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G.P.-S.25617—1974-75—3 000

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 Siviële Saak

S. Safinsteinsam ..... *Appellant,*

versus

Anglo African Shipping Co SA Ltd ..... *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Herwitz H & L
Respondent's Attorney / *Prokureur vir Respondent* Rosendorff vrB

Appellant's Advocate / *Advokaat vir Appellant* D. Weiss
Respondent's Advocate / *Advokaat vir Respondent* R J Welsh QC, A J Katz SC

Set down for hearing on
Op die rol geplaas vir verhoor op .....

Coram: Wessels A.C.J. Jansen, Muller
Joubert J.J. Hall Trengove H.J.A.
(T.P.D.)

9.45 am — 11.00 am
11.15 am — 12.30 pm
2.15 pm — 2.45 pm

C.A.V.

The Court dismisses the appeal with

Security not ordered.

P.T.O.

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:

SELWYN SAPIRSTEIN ..... First appellant,

HARRY SAPIRSTEIN ..... Second appellant,

LYNNE SECURITIES (PROPRIETARY) LIMITED ..... Third appellant

SELENE (PROPRIETARY) LIMITED ..... Fourth appellant

MENTONE APPEARANCE RECONDITIONING (PROPRIETARY) LIMITED ..... Fifth appellant

MENTONE AUTO RECONDITIONING (PROPRIETARY) LIMITED ..... Sixth appellant

and

ANGLO AFRICAN SHIPPING COMPANY (S.A.) LTD. ..... Respondent.

Coram: Wessels, A.C.J., Jansen, Muller et Joubert, JJ.A. et Trengove, A.J.A.

Date of appeal: 23 May 1978.

Date of judgment: 4 July 1978.

/ JUDGMENT

J U D G M E N T

TRENGOVE, A.J.A:

This is an appeal against the dismissal of an exception to particulars of claim, annexed to a combined summons, in an action in which the respondent sued the appellants, jointly and severally, the one paying the others to be absolved, for payment of the sum of R221 556,83 and costs on the scale as between attorney and client. I shall, for convenience, refer to the respondent as "the plaintiff" and to the appellants as "the defendants". The defendants' alleged indebtedness to the plaintiff is stated in the particulars of claim to arise from the following circumstances:

> "(a) MENTONE TRACTOR SALES (PROPRIETARY) LIMITED (MENTONE TRACTOR) and MENTONE CAR HIRE (PROPRIETARY) LIMITED (MENTONE CAR HIRE) are companies duly incorporated according to the laws of the Republic of South Africa.
>
> (b) MENTONE TRACTOR and MENTONE CAR HIRE respectively are the acceptor of certain bills of exchange and the drawer of certain cheques,

copies of which are annexed hereto marked "A1" to "A12".

(c) The Plaintiff is the lawful holder of the said bills of exchange and cheques.

(d) The said bills of exchange and cheques were duly presented for payment, but were dishonoured by non-payment.

(e) Notice of dishonour was and is dispensed with as MENTONE TRACTOR and MENTONE CAR HIRE respectively were the acceptors and drawers of the said bills and cheques.

9. (a) On the 1st day of August, 1975, and at Johannesburg the Defendants bound themselves in writing as sureties and co-principal debtors for all sums of money owing or which in the future might become owing by MENTONE TRACTOR and MENTONE CAR HIRE to the Plaintiff, howsoever arising. A copy of the deed of suretyship is annexed hereto and marked "B".

(b) In terms of the deed of suretyship:

(i) In the absence of agreement as to the rate of interest on any amount claimable from the debtor, then interest was to be calculated at the rate of 12% per annum calculated on daily balance.

(ii) The signatories to the deed of suretyship agreed to pay attorney and client costs incurred by the Plaintiff in obtaining implementation of the obligations of the sureties.

10. In the premises, the Defendants are jointly and severally liable to pay to the Plaintiff the sum of R221 566,83."

/ The.....

The defendants' indebtedness is alleged, in a certificate issued in terms of the provisions of the deed of suretyship (annexure B) to have arisen during 1976. Annexures A1 to A9 are bills of exchange drawn on Barclays Bank International Limited by the plaintiff, and accepted by Mentone Tractor Sales (Pty.) Limited (Mentone Tractor Sales) for amounts totalling, in all, R188 811,114; and annexures A10 to A12 are cheques drawn by Mentone Car Hire (Pty.) Limited (Mentone Car Hire) for amounts totalling R36 755,69. Annexure B is the written contract of suretyship upon which the plaintiff's claim is based. The portion of the deed directly relevant to this appeal reads as follows:

"S U R E T Y S H I P

TO ANGLO-AFRICAN SHIPPING COMPANY (S.A.) LIMITED
ANGLO-AFRICAN SHIPPING COMPANY (1936) LIMITED.
ANGLO-AFRICAN SHIPPING COMPANY OF NEW YORK, INCORPORATED.
ANGLO-AFRICAN FACTORS (PROPRIETARY) LIMITED
MANUFACTURERS DEVELOPMENT COMPANY (PROPRIETARY) LIMITED.

I/We the undersigned,

SELWYN SAPIRSTEIN

HARRY SAPIRSTEIN

LYNNE SECURITIES (PROPRIETARY) LIMITED

SELENE (PROPRIETARY) LIMITED

MENTONE CAR HIRE (PROPRIETARY) LIMITED

MENTONE TRACTOR SALES (PROPRIETARY) LIMITED

~~MENTONE AUTO RECONDITIONING (PROPRIETARY) LIMITED~~

MENTONE APPEARANCE RECONDITIONING (PROPRIETARY) LIMITED

do each of us hereby bind ourselves to you as sureties for and co-principal debtors in solidum with each and every of the other of us, so that each one of the undersigned hereby binds itself/himself to you as surety for and co-principal debtor in solidum with each and every of the other of the undersigned, the principal debtor in relation to each of the undertakings as surety and co-principal debtor being hereinafter styled "the debtor", for the payment on demand of all sums of money which the debtor may have in the past owed or may presently or in the future owe to each of you separately and individually or to your successors in title or assigns, whether such indebtedness arises from money already or hereafter to be advanced, or from promissory notes, cheques or bills of exchange already or hereafter to be made, drawn, accepted or endorsed or from damages for breach of contract or from guarantees

/ given....

given or to be given by the debtor to you on behalf of third parties or guarantees given or to be given by you on behalf of the debtor, or in respect of any indebtedness which may take the place of any novated debt, even if such novation is of a debt in existence during the existence of this Suretyship and the novation takes place after the termination of this Suretyship, I/we shall be liable for either the said existing debt or the said novated debt at your election; or in delict or otherwise howsoever, disbursements, including interest, discount, commission, law costs, including attorney and client costs and collection commission, stamps and all other necessary or usual charges and expenses, or any indebtedness arising by reason of your having acquired by cession or assignment or in any other manner the rights which any third party may have against the debtor to payment of any monies whatsoever, whether such cession takes place prior to or after the liquidation/sequestration of the debtor, or any cause of indebtedness whatsoever, (the aforegoing not to detract from the generality hereof) and whether now existent or which may come into being in the future.

Any reference to "you" herein shall be a reference to each of you separately and individually as if a separate Suretyship had been entered into by me/us in favour of each of you for the indebtedness or future indebtedness of the debtor to each of you, except

/ that.....

that the rights which you acquire by virtue of any cession in terms hereof shall be acquired and held by you jointly and severally."

The plaintiff is the first of the five promisees named in the contract; the other four are not involved in this dispute and may be disregarded for present purposes. The promisors are the six defendants and Mentone Car Hire and Mentone Tractor Sales, the two companies alleged in the particulars of plaintiff's claim to be the two principal debtors. The name of the sixth defendant, and the signature on its behalf were deleted, but nothing turns on that in this appeal. The sixth defendant is in fact one of the appellants. The contract was signed by the first and second defendants personally, and by or on behalf of all the other defendants and Mentone Car Hire and Mentone Tractor Sales, on 1st August 1975. So much for the summons and annexures.

The defendants gave notice of exception to the particulars of plaintiff's claim as not disclosing a cause of action and of their intention to apply, in the alternative, for

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the striking out of certain portions thereof. The matter was heard by THERON, J, who dismissed both the exception and the application to strike out, with costs. The defendants now appeal, with the leave of the Court a quo, against the order, but only in so far as it relates to the dismissal of the exception with costs; they are not persisting in the application to strike out.

The basis of the exception is that the contract of suretyship on which the plaintiff seeks to hold the defendants liable, is null and void because there has been a failure to comply with the provisions of section 6 of the General Law Amendment Act, 1956 (No. 50 of 1956) in that:

> "(a) there is uncertainty as to the identity of the sureties; and/or
>
> (b) there is uncertainty as to an essential term, namely, the identity of the principal debtor/s."

Section 6 of the Act provides that:

> "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 or on behalf of the surety; provided that nothing in this section shall affect the liability of

the signer of an aval under the laws relating to negotiable instruments".

The crucial issue in this appeal is whether a multiple guarantee of the kind under consideration is invalid ab initio by reason only of the fact that, at the time when the guarantee is given, the principal debt has not yet come into existence and the identity of the principal debtor and of the sureties has not yet been ascertained. The gist of the argument on behalf of the defendants is that, in the present instance, evidence would be inadmissible, as against them, to prove that after the execution of the contract of suretyship, Mentone Car Hire and Mentone Tractor Sales, respectively, became indebted to the plaintiff in the sum of R32 755,69 and R188 811,14; it was also contended that the deed, in question, required "recourse to the negotiations and oral evidence of the parties" before it could be established who was liable under the deed, and that oral evidence would be inadmissible as it would involve proof of "the future consensus of the parties". In my view there is no

/ substance.....

substance in these contentions.

At common law, a suretyship (or guarantee) may be contracted with reference to a principal obligation which has not yet come into existence. Suretyship (or guarantee) is defined in Caney, The Law of Suretyship, 2nd ed., at p 34 as:

> "... an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor, who remains bound, will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so, he, the surety, will perform it or, failing that, indemnify the creditor".

The contract is accessory in the sense that it is of the essence of suretyship that there be a valid principal obligation (that of the debtor to the creditor) but, as was pointed out by CORBETT, JA, in Trust Bank of Africa Ltd. v Frysch, 1977 (3) SA 562 (AD) at p 584 G-H, ".... it is not essential that the principal obligation exists at the time when the suretyship contract is entered into. A suretyship may be contracted with reference to a principal

/ obligation....

obligation which is to come into existence in the future". And, if such a contract of suretyship is recorded in writing, it follows that extrinsic evidence must necessarily be admissible to prove that the principal obligation has come into existence, and to establish the amount of the obligation if, as in this case, the guarantee is an unlimited continuing guarantee for payment of all sums of money which the principal debtor may in future owe to the creditors.

The provisions of section 6 of Act 50 of 1956 do not invalidate a contract of suretyship of this sort provided, of course, such contract is embodied in a written document, and it is signed by or on behalf of the surety. What section 6 requires is that the "terms" of the contract of suretyship must be embodied in the written document. It was contended by counsel for plaintiff that this meant that the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the

/ written.....

written document, supplemented if necessary by extrinsic evidence of identification other than evidence by the parties (i.e. the creditor and the surety) as to their negotiations and consensus. I agree with this contention. In my view, there can be no objection to extrinsic evidence of identification being given, either by the parties themselves, or by anyone else, unless the leading of such evidence can be said to amount to an attempt to supplement the terms of the written contract "by testimony as to some negotiation or consensus between the parties which is not embodied in the written agreement" (see Van Wyk v Rottcher's Saw Mills (Pty.) Ltd., 1948 (1) SA 983 (AD) at p 991).

I am satisfied that the contract of suretyship in the present instance complies with the requirements of section 6. In terms of the contract each of the promisors is both a potential principal debtor and a potential surety. The liability of the promisors, as sureties under the contract, does not arise until the principal obligation has

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been contracted and then, as soon as any one of the promisors becomes indebted to the plaintiff, such promisor becomes the principal debtor and each of the other promisors then becomes liable to the plaintiff as surety for the principal debt thus created. The incurring by any one of the promisors of a debt to the plaintiff, defines his position vis-à-vis the plaintiff and the other promisors; he becomes the principal debtor and the other promisors then become his sureties. The transaction between the creditor and the principal debtor, which gives rise to this result, does not amount to a negotiation or consensus between the creditor and any of the sureties, for, as counsel for plaintiff rightly pointed out, the result of that transaction is that the promisor in question ceases to be a potential surety and becomes the principal debtor. The legal position arising out of the contract under consideration seems to me to be precisely the same as it would have been if the plaintiff had entered into a separate written contract with each of the promisors,

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in terms of which such promisor bound himself (or itself) as surety and co-principal debtor for any indebtedness which any of the other promisors might in future incur, as principal debtor, to the plaintiff.

As far as the parties in the present proceedings are concerned, the suretyship, in essence, amounts to a promise by each of the defendants to the plaintiff to guarantee any indebtedness which Mentone Car Hire and Mentone Tractor Sales may, in future, incur to the plaintiff. The plaintiff subsequently entered into agreements with Mentone Car Hire and Mentone Tractor Sales, as a result of which these two companies in fact became indebted to the plaintiff in the amounts claimed. The fallacy underlying the argument on behalf of the defendants is that it treats these agreements as evidence of "future consensus of the parties", which they are not. Mentone Car Hire and Mentone

Tractor Sales were, of course, parties to the suretyship, but as such they were only potential sureties and then, as soon as they became indebted to the plaintiff, they became principal debtors and ceased pro hac vice, to be potential sureties. Evidence to prove the fact that they became indebted to the plaintiff would, in my view, clearly be admissible. Evidence of extraneous negotiations between the plaintiff and the sureties, i.e. the defendants, would, of course, be inadmissible but the plaintiff does not have to rely on evidence of that nature to establish its claim against the defendants. Counsel for the defendants also argued that the contract of suretyship should be declared invalid on another ground, namely, that because of the number of potential creditors, potential

/ debtors.....

debtors and potential sureties, a position may arise where it could be difficult or somewhat complicated to sort out the parties and establish their respective obligations. In my view, this cannot serve as a ground for questioning the validity of the contract. Such difficulty or complication, if any, would arise in the application of the terms of the contract and not in the interpretation thereof. In my view, the learned Judge a quo correctly dismissed the exceptions, with costs, and the appeal must, accordingly, be dismissed.

There remains the question of the costs of appeal. Clearly the plaintiff is entitled to these costs, but counsel for the plaintiff has submitted that the defendants should be ordered to pay the costs (including the

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costs consequent upon the employment of two counsel), jointly and severally, on the scale as between attorney and client. The combined summons contains a prayer for an order to this effect, and in terms of the suretyship agreement, the defendants accepted responsibility "for all charges and expenses of whatsoever nature", incurred by the plaintiff, "in securing implementation of our obligations hereunder or of your rights in terms hereof, including, without limitation of the aforegoing, all legal costs, including attorney and client costs". For some reason or other, the plaintiff did not press for an order in similar terms in the Court a quo. However, two questions now arise. The first is whether this Court should make a joint and several order as to the costs of appeal. The defendants bound themselves to the plaintiff jointly and severally and

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they made common cause in taking the exception and in appealing against its dismissal. That being so, I am satisfied that it is right that they should be ordered to pay the costs of appeal jointly and severally (cf. Davies v Gordonia Liquor Licensing Board and Others, 1958 (3) SA 449 (AD) at p 459).

The next question is whether we should give effect to the defendants' undertaking to pay costs on the scale as between attorney and client. Counsel for the defendants submitted that there were no grounds for awarding attorney and client costs in this instance and he asked us not to do so. It was contended that inasmuch as awards of costs are in the discretion of the Court, the Court should not allow its discretion to be fettered by an undertaking of this nature. Generally speaking, awards of costs are, of course, in the discretion of the Court and that discretion must be judicially exercised whenever the need arises.

/ But.....

But accepting this to be the position, I am of the view that there can be no objection, in principle, to a Court giving effect to an agreement between parties concerning their liability for legal costs arising out of a dispute between them. It is commonplace for parties to enter into agreements of this sort - for example, parties often agree that each party shall pay his own costs, or that no award as to costs shall be made, or that a party's liability for costs shall be limited to a particular amount, and so on - and for the Courts to make awards in terms of such agreements. In the present instance the plaintiff, in stipulating that costs should be paid on the attorney and client basis, obviously wanted to ensure that it would not be out of pocket in respect of any legal costs incurred in connection with disputes arising out of the agreement. The purpose of an award of costs is to indemnify a party "for the expense to which he has been put through having been unjustly compelled either to institute or defend litigation, as the case may be" (per INNES, CJ, in Texas Co. Ltd. v Cape Town Municipality, 1926 AD 467 at p 485) and

if a contracting party wants to ensure that he is fully indemnified against such expenses, there is, in my view, no reason why he should not be entitled to stipulate that such costs, if incurred, should be paid on the attorney and client scale. Counsel for plaintiff relied on the judgment of GROSSKOPF, J, in the case of Santam Bank Bpk. v Kellerman, 1978 (1) SA 1159, in which most of the decided cases on this point are discussed. The learned Judge came to the conclusion that an agreement to pay attorney and client costs is not prohibited by common law, and I respectfully agree with that view. I do not consider it necessary to decide whether the Court retains a residual discretion to refuse to enforce such an agreement in certain circumstances, or to deprive a successful party, relying on such an agreement, of any portion of his costs, because whatever the position may be, in the present instance no grounds exist for depriving the plaintiff of such costs or any portion thereof.

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In the result, the appeal is dismissed with costs (including the costs consequent upon the employment of two counsel) and the defendants are ordered to pay such costs, jointly and severally, the one paying, the other to be absolved, on the scale as between attorney and client.

J.J. TRENGOVE.

WESSELS, A.C.J.)
JANSEN, J.A.)
MULLER, J.A.) CONCUR.
JOUBERT, J.A.)