7-9-72

G.P.-S.43575—1969-70—2,000

125/72

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

HELEN DICKINSON *Appellant,*

versus

SOUTH AFRICAN GENERAL ELECTRIC CO.(PTY)LTD. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Reid & Haylett

Respondent's Attorney / *Prokureur vir Respondent* Webber & Newmarch

Appellant's Advocate / *Advokaat vir Appellant* M. Horwitz

Respondent's Advocate / *Advokaat vir Respondent* M.S. Stegmann

Set down for hearing on / *Op die rol geplaas vir verhoor op* 6-11-1972

1.2.3.8.9

Coram: Ogilvie Thompson C.J. van Blerk, Holmes, Jansen et Trollip JJ.A.

(A.L.D.) 9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 4.00 pm

C.A.V.

9. 1. 1973. JANSEN J.A.:-Appeal allowed with costs, and the order of the Court a quo is altered to read:- "Provisional sentence refused with costs".

Acting REGISTRAR

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:

HELEN DICKINSON ..... APPELLANT

AND

SOUTH AFRICAN GENERAL ELECTRIC COMPANY

(PROPRIETARY) LIMITED ..... RESPONDENT

Coram: Ogilvie Thompson, C.J., Van Blerk, Holmes, Jansen et Trollip, JJ.A.

Heard: 6 November 1972 Delivered: 9 January 1973.

J U D G M E N T

Trollip, J.A. :

I agree with the orders proposed by Jansen, J.A., for the reasons given by him, but I wish to add a further reason of my own for allowing the appeal.

As pointed out in the judgment, the ultimate causa debiti that respondent had to rely on was appellant's

signed .... /2

signed undertaking of liability as surety and co-principal debtor in respect of each cheque. Being a woman, appellant was entitled to and did raise the exceptio senatus consulti Velleiani, for neither in that undertaking nor otherwise did she expressly renounce that benefit. If these had been ordinary civil proceedings, respondent would have been entitled to meet that defence by adducing evidence to prove one or more of the exceptions to the applicability of the senatus consultum that were raised in its answering affidavit. But the present are not ordinary proceedings. They have taken the form of the extraordinary, summary, and interlocutary procedure of provisional sentence, which, although most useful in appropriate cases, has definite, technical limitations. One such important limitation is that generally the document relied upon must be liquid, i.e., it must not only specify or ascertain the amount of the indebtedness, but it must also be sufficient in itself and

not .... /3

not require extrinsic evidence to prove that the debt is due (Pepler v. Hirschberg 1920 C.P.D. 438 at p. 443, Union Share Agency & Investment Ltd. v. Spain 1928 A.D. 74 at p. 78). Consequently, I think that once appellant raised the exceptio senatus consulti Velleiani in answer to respondent's claim for provisional sentence, that effectively destroyed the liquidity of her signed undertaking of suretyship, thereby precluding the grant of provisional sentence thereon (cf. Voet 42.1.16, Gane's Translation 6th volume, p. 312 and S.A. Milling Co. Ltd. v. Burger 1921 C.P.D. 328). For then the respondent, in order to prove that the debts evidenced by the cheques were nevertheless still due and payable by appellant, had to resort to extrinsic evidence. And that is neither envisaged nor, indeed, countenanced by provisional sentence procedure. As Voet 42.1.14 (Gane's Translation, vol.6 p. 309) says:

"So also does it (provisional sentence) not apply if

proof .... /4

proof of the debt can only be made through witnesses. Many things are often wont to be set up against witnesses with the object of lessening their credibility which are matters for somewhat deep investigation."

It seems to me that the exceptions to the applicability of the senatus consultum Velleianum raised by respondent are all "matters for somewhat deep investigation". None of them is of that simple and very limited kind which modern practice now allows a plaintiff in provisional sentence proceedings to prove by extrinsic evidence in order to perfect his entitlement to such relief (see the Union Share Agency case, supra, at pp. 79, Levinson v. Batten & Co. Ltd. 1940 T.P.D. 41).

An analgous example of the application of those principles is to be found in Norton v. Satchwell 1 M. 77, as approved and explained in Ullman Bros. and Davidson v. Railton 1903 T.S. 596 at pp. 600, 602 and Moti and Co. v.

Cassim's ..... /5

our view on the law involved in the exceptions to the applicability of the senatus consultum Velleianum raised before us on behalf of the appellant, and it will furthermore be of unquestionable advantage to the parties to know our view on the abovementioned law before they embark on the principal case. Hence, I agree that we should assume, as Jansen, J.A. has done, that the respondent was entitled to raise those exceptions in the present proceedings.

W.G. Trollip, J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

HELEN DICKINSON ..... Appellant.

and

SOUTH AFRICAN GENERAL ELECTRIC COMPANY (PROPRIETARY) LIMITED. ..... Respondent.

Coram: OGILVIE THOMPSON CJ et VAN BLERK, HOLMES, JANSEN, TROLLIP JJA.

Heard: 6 November 1972. Delivered: 9 January 1973.

J U D G M E N T.

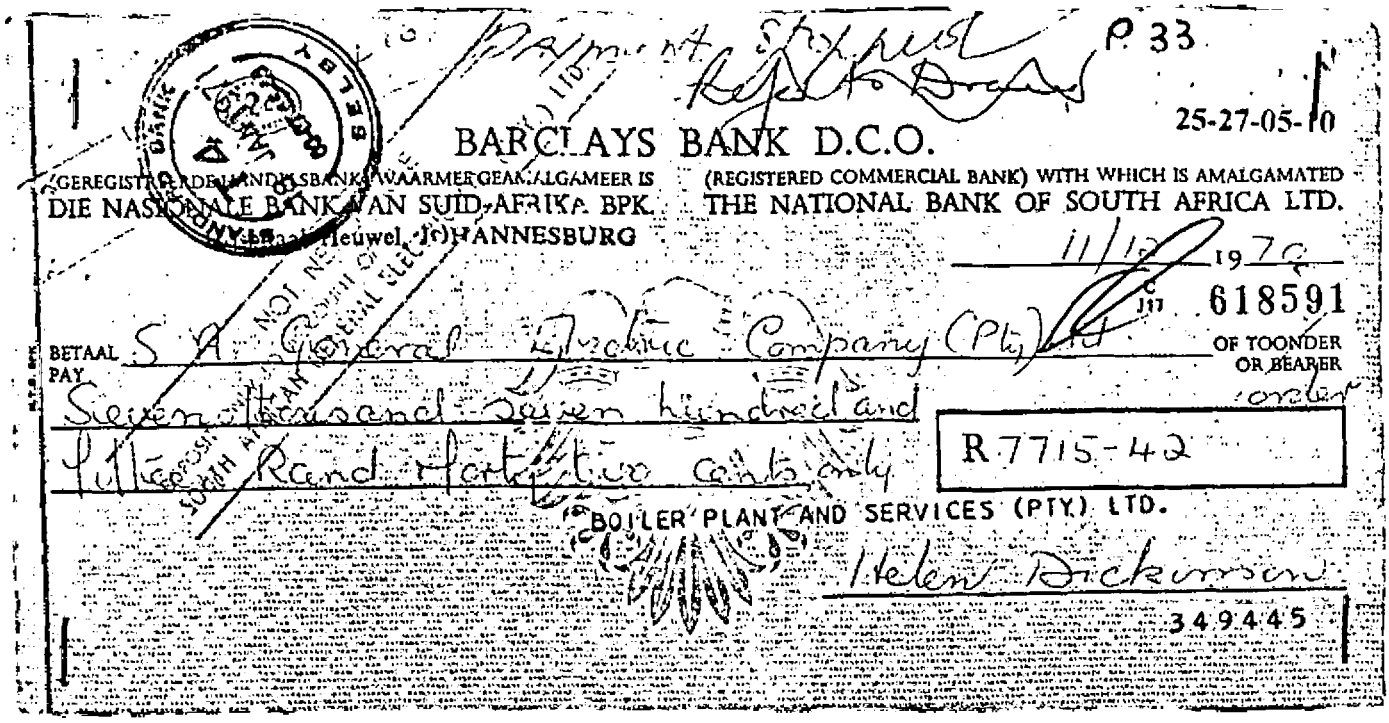
JANSEN JA:-

This appeal against provisional sentence granted by the Witwatersrand Local Division is brought direct to this Court by agreement, on leave by the Court a quo.

The respondent company (plaintiff in the Court below) sued on two dishonoured cheques dated 11 and 24

December/.....

December 1970 respectively. Facsimiles are before us and ~~it is convenient~~ to introduce that of the first :-


P 33

25-27-05-70

BARCLAYS BANK D.C.O.

GEREGISTREERDE HANDELSBANK WAARMEE GEAMALGAMEER IS DIE NASIONALE BANK VAN SUID-AFRIKA BPK.

(REGISTERED COMMERCIAL BANK) WITH WHICH IS AMALGAMATED THE NATIONAL BANK OF SOUTH AFRICA LTD.

JOHANNESBURG

11/12 1970

618591

BETAAL PAY S A General Electric Company (Pty) Ltd OF TOONDER OR BEARER

Seven thousand Seven hundred and Fifteen Rand forty two cents only R7715-42

BOILER PLANT AND SERVICES (PTY) LTD.

Helen Dickinson

349445

On the back is handwritten "Surety and Co Principal Debtor", with a signature "Helen Dickinson" similar to that appearing on the face. Save for the amount (being in this case R7715-43) and the date, the second cheque is similar to the first in all material respects, even as to the writing on the back.

In its summons the respondent alleged that it was the holder and payee of these cheques, that the appellant (defendant in the Court a quo) "was the drawer, or in respect

of/.....

of which cheques the Defendant bound herself as surety for and co-principal ~~debtor with the drawer~~ in respect of the drawer's obligations to the payee and/or holder", and that the cheques were dishonoured. In an answering affidavit according to the summons the appellant, a "femme sole", admitted the signatures "Helen Dickinson" to be hers, and did not deny the dishonour or that the respondent was the holder or payee. She averred, however, that she signed the face of the cheques "on behalf of the company Boiler Plant and Services (Proprietary) Limited in my capacity as a Director of the company". In the alternative, she alleged that the faces of the cheques "failed by mutual mistake to express the common intention of the parties" (viz. the issue of cheques drawn by the company only) and that she was, therefore, entitled to rectification. In respect of the writings on the back, she pleaded the Senatusconsultum Velleianum and Authentica si qua mulier. (This plea is not affected by recent legislation abolishing the beneficia). In reply the respondent filed a lengthy affidavit by one Donnelly,

the manager of its Credit and Collection Division.

He denied certain of the appellant's allegations of fact and contended that she was not "entitled to deny that she is the drawer of the two cheques in question" and, also, that she was not entitled to rectification. He advanced four reasons why the beneficia should not be available to the appellant: (a) the appellant had lost them by implied renunciation; (b) she had received consideration for the suretyship; (c) she had stood surety in the course of her business as "public trader"; (d) in the light of a certain representation made by her to Donnelly, her reliance on the beneficia was fraudulent.

The appellant sought to file a further affidavit (insofar as it related to her husband, confirmed by a brief affidavit by him), dealing mainly with Donnelly's allegations on the rectification and beneficia aspects - allegations which she could not reasonably have been expected to anticipate in her original affidavit. Rule 8(5) does not provide for

a/.....

a further set of affidavits, but a court undoubtedly would have a discretion, in appropriate circumstances, to allow such further affidavits (cf. Rule 27(3)). In the present case the Court a quo refused the admission of the appellant's affidavit, mainly because it thought that the appellant had not made out a case for rectification in her first affidavit. The question of the beneficia it considered irrelevant, so it would appear, because, having failed to make out a case for rectification, the appellant could not contradict that she was a drawer - which the Court held her to be ex facie the cheques (Von Ziegler and Another v. Superior Furniture Manufacturers (Pty.) Ltd., 1962(3) SA 399 (T)). (That even as drawer the appellant might invoke the beneficia on the basis of an intercessio, was apparently not then raised). In so limiting its discretion, the Court a quo was in error. The application had to be approached in the light of all the issues raised, and at least in respect of the beneficia, a proper adjudication would require an answer by the appellant to the

matters/.....

matters raised by the respondent. In my view the filing of the further affidavit should have been allowed, and the present inquiry will proceed upon the assumption that it has been admitted.

In/.....

In view of what will be said in regard to the other points, it is unnecessary to decide whether ex facie the cheques the appellant is clearly a drawer or not, or whether there is at least some ambiguity. It is, therefore, desirable to leave aside the controversies raging around the so-called composite signature of a company (cf. 1958 SALJ 189; 1961 SALJ 293; Cowan on the Law of Negotiable Instruments, 4th ed. p. 148 et seq.). The whole question may well require reconsideration in view of recent banking practice. Although he considered himself bound by the decisions, the learned Judge a quo, in granting leave to appeal, directed attention to the following :-

> "It is common knowledge that the cheque forms supplied to their customers by banks which have adopted computerisation, have printed on them a name and a number. The name is that of the bank's customer in which the banking account is conducted; it is not, of course, a signature. The number is that by which the account is identified in the bank's records. Where, at any rate, a single signature is affixed to such a cheque, it may well

be argued that in the light of the circumstances to which I have just referred, that signature is intended to be and is to be interpreted as being the signature of the customer whose account it is. That may be so even where, as in the present case, the name of the customer as printed on the cheque is that of a company ('Boiler Plant and Services (Proprietary) Limited') and the signature is the unqualified signature of a natural person ('Helen Dickinson').

Prima Facie when a person has signed a cheque form such as the present he intends to write, and will be understood as writing, the signature of the customer of the bank whose name is printed on the cheque. If he intended to sign in his own person he would presumably strike out the printed name and number which appears on the cheque".

In conjunction with this the argument is raised that sec. 24(1) of Act 34 of 1964 does not necessarily imply the converse, viz. that unless e.g. a drawer adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative capacity, he is personally liable.

But/.....

But on these matters, as has been indicated, it is not necessary to express any final opinion.

In the present case the documents are to be construed as between immediate parties, and it is trite that in each case the whole document must be looked at. The whole would include both the front and the back. The writing on the back would, in my view, raise sufficient doubt in regard to the significance of the appellant's signature on the front, as to allow the introduction of evidence. But be that as it may, it would appear (if appellant's affidavit is read in conjunction with that of Donnelly), that, in any event, the appellant will probably succeed in establishing her defence of rectification. The appellant intended, so she says, to sign for the Company and thought that she had done so, and Donnelly accepted the cheques, assuming them to be cheques of the Company. That this was Donnelly's state of mind is clearly to be inferred from para. 28 of his affidavit :-

"I am bound to say that after I had left the

> Defendant, it occurred to me that she had not renounced the benefits of the Senatusconsultum Velleianum and the Authentica si qua mulier, and — — I wondered whether I should take any further steps in that regard. However, on looking at the cheques again I saw that she had not qualified her signatures on the faces of the cheques so as to suggest that she was signing merely as an agent for Boiler Plant & Services (Pty.) Ltd. and (although, as I say, I have known certain persons who signed thus to have escaped personal liability on some basis or other) I was not aware of any grounds on which the Defendant could seek to contend that she was not personally liable for the amounts reflected in these cheques. I therefore decided to rely on the cheques as they were."

The fact that the respondent first sued the Company before instituting the present proceedings also points in this direction. In the circumstances the balance of probabilities [redacted] favours the view that the cheques were issued on the common understanding that they were the Company's cheques, and if on their true meaning they, in terms, are the appellant's cheques, they do not reflect that common understanding. The error would have been common to both at the moment of issue.

Such/.....

Such being the probabilities on the papers before us, the case falls, in my view, completely within the principles stated in Steelmetals Ltd. v. Truck & Farm Equipment Ltd. & Another

(1961/.....

(1961(2) SA 372 (T), 376).

Once the cheques are rectified, it must be accepted that the company was the drawer, and that the respondent's cause of action against the appellant is restricted to the writing on the back of each. It is common cause that the cheques were given in respect of goods sold and delivered to Air Control (Pty.) Ltd., a company associated with Boiler Plant and Services, and that the principal debt was that of Air Control. Some point has been made of the fact that the two cheques in question had been issued in substitution of four cheques previously issued by Boiler Plant and Services in respect of the same debt. It is said that as the appellant had signed those cheques in exactly the same manner as those in the present case, she had then herself incurred liability as a drawer, which was the causa for her now standing "surety" as a co-principal debtor. On the probabilities it seems, however, that she would, if necessary, be able to obtain their rectification on similar grounds as those relating to the

present/.....

present cheques. That she never intended to bind herself as drawer, is probable; and the inference is plain that the respondent did not accept them, at issue, as being her cheques. In the circumstances the appellant's writing on the back of the two cheques now in question would constitute an intercessio on her part, an undertaking of a liability on behalf of Boiler Plant and Services. Prima facie she would, therefore, be entitled to such of the beneficia as may be appropriate. In the present case, although her husband is involved in the company, it is the SC Velleianum, and the onus of establishing facts depriving her of that privilege would rest on the respondent.

It seems unlikely that a plaintiff is entitled to defeat a claim to the beneficium in provisional sentence proceedings, unless he can produce clear written proof of renunciation (cf. Voet 42.1.16; Van der Keessel, Praelectiones ad Grotii Introductionem, ad 3.3.14; Leyser, Meditationes ad Pandectas, specimen 171, corollarium 2,

and the comment on this by Connor CJ in McAlister v. Raw & Co., 6 NLR 10, 14). But I shall assume, without deciding, that in the present proceedings it is open to the respondent to raise the four issues mentioned above. Applying the general rule in provisional sentence cases, it would follow that the appellant, in order to escape provisional sentence, must satisfy the court that it is unlikely (on a balance of probabilities) that the respondent will succeed in the principal case (Joannes van der Linden, Verhandeling over de Judicieele Practijeq, Book 2, chapter 6, sec. 13; Morris & Berman v. Cowan, 1940 WLD 33). As here the onus in the principal case would be on the respondent to prove grounds for depriving the appellant of the beneficium, that general rule would require the appellant to show that it is unlikely (on a balance of probabilities) that the respondent will succeed in discharging that onus (Allied Holdings Ltd. v. Myerson, 1948(2) SA 961 (W), 966 et seq.).

On/.....

On the papers, as they stand, three of the grounds raised by the respondent for depriving the appellant of the beneficium may be dealt with summarily. Although Voet 16.1.9 states that "renunciation is at times not faultily inferred even from very facts and actions", it is not clear whether this is not a statement which should be restricted to the type of case where a woman in her last will provides for satisfaction being made to the creditor. But be that as it may, in the present case the appellant, on her own version, did not intend to renounce the benefit of which she was unaware, and, on Donnelly's version, he did not understand her to renounce the beneficium, as appears from para. 28 of his affidavit (quoted above). The ground of fraud, as raised in argument, would founder on the same rock. The sole alleged representation relied upon is that the appellant brought Donnelly under the impression that her writing on the back of the cheques would be as effective as a proper deed of suretyship with an express renunciation

of the benefits. Assuming the appellant to have made such representation (which she denies), the probabilities on the papers are, however, against Donnelly having been misled or prejudiced. On his own affidavit he did not dismiss her failure to renounce the benefits on the cheques as being of no consequence; he did reflect upon it and decided to rely solely on her signature on the face of the cheques. As to the appellant being a "public trader", she did act as sole director of the two aforementioned companies and conducted certain of their business. But this she did in a representative capacity. In the circumstances disclosed by the affidavits it is unlikely that she would be found, in the principal case, to be a "public trader" or to have bound herself in the course of her own business (cf. Grobler v. Schmilg and Freedman, 1923 AD 496; Schoeman & Co. 3.3.18).

The last ground raised by the respondent, viz.

that/.....

that the appellant has forfeited the beneficium because she had received consideration for the suretyship, is of greater import and raises greater difficulties. It is said that the appellant by her intercessio obtained time for the two aforementioned companies, which were in financial difficulties, and that she thereby benefited herself, by reason of her holding 24 out of a 100 shares in each of the companies, being sole director of both, and being employed by them. Reliance is also placed on the following paragraphs from Donnelly's affidavit:-

> "23. At one of the meetings that I had with the Defendant and her husband in an endeavour to get payment for the Plaintiff, the Defendant gave me three reasons why she wanted an extension of time, and why it would be embarrassing for her companies and herself if I were to sue the companies, take judgment and, if necessary, put them into liquidation as I was threatening to do. The reasons were:
>
> (a) That the Defendant's husband was negotiating with an English company for the take-over of Air Control (Pty.) Ltd. which would have the effect of providing it with the funds necessary to pay its debt;
>
> (b) That she had recently concluded a large contract or order on behalf of Air Control (Pty.) Ltd., which contract or order she was discounting with a financing company, and after which

discount/.....

discount Air Control (Pty.) Ltd. would have the funds with which to pay its debt;

(c) That Air Control (Pty.) Ltd. was negotiating with an Israeli manufacturer and exporter of air-conditioning equipment for a sole agency in South Africa, and that the conclusion of this agency agreement would enable her to obtain further credit and to borrow on behalf of Air Control (Pty.) Ltd. with which to pay its debt.

24. These were the Defendant's reasons for seeking an extension of time in which to pay the debt, and I made it absolutely clear to the Defendant that I would only be prepared to agree to the extension of time provided that her personal liability to the Plaintiff in respect of the debt was placed beyond all doubt."

These allegations by Donnelly are, however, not undisputed.

The appellant deals with them as follows in her affidavit :-

"

16.

AD PARAGRAPH 23

The matters referred to in sub paragraphs a, b and c of this paragraph were discussed at the meeting at which I was present but the information therein set out was given by my husband and Mr. Donnelly knows this.

a) I respectfully submit that he is attempting to create an impression that my husband played a passive role, whereas the opposite is true.

I attach/..

I attach hereto as Annexure "E' an affidavit by my husband confirming my allegations.

b) I deny when the meeting at which the matters referred to in the said sub paragraphs were discussed, Mr. Donnelly had threatened to sue the companies, take judgment and if necessary, put them into liquidation.

c) I deny that I expressed personal embarrassment or that Mr. Donnelly told that I had concluded a large contract on behalf of Air Control (Pty.) Ltd., which was discounting with a financing company. In fact, I would not be qualified to do this.

17.

AD PARAGRAPH 24

I again deny that it was I who sought an extension of time in which to pay the debt and I deny that Mr. Donnelly stated that he would only be prepared to agree to the extension of time provided my personal liability was placed beyond doubt."

But be that as it may, it is common cause that Donnelly thereafter (according to him early in December) approached the appellant and she then gave him the two cheques. On Donnelly's version :

"The defendant again pleaded for more time saying that her husband was abroad in connection with the contracts which were going to result in the company having the finance with which to pay its debts. However, I insisted that I had come to receive her personal liability as that was the basis upon which the extension of time had been granted".

The benefit to the appellant here involved (if any) is clearly indirect, but it is contended that it is a "benefit in consequence of entering into a suretyship" (National Industrial Credit Corporation Ltd. v. Zachareas, 1949(4) SA 790(W), 793), being "a real and not an illusory or purely sentimental benefit" (Alliance Commercial Office & Estate Agency v. Klotz, 1951(4) SA 291(T), 293 B-C; United Dominions Corporation (S.A.) Ltd. v. Rokebrand, 1963(4) SA 411(T), 414 D-E). It must be pointed out, however, that although the appellant undoubtedly had a financial interest in the fate of the companies, it would be impossible, on the information before us to assess, if required to do so, the value, or potential value, to her of obtaining at the beginning of December, at the cost of binding herself for R15,430-85, an extension of time for the companies - judging by the postdating of the cheques no longer than 11 days in respect of half of the debt and 24 days in respect of the other half.

Save that they were obviously in difficulties, the state of their affairs at that stage does not appear. Moreover, judging by the event (they could not pay and were liquidated), the prospects of improvement would appear to have been illusory. The respondent, in any event, has not attempted to show the contrary.

In these circumstances it would seem at least doubtful whether the appellant could be said to have received a "real benefit" in consequence of binding herself. But be that as it may, the problem here involved necessitates a review of the sources and development of our law in respect of the SC

Velleianum.

The Senatusconsultum Velleianum, dating from the middle of the first century A.D., protected women by prohibiting them from intercessio, i.e. the incurring of liabilities for the benefit of others (Max Kaser's Roman Private Law, trans. Dannenbring, 2nd ed. p. 236; Die Interserende Vrou, Nienaber & Dannenbring, Codicillus, Vol. 8, No. 1, May 1967); it gave them the beneficium of a defence. The prohibition was in general terms, but by the time of Justinian's codification, as a perusal of D.16.1 will indicate, a number of exceptions (real or apparent) were recognized. It may be pointed out, without attempting to enumerate or classify all the cases mentioned in this title of the Digest, that some of the exceptions are based on the intercedent's calliditas; others illustrate a principle that the defence fails "indien en voor zooveel sy uit de handelinge iet hebben genooten" (De Groot, Inleidinge 3.3.16); and there are instances where it is considered that the intercedent is in fact binding herself in rem suam.

The/.....

The principle stated by De Groot is mainly derived, so it would seem, from D.16.1.16 (Groenewegen's reference) and D.16.1.21 (Tindall J. in The African Guarantee and Indemnity Co., Ltd. v. Rabinowitz, 1934 WLD 151, 159).

As to the intercedent binding herself in rem suam, it is not always easy to determine where the line is drawn between mere intercessio and intercessio in rem suam. In certain cases (such as that mentioned in D.16.1.17.2) it may be of importance that there is "a direct advantage accruing to her and flowing from her act of intercession - not a vaguely connected and fortuitous gain .....", but the main underlying principle would appear to be that the intercedent "is protected ... against her optimism in cases where, to the knowledge of the creditor, she pledges her credit or her property in the expectation that the other will either pay the creditor or pay her so that she can pay her creditor"; whereas she is not protected where "she cannot be misled by optimism in assuming an obligation in the hope that another will discharge it, for, whether or not another was initially obliged, she definitely under-

takes/.....

takes to pay" (Van den Heever J in Van Rensburg v. Minnie, 1942 OPD 257, 261-2). In the latter case "temptation is no greater than in any other credit transaction, like a sale or a loan, in respect of which admittedly she obtains no relief qua woman" (ibid.).

By Imperial Constitutio Justinian, however, also effected certain changes. Of particular importance to the issues in the present case is the constitutio in C.4.29.23 (as translated by S.P. Scott):-

> "For the purpose of removing the subtleties and difficulties of ancient jurisprudence, and desiring to abolish superfluous distinctions, We order that where a woman has offered herself as surety, and had received anything in the beginning or afterwards, in consideration of so doing, (sive ab initio sive postea aliquid accipiens, ut sese interponat), she shall, under all circumstances, be liable, and cannot invoke the aid of the Velleian Decree of the Senate, whether she has incurred liability with or without an instrument in writing. If, indeed, she should state in the instrument itself that

she had received something, and, on this account, had furnished security, and it should be ascertained that the said instrument had been publicly executed and attested by three witnesses, it must, by all means, be believed that she did receive money or other property (pecuniam vel res), and she cannot have recourse to the privilege of the Velleian Decree of the Senate.

When, however, she became surety without any bond, or if the instrument was not drawn up in this manner, then, if the stipulator can show that she received either money or property, and in consideration of the same rendered herself liable, she shall be excluded from the relief of the Decree of the Senate. But if this should not be proved by him, the woman will then be entitled to relief, and the ancient right of action will be preserved in favor of the creditor against the person for whom the woman became surety.

(1) If anyone should give money or other property to a woman who was not qualified to become a surety, in order that she might obligate herself for him, she who actually received the said money or property shall not be permitted to have recourse to the authority of the Decree of the Senate, and the creditor is hereby authorized to proceed against her to collect whatever he can, and to sue the old debtor for the remainder, that is, for a

> part of the debt if he was able to collect something from the woman; or for the entire amount of it if she was in absolute want. ....."

Justinian clearly envisaged, as appears from the text, that the aliquid received by the intercedent would consist of pecunia or res and that it would be accepted ut sese interponat. That the aliquid is a commission for undertaking the liability appears never to have been questioned. Voet 16.1.11 e.g. speaks of a pretium and in 46.1.32 he says (Gane's translation) :

> "Now it is true that in the case when a surety becomes such on a mandate from the debtor nothing forbids some reward for the suretyship being given or promised to the surety by the debtor. Both is it allowed to make an agreement for the price of a risk, and the promising of a douceur in a mandate has not been discountenanced. Nay a woman is said to be effectively bound on her suretyship, and cannot be aided by any relief from the senatorial decree named after Velleius, if either originally or later she has received something for becoming security (ut se interponat)".

The failure of the beneficium in this case is explained by Voet 16.1.11 on the basis that et hic lucrum captasse intelligatur, recipiendo periculi pretium, quam damnosam fecisse intercessionem. Donellus e.g. suggests that Justinian considered the woman in such a case to be unworthy of the assistance of the SC tanquam quae malo more se alienae litis redemptricem constituisset, a kind of redemption maxime improbatum (De Jure Civili 12.32.6).

Whatever the true ratio for the enactment of the Constitutio may be, it is, however, clear that the loss of the beneficium does not flow from any advantage (in a general sense) expected to accrue from the intercession but is based on the fact that the woman is in effect selling her intercession. Whether the price is large or small could hardly affect the issue, but in an extreme case the harsh result could be that a woman forfeits her protection when undertaking a very large obligation for another, by merely accepting a nominal sum, a kind of foolishness akin to that against which the SC normally guards. The old

writers/.....

writers were not unaware of this problem, and departing from the point that the Constitutio does not expressly define the limits of aliquid, adopted broadly speaking, one of three possible solutions :

(a) the Constitutio must be read literally and aliquid would, therefore, include e.g. a single coin;

(b) aliquid represents something equivalent to the obligation undertaken;

(c) the aliquid sufficient to entail forfeiture of the benefit of the SC must be determined by the Court according to the circumstances of each case.

As early as the 14th century we find the Commentators dealing specifically with this problem arising from C.4.29.23, as three examples may indicate. Cynus Pistoriensis (1270 - 1336) adopts solution (b); Bartholomaeus de Saliceto (ob. 421), also known as Salicetus considers (a) to be correct; Baldus de Ubaldis (1327 - 1400) is a protagonist of (c). In view of later developments the latter, however, merits more detailed mention. He postulates the case of a woman who for a consideration of a single coin binds herself as surety pro mille marchis argenti. He rejects solutions (a) and (b), and considers that forfeiture depends upon whether the price received is that for which a homo discretus would have bound himself. He states,

however/...

however, that the whole matter pertains ad cognitionem judicis. About 200 years later the Italian writer Menochius, in his De Arbitrariis Judicum (first published in 1583), was to arrive at substantially the same conclusion (Bk. 2, case 234) as Baldus: as aliquid is not defined in the Constitutio, quae et qualis quantave, the matter is left to the discretion of the court (arbitrio judicis). He cites de Afflictis (of Naples, 1448 - 1528) whose works, however, are not available to us.

That the matter should be left to the court also appears to have been the prevailing view of the German writers of the 17th and 18th centuries: Heringius (ob. 1606), Tractatus de Fidejussoribus (running into several editions during the 17th century); Brunnemannus (1608 - circa 1672) Commentarius in Codicem, ad. C.4.29.23; Lauterbach (1618 - 1678), Collegium Theoreticum-practicum ad L. Pandectarum Libros, 16.1.22; J.H. Boehmer (1674 - 1749), Exercitatio 50, ad D.16.1., cap. 2, sec. 5 n(k); Glück (1755 - 1831), Erläuterung der Pandecten, ad D.16.1., sec. 924. There are individual differences between these

writers/.....

writers as to what precisely the court should take into consideration, but Glück's statement of the law, as set out by Tindall J in The African Guarantee and Indemnity Co. Ltd. v. Rabinowitz (supra, 157), appears to be a fair synthesis:

> "Glück says, however, that as the lex in Code (4.29.23) says nothing on the point, the case can only be left to the reasonable judgment of the judge who must consider the proportion of the debt, the circumstances of the debtor and the nature of the intercession in order to decide whether perhaps the cunning of the creditor is at the back of it or the reward received is proportionate to the size of the risk taken over. As little as every trifle will influence the Judge to declare forfeited the benefit of a woman who intercedes, so little is there any reason why the reward must just equal the amount of the debt, as the law does not require this. Glück proceeds to say that it does not matter whether she got the reward from the creditor or the debtor, provided that she received it for the intercession. She may then have received it instantly at the beginning or only afterwards, provided that in the latter case a promise

preceded/.....

preceded it. In that way, Glück thinks, the words 'sive ab initio sive postea aliquid accipiens ut sese interponat' contain no contradictory meaning."

In France the SC was abolished by Henry IV in 1606, but it is of interest to refer to two writers of the French School preceding that enactment. Duarenus (1509 - 1559) in his commentary on C.4.29 and D.16.1 (Opera Omnia, Francofurti, 1592, p. 989) rejects the view that the price should be equal to the obligation and states that if a woman is given an exigua quantitas as a premium for her intercession ut appareat hoc in fraudem datum esse, she should be supported with the exception of the SC - and that should be left to the discretion of the judge (arbitrio judicis). Donellus (1527 - 1591) does not follow his mentor. In dealing with C.4.29.23 he simply states (De Jure Civili 12.32.6) that as no distinction is made as to how much a woman should receive (i.e. to incur forfeiture of the

protection/.....

protection of the SC), it appears that even if she intercedes for a large amount she will not be able to invoke the beneficium of the SC where she accepts a modicum (modico aliquo accepto). He, therefore, adopts, so it would seem, the literal interpretation of the Constitutio which Baldus had already rejected in the 14th century. Donellus in this passage does not discuss the matter or give any reasons.

The writers of the Netherlands were fully aware of the views held in the rest of Europe on the matter now under discussion, as a few examples may indicate. Böchelman (1633 - 1681) mentions the problem (Commentarius, ad D.16.1) and agrees that the matter should be left to the court (arbitrio judicis), Perezius (1583 - c.1672) states the various points of view (Praelectiones in XII libros Codicis Justiniani, ad C.4.29, par. 19). He, by implication, rejects the solution that the aliquid should be equal to the obligation and he considers the literal interpretation to be harsh. He prefers the view, "with Baldus", that the determination of the aliquid should be left arbitrio judicis,

for the judge will consider how much (quantitas) the woman has promised and also how much she has received. He points out that if she has accepted 10 to stand surety for 12, she forfeits the beneficium of the SC; but aliter if she accepts 10 to stand surety for a 1000; in the latter case she will appear to have accepted a modicum (modicum quid) and is assisted as if she has accepted nothing. Tulden (circa 1595 - 1645) also agrees that the matter should be left arbitrio judicis (Commentarius ad Codicem, 4.29, par. 4). He refers to the standard of the diligens paterfamilias. Wissenbach (1607 - 1665) leaves the matter arbitrio judicis without qualification (Commentationes in libros VII priores Codicis, ad C.14.29.23). He cites Hottomann, Duarenus, Menochius, Sichard and Tulden for this view, after mentioning that for Salicetus and Donellus quantulumcunque pretium suffices.

Hugo de Groot (1597 - 1662), in his Inleiding of 1631, does not list (3.3.15-18) the instance of the acceptance of a pretium among the exceptions to the SC. That he could have been unaware of this aspect of the Constitutio, and the different views on its interpretation, is out of the question; nor is it likely that he could have considered that the Consti-

tutio was no longer law in this respect. Groenewegen (1613 - 1652) e.g. does not suggest in his De Legibus Abrogatis (ad. C.4.29.23) that it was obsolete on this point; nor does any other writer appear to do so. The explanation for De Groot's silence may, however, so it would seem, be found in Prof. van der Keessel's Praelectiones (ad Gr. 3.3.16): in saying that a woman is bound "indien ende voor zoo veel sy uit de handelinge iet hebben genooten", De Groot approves the interpretation that the aliquid mentioned in the Constitutio must correspond with the sum for which the woman intercedes. This would, of course, make it unnecessary for De Groot to name the acceptance of a pretium as constituting a separate exception - it would fall within the wider category of "genooten". Wassenaar in 1661 (Praktyk Notariael, Cap. 10, sec. 16) sets out a number of exceptions to the SC but he does not mention specifically that created by the Constitutio. Whether this means that he shared De Groot's views is not clear. Simon van Leeuwen (1626 - 1682) is of no assistance in the present inquiry: in his Rooms-Hollands Regt (1664) e.g. he only deals with renunciation as an exception to the SC. In

1686 Ulrich Huber (1636 - 1694) mentions that the SC falls away inter alia where the woman "gelt voor de borchtogte genoomen heeft" (Heedendaegse Rechtsgeleertheyt, 3.27.16). He does not enlarge upon this, but from his Praelectiones (Pars II: 16.1.11) it may be inferred that he did not consider it necessary for the pretium to be equal to the sum guaranteed.

A conspectus of the abovementioned writers of the Netherlands indicates at least that during the seventeenth century the prevailing view (as in Italy and Germany) was not that aliquid, where it appears in the Constitutio, should be literally interpreted. It comes, therefore, somewhat as a surprise to find that circa 1700 Voet (ad Pandectas: 16.1.11) follows Donellus and states that the beneficium is forfeited whatever the pretium received, "whether large or small". He gives no reasons for rejecting the vast literature pointing the other way, and save for inviting the reader to compare Menochius, he (as Donellus in the passage to which the reader is referred) gives no indication of the debate which had by then gone on for centuries. Voet was, however, to be supported about a hundred years later by Prof. van der Keessel in

his lectures at the University of Leiden:

> "aangesien dit blyk dat daar hier niks nuuts deur ons gewoontereg ingevoer is nie, sien ek nie in waarom daar van die Romeinse Reg afgewyk moet word nie, en dit des te minder aangesien die gebruik van ons howe, wat die afstand (van die voorreg) deur die vrou toelaat, die tussenkoms vir ander se skulde deur vrouens nog meer skyn te begunstig as die Senatusconsultum dit doen" (Praelectiones ad Grotii Introductionem, ad 3.3.16, transl. Gonin).

Whether these are Van der Keessel's full reasons is not clear: he refers to his lectures on the Digest, which are not available to us. But be that as it may, this appears to be an unjustified return to what is considered by him to be the original unvarnished effect of the Constitutio: the accretion of ages cannot thus be stripped off. In this respect Voet and Van der Keessel, so it would seem, fall outside the main current of legal thought, in the Netherlands and the rest of Europe (France excluded), which accepted that the receipt of a purely nominal pretium for standing surety, would not per se debar a woman from the protection of the SC - it being a matter for the Court's discretion according to the particular circumstances of the case. In accepting the latter to be the prevalent view, De Groot's interpretation of aliquid (as attributed to him by Van der Keessel) must also be considered as

exceptional/...

exceptional for his time. Despite his immense stature as a lawyer, the apparent lack of direct authority indicating general acceptance of his interpretation cannot be ignored. An inference may, perhaps, be drawn from Wassenaar's list of exceptions (referred to above); it may be of significance that Lybreghts in 1734 (Redenerend Vertoog over't Notaris Ampt, 2de deel, hoofstuk 34, par. 17), Kersteman in 1768 (Hollandsch Rechtsgeleert Woordenboek, s.v. Beneficium) and Decker in 1783 (notes on Van Leeuwen's Rooms-Hollands-Regt, 4.4.2) all appear to adopt De Groot's list of exceptions and do not mention the acceptance of a pretium as giving rise to an additional exception; and the fact that Schorer in 1767 (Notes on De Groot's Inleiding) and the anonomous writer (L.W. Kramp) of the Aanmerkingen on Lybreghts in 1778 (Aanmerking 52) do not question their authors' treatment of the exceptions to the SC in this respect, might, perhaps, be ascribed to acceptance of De Groot's interpretation. But all this is clearly too speculative

for/...

for a finding that De Groot's interpretation had generally been accepted in Holland and that a reversion to Ulpianus had taken place.

Turning back from the interpretation of aliquid in C.4.29.23, between the 14th and 18th centuries, to a general view of the exceptions to the SC Velleianum mentioned in the Corpus Juris, it appears that they were of mixed character. A woman could inter alia forfeit her protection when she was acting in rem suam or when she accepted a price for standing surety, but no general principle is to be found that whenever an intercession is, in a wide sense, "to her benefit", such forfeiture takes place. In 1631 De Groot certainly did not read the texts of the Corpus Juris to be

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to this effect; neither did Voet (ad D.16.1) in 1700. The latter's treatment of the SC mainly reflects the old exceptions of the Corpus Juris, with some innovations - e.g. the case of the public trader and the question of renunciation. He enunciates no general principle of forfeiture based upon an indirect general benefit derived from an intercessio. In 16.1.10, dealing with an exception to both the SC Velleianum and the Authentiqua si qua mulier (the case of the woman who intercedes for her husband and is bound "to the extent to which she is indebted" to him, "or" feigns before an ignorant creditor that she is so indebted"), Voet, it is true, mentions the following :-

> "Antonius Faber adds to this that a woman ought not to be assisted if she has bound herself for the release of her husband when he has been thrust away in prison not by reason of debt, in respect of which he could have been released from the filth of prison by surrender of his goods, but by reason of wrongdoing; or if she bound herself for her husband in order to evade an execution which was being made upon her husband's goods."

These instances are, however, not based on any theory of a "benefit" received by the intercedent. In reporting the relevant decisions, decided by the Senate of Savoy during 1593 and 1594, Faber makes it clear that in the case of the imprisoned husband the ratio was: "propterea quod honestum sit desiderium mulieris virum non tam a carceribus, quam a poenae corporalis aut infamiae periculo eximere volentis". (Cf. Wissenbach, ad C.4.29.22, who considers this to be a pia causa). The decision in relation to the execution rests mainly on fraud by the wife, which was found to be present in the particular circumstances of the case. (Cf. McAlister v. Raw and Co., 6 NLR 10, 14; Papageorgiou v. Kondakis and Others, 1968 (1) SA 85 (O), 91H - 92C; Western Bank Ltd. v. Orpen, 1969(3) SA 80(T)).

Turning to our own case law, it is difficult to deduce any principle in this regard from the old Cape cases. In Oak v. Lumsden, (3 SC 144, 148) De Villiers CJ stated :-

> "And whether the woman be a trader or not, if she became a surety for another on a good consideration, or led the creditor to believe she had received such consideration, she would

not be entitled to the privilege".

What precisely the learned Chief Justice intended to convey by "a good consideration", and how this fits in with our common law on intercession by women, is not clear; nor do the subsequent cases decided by him during 1884 - 1909, with all respect to such a great jurist, elucidate the matter (cf. Zeederberg v. Union Bank, 3 SC 290; Le Roux v. Brink's Executor, 4 SC 74; Mackie, Dunn & Co. v. McMaster, 9 SC 212; Trustee of Bevern v. Kretschmar, 11 SC 18; Maasdorp v. Graaff Reinet Board of Executors 3 Buch. AC 482). In none of these cases is any specific reference made to Roman Dutch authorities on this point; nor is any distinction drawn between instances where a commission is accepted by a woman and other cases. Moreover, since 1874 the learned Chief Justice had adopted the requirement of "valuable consideration" (mainly as understood in England) for the validity of any contract (except donation). (Cf. Alexander v. Perry, Buch. SC Reports, 1874, 59; Tradesmen's Benefit

Society/.....

Society v. Du Preez, 5 SC 269; Mtembu v. Webster, 21 SC 323). The law of negotiable instruments in relation to accommodation parties also seems to figure in some of these cases.

In the circumstances Bevern's Trustee v. Kretschmar (supra) cannot be considered to be good authority for the proposition that where a woman promises a definite sum of money in consideration of the release of her boarder, she forfeits the protection of the SC because of an indirect benefit involved. In this regard it is instructive to refer to certain aspects of Maasdorp's case (supra). According to the headnote, "the defendant, who was married out of community, wrote on the back of a promissory note made by her husband in favour of the plaintiff's, an undertaking binding herself as surety ....." The plaintiff sued the wife in the Eastern Districts Court. On the question of consideration Buchanan J said in the Court a quo (p. 484, supra) :-

"This/.....

"This note was given at a time when the husband was being pressed, and, in consequence of this note being signed by the wife, time was given to the husband. This time given to the husband was a sufficient consideration for the husband's note. The question has been raised whether there was not also consideration for this note given to the wife, because the husband and wife were living together on a farm, and the wife had stock of her own, which were grazing on the farm. She said from the milk from this stock she made butter, and sold the butter, and thus was in beneficial occupation of the farm with her husband. If time had not been given, the husband would have been unable to retain possession of the farm, and the wife could not have kept the stock. I am not going to press the question of the consideration of the wife too far, as it would in this case be a slender cause on which to base a decision."

(supra, p.489.)

On appeal De Villiers CJ said on this aspect:-

"The defendant's suretyship was entered into entirely for the benefit of her husband, and the plaintiff Board well knew that she was only a surety. She probably obtained some indirect benefit from the assistance rendered by the Board to her husband, but that would be true in nearly every case where a woman, at the intercession of her husband, becomes surety for him in order to extricate him

from his difficulties....."

The learned Chief Justice appears to be in agreement with Buchanan J on the question of consideration.

In Richter v. Transvaal Government (1906 TS 146) it was said by Innes CJ that "when a wife herself receives a real benefit from the transaction, or leads a creditor to think that she is receiving such a benefit, she cannot take advantage of the fact that she has not renounced the defences to which I have referred (viz. SC Velleianum, authentica si qua mulier)"; The learned Chief Justice also expressed the opinion that where a wife enters into a recognizance to procure the release of her husband who is under criminal arrest, she receives such a benefit by having her husband out of goal. The actual decision was, however, based on Wissenbach and Voet 16.1.10, where he cites Faber, As pointed out above, the cases there mentioned do not rest on "benefit", but on other grounds.

On analysis it would appear that the cases relied upon by the respondent in respect of "benefit", are largely

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based, directly or indirectly, on Bevern's Trustee v. Kretschmar (supra) and Richter v. Transvaal Government (supra). As has been pointed out, they do not afford reliable authority, in accord with our law, for a general rule that the beneficium falls away whenever a benefit, even indirect, is received. Moreover, the distinction between a benefit accruing and a commission received, has become blurred, despite Tindall J's clear statement in The African Guarantee and Indemnity Co. Ltd. v. Rabinowitz (supra). (Cf. 1963 Annual Survey, 203; Caney, Law of Suretyship, 2nd ed., 188 et seq.).

In the present case (no question of "genooten" as understood by De Groot being raised) the true test is whether the appellant has stood surety for a pretium. Applying the general rule in provisional sentence proceedings (as discussed above), the inquiry then is whether the balance of probabilities (within the ambit of the affidavits) is against the respondent discharging, in the principal case, the onus of proving the receipt by the appellant of such a pretium.

On/.....

On the papers there is a conflict in evidence. According to Donnelly the appellant bargained for time on behalf of the companies, holding out the prospect of improvement in their fortunes; according to the appellant, she was persuaded to stand surety in order to stave off legal steps until her husband's return from overseas. The matter may, however, be disposed of on Donnelly's own version. As it stands on the papers, that version does not seem likely to persuade a court hearing the principal case that the nature of the transaction between Donnelly and the appellant was such as to amount to the acceptance by her of a pretium ut sese interponat - the kind of transaction disapproved of by Justinian and, therefore, involving forfeiture of the benefit of the SC. It is more likely to be adjudged the type of case where a woman is motivated, not by a desire to earn a commission, but by her optimism - that very kind of optimism against which the SC is designed to protect. But, in any event, the problem would remain whether the giving of time by the respondent to the companies, could be equated at

all with a pretium given to the appellant. On the information before us any consequential benefit to the appellant appears to be so indirect, nebulous and uncertain that it is unlikely that it would be held in the principal case that the giving of such time is tantamount to such a pretium.

On the papers, the appellant has shown, in my view, that the respondent is unlikely to succeed in the principal case, and that, consequently, the Court a quo should have refused provisional sentence.

The appeal is allowed with costs, and the order of the Court a quo is altered to read: "Provisional sentence refused with costs."

E.L. JANSEN JA.

Ogilvie Thompson, C.J.)
van Blerk, JA.)
Holmes, JA.)