before it. Para. 4 of plaintiff's declaration reads as follows:

> "(a) On or about the 23rd October, 1970, and at East London, within the area of jurisdiction of this Honourable Court, Plaintiff and Defendant entered into a written agreement of suretyship in terms of which Defendant bound himself as surety and co-principal debtor for all amounts due and which might in future become due by the Company to Plaintiff up to a maximum amount of R5 000.00.
>
> (b) A copy of the said agreement of suretyship is annexed hereto marked "A"."

The copy marked "A" reads as follows:

> "We, the undersigned,
> JAN VAN DER MERWE AND JOSEPH HENRY NELSON
>
> do hereby bind ourselves as surety and Co-Principal Debtors under renunciation of the benefits of divisionis and excussionis for the payment of all amounts due and which may in future become due by H.B.C. PROPERTIES (PROPRIETARY) LIMITED to HODGETTS TIMBERS (EAST LONDON) (PROPRIETARY) LIMITED up to a maximum amount of R5,000-00. (FIVE THOUSAND RAND).
>
> We do further declare that it shall be in the absolute discretion of the said HODGETTS TIMBERS (EAST LONDON) (PROPRIETARY) LIMITED to determine the extent, nature and duration of any other arrangements with the said H.B.C. PROPERTIES (PROPRIETARY) LIMITED and to give time to or compound with the said H.B.C. PROPERTIES (PROPRIETARY) LIMITED without prejudice to the

right of HODGETTS TIMBERS (EAST LONDON) (PROPRIETARY) LIMITED to recover from us to the full extent of this guarantee any sum which may remain owing by the said H.B.C. PROPERTIES (PROPRIETARY) LIMITED.

AND

We do hereby choose domicilium citandi ex executandi at CITY PERMANENT BUILDINGS, 17, TERMINUS STREET, EAST LONDON.

THIS DONE AND EXECUTED AT EAST LONDON BY JAN VAN DER MERWE on this day of OCTOBER, 1970, in the presence of the undersigned Witnesses.

AS WITNESSES: _____

(1)_____

(2)_____

THUS DONE AND EXECUTED AT EAST LONDON BY JOSEPH HENRY NELSON on this day of 23rd OCTOBER, 1970, in the presence of the undersigned Witnesses.

AS WITNESSES: (Sgd.) J.H. Nelson.

(1) (Sgd.) ?

(2) (Sgd.) ?"

At the outset it is necessary to refer to the provisions of sec. 6 of Act 50 of 1956 which are as follows:

"No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by the surety: Provided that nothing in the section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments"

The first point to be decided is whether the deed of suretyship complies with the requirements of this section, *in casu*, whether the parties to the contract have signified their assent to the contents of the document by their signatures.

The case for the plaintiff was, and is, that the signature by the defendant was sufficient to create a written deed of suretyship between him and the plaintiff and that the absence of Van der Merwe's signature does not invalidate the contract between defendant and the plaintiff. This argument would appear to be correct if *ex facie* the document it appeared that the parties thereto intended no more than that the document should constitute two separate agreements, the one between Nelson and the plaintiff and the other between Van der Merwe and the plaintiff. In that case, if either Van der Merwe or Nelson affixed his signature to the document, the contract between the signatory and the plaintiff would be a written contract between the signatory and the plaintiff and would therefore comply with the section referred to.

Before/.....

Before considering the intention of the parties, ex facie the document, it is necessary to state briefly the consequences of a deed of suretyship and to refer to the rule of construction to be applied in the case of a written contract. Although the liabilities under a deed of suretyship exist because of a contract between the surety and the creditor, such contract nevertheless gives rise to three sets of legal relationships, namely, that between the surety and the creditor, that between the surety and the principal debtor and that between co-sureties, if any. It is firmly established, I think, in our law - at least when several sureties have agreed to become such in one document - that each one may be sued for his share by any one of them who has paid the whole debt. This right to contribution is a right which the surety possesses de jure. See the decision in Kroon v. Enschede and Others, 1909 T.S. 374, which has been followed in a number of cases. See also Caney's The Law of Suretyship, second edition, ch. XIII. It may therefore be of importance not only to the creditor that there are co-sureties, but also to a surety who, being prepared

to/.....

[illegible] co-operators [illegible]

[illegible] alone [illegible], it is necessary [illegible]

[illegible] co-operators [illegible]

[illegible] of co-operat[illegible]

conc[illegible] included [illegible]

exist because of [illegible] correct use [illegible] one more [illegible] tion,

and co-operative [illegible]

[illegible] co-operator,

[illegible]

not for co-operators, [illegible]

in our [illegible] have never [illegible]

[illegible] for

[illegible] that [illegible]

that [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

there are co-[illegible]

[illegible]

to assume liability, would prefer to reduce his ultimate liability by acquiring the benefit of a right of contribution against any co-surety.

As far as the intention of the parties to the deed is concerned, the rule is "to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract. As was said by Solomon, J. in Van Pletsen v. Henning (1913 A.D. 82 at p. 89): 'the intention of the parties must be gathered from their language, not from what either of them had in mind'". See Worman v. Hughes and Others, 1948 (3) S.A. 495 at p. 505 (A.D.). This rule is, of course, not inflexible, as was pointed out i.a. in Trollip v. Jordaan, 1961 (1) S.A. 238 (A.D.) at p. 245, but this is not a case where the ordinary meaning of the words used would lead to an absurdity or "to something which from the instrument as a whole, it could clearly be gathered the parties could not have intended."

As the problem concerns the intention of the parties to be inferred from the words used in the deed

of suretyship, it may be as well to mention the elementary principle expressed by an English judge, quoted in Steenkamp v. Webster, 1955 (1) S.A. 524 (A.D.) at p. 530, that "when the signature comes at the end you apply it to everything which occurs throughout the contract".

On behalf of the plaintiff it was submitted that ex facie the deed of suretyship defendant contracted to bind himself as surety and that the effect of Van der Merwe's signature would have been to establish two individual contracts embodied in one document and that such signature would not have affected the contract between plaintiff and the defendant. The point to be decided is, therefore, whether the parties, ex facie the document, intended to enter into a joint contract of co-suretyship or two separate contracts of suretyship.

The form in which the document is cast and the words used are such that, in my view, it must be necessarily inferred that the parties intended a joint contract of co-suretyship. The deed expressly states that "We, the undersigned ..... do hereby bind ourselves as surety and

Co-Principal Debtors under renunciation of the benefits of divisionis....." and "We do further declare that ..... to recover from us ...." and "We do hereby choose domicilium citandi ex (et?) executandi at City Permanent Buildings, 17, Terminus Street, East London".

The learned trial Judge in his judgment quoted i.a. the following passage from Kalil v. Standard Bank of South Africa Ltd., 1967 (4) S.A. 550 (A.D.) at p. 557:

> "The mere fact that the individual obligations of two or more co-sureties are recorded in one document would not alter the nature of the obligations of the several co-sureties; each contracts as an individual, with the creditor and the document should be read in the light of that fact, subject of course to the specific terms of the document."

After referring to the fact that a surety acquires no contractual rights against his co-surety, even though their obligations are evidenced in a single writing, and that their rights inter partes arise by operation of law and not ex contractu, he continued as follows:

> "Accordingly an agreement of suretyship, when several co-sureties join in signing one deed, must be read as the individual

contracts/.....

> contracts entered into between each of them and the creditor. Thus had the deed in the present case been signed by both the defendant and van der Merwe each would individually be bound thereby as if they had signed individual deeds. It follows that the mere fact that van der Merwe did not sign does not render the agreement of suretyship entered into between the defendant and the plaintiff invalid."

I do not think that the reasoning of the learned trial Judge is correct. The present case is not concerned with the nature of the obligations of two co-sureties recorded in one document, but with the question whether or not the parties, in terms of the deed, intended a joint contract of suretyship, and whether the defendant in signing the document, without Van der Merwe having signed it, intended, notwithstanding the wording of the deed, to conclude a contract in terms of which he would become the sole surety for the obligation of the principal debtor. To meet the difficulty which the wording of the deed presents, counsel for defendant, during argument in this Court, contended that in the present case the position would be the same as if the parties had used the word "I" instead of "we" wherever these words are used in the deed. This argument, of course, ignores the express words used by the parties and also

assumes the validity of the contract which is the very matter in issue.

As indicated above, there are cogent considerations why a surety should want to be joined by a co-surety and why he should intend to enter into a contract of joint suretyship, and if the words of a contract clearly indicate that such was the intention of the parties, effect must be given thereto. In the result I am of the opinion that, in the absence of the signature of Van der Merwe, the deed of suretyship does not comply with the provisions of sec. 6 of Act 50 of 1956 and cannot be sued upon. It is not necessary to deal with the English decisions quoted to us, which seem to be based purely on the law of Equity as applied in that country, nor is it, in the result, necessary to deal with the question whether or not a condition precedent or an implied condition was proved by the defendant.

As far as the application for summary judgment is concerned, it was submitted on behalf of the

defendant that the trial Court should have found that the application was so ill-founded that attorney and client costs should have been awarded to the defendant. Reliance for this submission is sought in the wording of Rule 32 (9) (a) of the Uniform Rules of Court which provides that at the hearing of an application for summary judgment the court may make any order as to costs as to it may seem just, provided that "if the plaintiff makes an application under this rule, where the case is not within the terms of sub-rule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client;" Counsel for defendant argued that under this rule an order as to attorney and client costs should be made unless reasons exist why such order should not be made. I do not agree that this is the intention of the Rule and see no reason why the order of the trial Court should be interfered with.

In the result, the appeal is allowed, with costs, and the order of the Court a quo is set aside and substituted by the following order: "There will be judgment for Second Defendant with costs, Second Defendant being declared a necessary witness".

JUDGE OF APPEAL.

WESSELS, J.A.
JANSEN, J.A.
RABIE, J.A.
MULLER, J.A.

Concur.