397/79.
K C

SOCIéTé COMMERCIALE DE MOTEURS

and

WERNER JULIUS ACKERMANN

JANSEN JA.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :-

SOCIÉTÉ COMMERCIALE DE MOTEURS ..... Appellant

and

WERNER JULIUS ACKERMANN ..... Respondent

Coram: Wessels, Jansen, Kotzé, Joubert JJA et Galgut AJA.

Heard: 25 November 1980.

Delivered: 31 March 1981.

J U D G M E N T

JANSEN JA :-

I have had the advantage of reading the judgment by my brother GALGUT. I regret that I am unable to agree with his conclusion that the two exceptions were rightly upheld.

The / .....

The appellant alleges in its particulars of claim two written contracts with the respondent, of which the letters Annexures A and C to the further particulars are the respective copies. (They are fully reproduced in the judgment of GALGUT AJA). A purports to be signed by G. Solomon (alleged to be the respondent's duly authorized agent, and so to be considered for present purposes); C, by W.J. Ackermann (the respondent) and F.C.F. Gratz. Both letters are addressed to the appellant. As it is in effect alleged that letters A and C constitute binding contracts, it must be accepted on the pleadings, for the purposes of the exceptions, that the purported signatures are in fact those of the abovenamed persons, that they issued (sent) the respective letters signed by them to the appellant; and further, that the appellant received both letters and accepted the undertakings therein according to its understanding of them. These facts are fundamental to the allegation that each letter constitutes a contract between the appellant and Ackermann, and are clearly

implied /.....

implied in the pleadings.

In dealing with the type of problem arising in the present case, that of determining the meaning to be ascribed to the declarations of intention by the signato= ries to the letters, reference is often made to the rule (by way of an obiter) in Worman v Hughes and Others (1948 (3) SA 495 (A), at p 505) :-

> "..... in an action on a contract, the rule of interpretation 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."

The rule so stated, must, however, be applied with care, as its very simplicity may lead to misconception. It tends to obscure the true basis of contractual liability in our law, which is not the objective approach of the English law, but is - save in cases where the reliance theory is applied - the real consensus of the parties (cf Cinema City v Morgenstern Family Estates and Others, 1980 (1) SA 796 (A), at p 804 D-E). As a rule of inter=

pretation, it is subject to qualification. In Nelson v Hodgetts Timbers (East London) (Pty.) Ltd. (1973 (3) SA 37 (A), at p 45 C-D) this Court said that the rule was not "inflexible" and referred to p 245 of Trollip v Jordaan (1961 (1) SA 238 (A)) with evident approval. At that page STEYN CJ said in reference to this rule and the parol evidence rule :-

> "Dit is erkende algemene beginsels. Maar hul is geen onwrikbare wette van Mede en Perse nie. Daar moet gewaak word teen 'n toepassing daarvan wat by die uitleg van geskrifte (n letterdienstigheid bewerk en 'n soort woordformalisme invoer waarvoor in ons eie regsbronne geen werklike steun te vind is nie. Dat gevolg gegee moet word aan die woorde wat die partye self gekies het, is 'n beginsel wat nie na behore toegepas kan word nie sonder om ag te slaan op sy korrektiewe teenvoeter dat hul wil en bedoeling sterker dan hul woorde is."

To the extent that the rule may be read as limiting the inquiry to the words appearing in the writing only, it

must / .....

must again be qualified: there are cases in which extrinsic evidence may complement the writing, ranging from evidence of surrounding circumstances to evidence of what passed between the parties (cf Delmas Milling Co. Ltd. v Du Plessis, 1955 (3) SA 447 (A), at pp 453 H - 455). A safer guide to a problem of interpretation would appear to be the fundamental rule as stated by INNES CJ in Joubert v Enslin (1910 AD 6, at p 37-38) :-

> "The golden rule applicable to the inter= pretation of all contracts is to ascertain and follow the intention of the parties; and, if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a Court should always give effect to that meaning."

The "golden rule" has often been applied (e.g., in Standard Building Society v Cartoulis, 1939 AD 510, at p 516 - 517).

The / .....

The key to admissibility of evidence in aid of interpretation is said in the Delmas case to be "difficulty" in interpretation, as opposed to "certainty in the language" - "a matter of individual judicial opinion on each case" (at p 454 H - 455 A). More recently, the trend of legal thought appears to favour a more liberal resort to extrinsic evidence (Van Rensburg en Andere v Taute en Andere, 1975 (1) SA 279 (A) at p 303 D - E; List v Jungers, 1979 (3) SA 106 (A), at p 120 B - F; and see the discussion in Swart en 'n Ander v Cape Fabrix (Pty.) Ltd., 1979 (1) SA 195 (A) and Morgenstern Family Estates and Others, supra, at p 805 F - H). However, for present purposes the matter need not be pursued. It will be assumed in favour of the respondent that a degree of "uncertainty" - the extent being "largely a matter of individual judicial opinion" - is required to open the door to such evidence. In any event, circumstances emerging from the writing itself must at least be considered (Trollip v Jordaan, supra, at p 246).

Whether the possibility of extrinsic evidence

affecting / .....

affecting the interpretation is to be taken into account at the exception stage, may, however, be influenced by the attitude of the parties: "They may within limits force the court to give the best meaning it can to a contract ...." (Delmas Milling Co. Ltd. v Du Plessis, supra, at p 455 C - D). In a case such as, e.g., Nelson v Hodgetts Timbers (East London) (Pty.) Ltd., supra, it was conceded in the Court a quo "that the validity of the deed of suretyship had to be determined ex facie the document itself and that no evidence was required, nor indeed would be admissible, in determining the issue" and that the Court a quo thought that the "issue should have been the subject of an exception" (1972 (4) SA 208 (ECD), at p 211 in initio). It was no doubt on such a basis that this Court in that matter approached the appeal. In the present case the appellant does indeed contend, in the alternative, that if the letters do not ex facie justify its understanding of them, they are then so uncertain in meaning as to admit extrinsic evidence,

and / .....

and that the matter should therefore not be decided on exception. This was apparently also its attitude in the Court a quo (1980 (1) SA 109 (T), at p 111 F). It follows that if in the present case conceivably useful extrinsic evidence is admissible owing to "uncertainty", the exceptions in the present case must in any event fail (Delmas Milling Co. Ltd. v Du Plessis, supra, at p 455 G; Cairns (Pty.) Ltd. v Playdon and Co. Ltd., 1948 (3) SA 99 (A); Baragwanath v Olifants Asbestos Co. (Pty.) Ltd., 1951 (3) SA 222 (T), at p 230 D). It does not appear from these cases that the circumstances upon which reliance could be placed, must necessarily be pleaded. In Standard Building Society v Cartoulis (supra) the Court had no doubt as to the meaning of the documents in question, no extrinsic evidence was considered to be admissible, and therefore, the matter could be decided on exception. No doubt, however, the possibility of extrinsic evidence influencing the interpretation must be "something more than a mere notional or remote possibility" (Davenport Corner Tea

Room / .....

Room (Pty.) Ltd. v Joubert (1962 (2) SA 709 (D & C), at p 716 C-D).

Bearing in mind these general observations, we may now turn to the two letters in question.

The first letter (Annexure A to the further particulars) dated 12 March, 1973, purports to be signed by G Solomon. As has been explained, he, as duly authorized agent of the appellant, must be assumed to have signed it and to have issued it to the appellant; and the appellant must be assumed to have received it and to have accepted any undertaking in terms thereof, according to its (the appellant's) understanding of the contents. The appellant alleges that the respondent :-

> "guaranteed, alternatively bound himself jointly and severally liable with the First Defendant (Peughold) for the due payment of the purchase price of all the goods sold and delivered or to be sold and delivered by the Plaintiff (Appellant) ....." (Par 9 of the Main Claim).

The / ....

The meaning contended for by the respondent appears from his only grounds of exception in respect of the main claim :-

> "1.1 The document upon which the plaintiff [appellant] relies for the allegations in paragraph 9 of the main claim, is not a guarantee by the second defendant [respondent]. It purports to be a communication to the plaintiff [appellant] of a resolution of the first defendant [Peughold] relating to future conduct;
>
> 1.2 The second defendant [respondent] did not bind himself in terms of the said document jointly and severally with the first defendant [Peughold] ..... The said document purports to be a communication to the plaintiff [appellant] of a resolution of the first defendant [Peughold] relating to future conduct."

It seems clear enough that the letter goes beyond a mere communication to the appellant of a resolution by Peughold. The writer is not giving information to the

appellant merely as a matter of interest - he is laying the basis for the future conduct of the business between Peughold and the appellant, and his intention is clearly that the latter should act accordingly, In saying that "we have also decided that all orders will in the first instance be guaranteed by Mr W Ackermann" he is, as agent of the respondent (Ackermann), conveying to the appellant that the respondent (as also the others) had decided that all orders will in the first instance be guaranteed by him. The notification of this decision of the respondent (Ackermann), by his agent Solomon, to the appellant is reasonbly capable of being understood as an implied undertaking by the respondent "that all orders will in the first instance be guaranteed by me". The real difficulty lies in the meaning of this undertaking. Could the appellant reasonably have understood that the respondent was intending thereby to give a continuing guarantee in respect of "all orders"? The letter seems reasonably capable of being so read. An alternative

reading / ....

reading is, e.g.; that the respondent would, as each order was placed, enter into a separate guarantee in respect of that order. It would, in my view, be difficult on exception to decide which of these two readings must be taken to reflect the real intention of the parties. Evidence could conceivably assist - the surrounding circumstances, the relationship between the parties at the time, and, if necessary, what had passed between them and what their subsequent conduct was. I do not consider it a remote possibility that evidence of such a nature could assist in arriving at the real intention of the parties. Does the "uncertainty" in the letter allow recourse to such assistance? As has been mentioned above, the degree required to open the door to extrinsic evidence is largely "a matter of individual judicial opinion on each case". In the present case, in my view, recourse should be had to extrinsic evidence to resolve the difficulty, and enable the court to determine the proper meaning to be attached to the letter. Whether it will be either

necessary or permissible to invoke all of the categories of evidence mentioned above, it is unnecessary at this stage to decide. The likelihood of some extrinsic evidence being of assistance in interpreting the letter, to my mind, suffices to preclude its meaning being deter= mined on exception.

The exception to the main claim, should, in my opinion have been dismissed.

The second letter (presumably typed) is dated 30 May 1975 (Annexure C to the further particulars). The effect of the appellant's allegations in regard thereto is this: the signatories, W. J. Ackermann (the respondent) and F.C.E. Gratz, by this letter bound themselves jointly and severally with Peughold to honour the bills mentioned in the letter. There is no linguistic difficulty what= soever in reading the letter in this sense and this would seem to be the ordinary meaning of the words. The sole matter that raises a query is that below the signatures of Ackermann and Gratz there appear four additional names, but

with no corresponding signatures. It is because of this that the respondent alleges in his notice of exception that "ex facie the document it was incomplete and unen= forceable without the signatures of the other persons whose names appear on the document". For this contention the respondent relies mainly on Nelson v Hodgetts Timbers (supra).

In that case ex facie the writing it appeared that only one of two proposed co-sureties had signed. The question was whether the only signatory had bound himself. This Court said that "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" (at p 45 F), and it came to this conclusion: "The form in which the document is cast and the words used are such that ..... it must be necessarily inferred that the parties intended a joint contract of co-suretyship" (at p 45 G). It followed that as a result of the absence of the second

signature, / .....

signature, the "deed of suretyship" was held not to comply with the provisions of sec 6 of Act 50 of 1956. The Court considered the use of the word "we" throughout the deed as being an important indicium, as also the fact that the blank space where the missing signature should have been, was above the signature that did appear. It may be added that the deed was a formal one, and that proper provision was made for two signatories, with two witnesses each. But most important, the "we" appearing throughout the deed, was defined in the first few lines of the deed itself as follows : "We, the undersigned, Jan van der Merwe and Joseph Henry Nelson do hereby bind ourselves ...." The absence of the signature of Jan van der Merwe clearly proclaims an inchoate document, despite the presence of the signature of J H Nelson.

In the present case there are no such clear indicia. Ex facie the letter those binding themselves are "we, the undersigned" and there are only two such,

namely Ackermann and Grätz. The other four names typed under the two signatures would appear to be mere surplusage and of no contractual significance. From their mere presence it could not be inferred with any conviction that Ackermann and Gratz signed, intending only to be bound if all the persons bearing those names also signed (whatever instructions may originally have been given to the typist). By this letter Ackermann and Gratz, as signatories, sought to obtain an indulgence from the appellant on behalf of Peugh old, viz. an extension of the bills; they gave an undertaking to bind themselves jointly and severally; they allowed this letter to be sent in this form (as must be assumed on the pleadings, as explained above). They could not have intended that it should be read as inchoate.

It may be pointed out that if the reference in this letter to "the letter dated 12th March, 1975, and signed on behalf of the Directors by Mr G Solomon" is a reference to the first letter (Annexure A to the further particulars) - as would seem to be the case, despite the discrepancy as to dates - the position is even clearer.

There the appellant was informed that "all orders will in the first instance be guaranteed by Mr W Ackermann and, even though this is of no real interest to you, he will have counter guarantees from his colleagues on the Board of Peughold". The first letter, if read with the second, would strengthen the impression that the respondent, by signing the second letter, intended to be bound unconditionally by his signature.

In my view the inferences are clear; but even if they are not, the exception should in any event have been dismissed. There would at least be uncertainty which, in all probability, could be clarified by extrinsic evidence. Such evidence would be admissible. In the writing in question all the essentialia for a contract of guarantee between the appellant and Ackermann and Gratz are present. For the appellant additional guarantors would only mean greater security; for Ackermann and Gratz, only a greater possibility of contribution. At best for the respondent, the absence of the signatures could only mean that a

material provision had been left uncompleted. So stated the analogy to the question decided in Johnstone v Leal (1980 (3) SA 927 (A)) becomes plain. Evidence would be admissible to determine the intention of the parties: whether they intended the additional names to be pro non scripto, or whether they intended that the other signatures were still to be appended before the writing became operative. The extrinsic evidence may relate "to all relevant surrounding circumstances, including the negotiations leading up to and at the time of the signing" and acceptance of the letter (Annexure C to the further particulars) (Johnstone v Leal, supra, at p 947 G).

For these reasons the exception to the alternative claim is, in my view, also unfounded.

I would allow the appeal in respect of both exceptions.

E.L. Jansen

E.L. JANSEN JA.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SOCIÉTÉ COMMERCIALE DE MOTEURS Appellant

and

WERNER JULIUS ACKERMANN Respondent

Coram: WESSELS, JANSEN, KOTZÉ, JOUBERT, JJ.A. et

GALGUT, A.J.A.

Heard: 25 November 1980

Delivered: 31 March 1981

J U D G M E N T

KOTZÉ, J.A.:

I have had the advantage of reading the judgments prepared by my Brothers Jansen and Galgut. In regard to the exception to the main claim I am in agreement with the

conclusion...../2

conclusion reached by my Brother Galgut and in regard to the exception to the alternative claim I am in agreement with the conclusion reached by my Brother Jansen.

E. P. R. M.

JUDGE OF APPEAL

30. iii. 1981.

(397/79)
J vd M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:-

SOCIÉTÉ COMMERCIALE DE MOTEURS APPELLANT

and

WERNER JULIUS ACKERMANN RESPONDENT

CORAM: WESSELS, JANSEN, KOTZÉ, JOUBERT JJA et GALGUT, AJA

HEARD: 25 NOVEMBER 1980

DELIVERED: 31 MARCH 1981

J U D G M E N T

GALGUT, AJA

The appellant company, plaintiff in the Court a quo, carries on business in FRANCE as a manufacturer and supplier of compressors. During the period June 1974 to April 1977 it sold compressors and spare parts in connection therewith to Peughold (Pty) Ltd (Peughold)

a /.....

a Johannesburg based company. It sued Peughold as first defendant for the sum of FF 2 823 913,52 i.e. R533 000,00 being the price of the goods so delivered. In this its main claim it joined, as second defendant, the present respondent alleging that he had guaranteed the indebtedness of Peughold. There was also an alternative claim for FF 3 222 195,23 i.e. R605 000,00 against respondent based on an allegation that he had bound himself "jointly and severally" to honour certain bills of exchange which had been accepted by the first defendant in respect of the latter's indebtedness for the goods it had purchased from the plaintiff. Details of the main and alternative claims will be set out later. The difference in the amounts claimed in the two claims is not explained in the papers. This is, however, not material to the issues before us. I will continue to refer to the parties as plaintiff, Peughold and second defendant respectively. Peughold did not defend the action. Second defendant did defend it and excepted

to both the main claim and the alternative claim, both as amplified by certain further particulars, on the ground that neither claim disclosed a cause of action. Both exceptions were upheld and an appropriate order was made. It is against that order that this appeal is brought. The judgment of the Court a quo is reported, see 1980(1) SA 109 (T). The relevant facts are there set out but I will for the sake of convenience repeat certain of them.

I deal first with the appeal relating to the main claim. In paragraph 4 thereof plaintiff alleges that it had sold certain goods to Peughold; that Peughold had agreed to pay therefor by accepting bills, details of which are set out. In paragraph 5 it is alleged that Peughold in fact accepted the bills and undertook to honour them according to their tenor. This claim also deals with certain goods which were sold to Peughold on consignment and which have not been accounted for or paid for.

There is no need to set out all the details of the main claim. It is sufficient to say that plaintiff alleges that the goods have not been paid for nor have the bills been honoured. Paragraph 9 of the main claim then goes on to allege:-

> "On or about the 12th March 1973 the Second Defendant, acting through his duly authorised agent, one Solomon, in writing guaranteed, alternatively bound himself jointly and severally liable with the First Defendant for the due payment of the purchase price of all the goods sold and delivered or to be sold and delivered by the Plaintiff and interest thereon to date of payment of the purchase price to the First Defendant as aforesaid."

Second defendant then asked for a copy of the written guarantee and in reply to the request plaintiff furnished the following letter (annexure A to the further particulars) written on the letter-head of the said Solomon who is a Registered Chartered Accountant:-

> " 12 March 1973
>
> Société Commerciale de Moteurs -C.I.M.,
> 49, Rue Noël-Pons,
> 92 - Nanterre - B.P. 35,
> FRANCE
>
> Attention: Mr. R. Proumen
>
> Dear Mr. Proumen,
>
> I wish to inform you that at a recent Meeting of the Board of Directors of Peughold (Pty.)

Ltd., it was agreed that all orders placed by that Company on yourself would be signed by any two of the undermentioned Directors:

Mr. F.C.E. Gratz
Mr. J.A. Stanton
Capt. T. Meredith
Capt. C.H. Snelgar
Mr. W. Ackermann
Mr. W.E. Hamilton

We have also decided that all orders will in the first instance be guaranteed by Mr. W. Ackermann and, even though this is of no real interest to you, he will have counter guarantees from his colleagues on the Board of Peughold.

Yours faithfully,

(sgd) G. SOLOMON."

The exception taken to the main claim can be summarised. It alleges that paragraph 9 as amplified by the letter of 12 March does not disclose a cause of action in that the letter is not a guarantee by the second defendant; that it is no more that a communication to the plaintiff of a resolution taken by Peughold relating to future conduct.

Counsel for plaintiff at the outset submitted that, for purposes of the exception, the allegation that Solomon was the duly authorised agent of the second defendant must be regarded as correct. This submission can be accepted. Hence the letter should be construed

as emanating from second defendant.

If the letter is so construed, the first paragraph needs no amendment. It informs plaintiff of the resolution taken by the board viz. that in the future all orders would be signed by two directors. The second paragraph would then be amended to read:-

> "The board (of which I am a member) has also decided that all orders will in the first instance be guaranteed by (me) and, even though this is of no real interest to you, (I) will have counter guarantees from (my) colleagues on the Board of Peughold."

It was not suggested that the word "guarantee" created any ambiguity. There can be no doubt that in annexure A it bears its ordinary meaning, as to which see List v Jungers 1979(3) SA 106 (A.D.) at p. 117.

Counsel for plaintiff then went on to submit (the submissions are shortly stated);

(A) that annexure A is reasonably open to the interpretation that it in itself is a guarantee, to operate with immediate effect, given by second defendant covering future orders; alternatively

(B) that annexure A is an offer of a guarantee, to operate with immediate effect, covering future orders;

(C) that the said immediate guarantee and/or offer was acted upon and therefore impliedly accepted by virtue of the subsequent execution of the orders placed.

As an alternative to A,B and C it was urged,

(D) that, at worst for the plaintiff annexure A is ambiguous and should be construed contra proferentem and that the lack of certainty should be resolved by a trial court which would have regard to all of the admissible evidence including the attitude of the parties and other circumstances surrounding the issue of the guarantee and the execution of the orders.

As to A above. It was urged that annexure A is a communication from one business man to another and it was reasonable for plaintiff to interpret it as re-

flecting an intention on the part of second defendant to give an immediate binding guarantee as opposed to an intention to issue a guarantee in the future.

In Worman v. Hughes 1948(3) SA (A) at p. 505 Greenberg JA said the following:-

> "It must be borne in mind that in an action on a contract, the rule of interpretation 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 may have had in mind'. (See also Union Government v. Smith (1935, A.D. p. 232 at pp. 240/1); Lanfear v. du Toit (1943, A.D. p. 59 at pp. 72/3) and, in regard to wills, Cuming v. Cuming (1945, A.D. p. 201 at p. 206))."

See also Nelson v. Hodgetts Timbers (East London (Pty) Ltd 1973(3) SA 37 (A) at p. 45 B.

As we have seen the particulars in the main claim allege that the second defendant bound himself in writing and that the writing is annexure A. No other facts are pleaded by Plaintiff. Evidence would not be admissible to prove facts not pleaded. Put another way the plaintiff has stated the facts on which it bases its claim and if, admitting those facts, they do /.....

do not justify the claim, an exception should be taken and should succeed; see the dicta of Stratford CJ in Standard Building Society v. Cartoulis 1939 A D 510 at p. 516. It thus becomes necessary to examine annexure A, construed as set out above, in order to ascertain therefrom what was conveyed by second defendant to plaintiff. Such examination shows

(a) that annexure A

  (i) informs the plaintiff of a decision of the board of directors of Peughold; and
  (ii) details the procedure which the board resolved to follow in the future viz., that future orders would be signed by two directors;

(b) that second defendant advised plaintiff that in terms of its resolution the board had decided

  (i) that future orders would in the first instance be guaranteed by him; and
  (ii) that the second defendant would receive counter guarantees from his co-directors.

I am of the view that annexure A in itself and as broken down in a (i) & (ii) and b (i) & (ii) means no more than that a resolution was passed regulating

future /.....

future procedure in terms of which future orders would be accompanied by the signatures of two directors and by a guarantee by second defendant. A part of the procedure, which did not concern plaintiff but which would obviously be of vital importance to second defendant was that he, second defendant, would in turn receive a counter-guarantee from his co-directors. The resolution makes it clear that three steps were envisaged. The first and third steps would be of importance to second defendant when future orders were to be placed. The first and second steps would be of importance to plaintiff. Annexure A does not convey that if plaintiff receives an order signed by two directors that plaintiff can assume or accept that such order is in fact guaranteed by second defendant. Had that been intended the relevant portion of the last paragraph would have read:-

> "All such orders are hereby guaranteed by Mr Ackermann."

If the paragraph is to be read as if the second defendant sent it it would have read:-

> "I hereby guarantee all such orders."

It follows from what has been said above that there can be little dispute if any as to what the resolution conveyed. No further facts are pleaded. Plaintiff relies on annexure A. This document in itself and by itself conveys the clear inference viz., that the board of directors had resolved that second defendant would in the future guarantee the orders if signed by two of the named directors.

In these circumstances the principle enunciated by Greenberg JA in Worman v. Hughes cited above is directly in point and it would serve no useful purpose to compile a catalogue of cases in which that principle was accepted.

All that has been pleaded is annexure A. This says three things. Nothing is stated as to the relationship of the parties. No good purpose can be served by discussing cases which suggest that the factual background must be considered. On the claim as pleaded no such evidence could be led. See the Standard Building Society case cited above at p. 516.

That is all that need be said but as we are not

agreed I pause to add that, in any event, it is not alleged that any of the relevant orders was signed by two directors. This in itself may render this claim excipiable.

It follows from the above that the submission in A cannot be upheld.

As to B above. It is relevant to stress that plaintiff did not plead that annexure A was an offer which was accepted as suggested in C above. However that may be I will discuss this submission. The case of Veitch v. Murray and Company 1864(2) Court of Sessions 1098 was relied on in support of this submission. The relevant letter in that case is set out at page 111 of the report of the Judgment of the Court a quo and need not be repeated here. In response to that letter Veitch, the addressee, sent the requested samples and prices to Murray & Co. Thereafter Murray & Co. sent a further letter to Veitch enclosing an order from W.S. Murray. That order was then executed. Hence it is not surprising

that the Court there held that the first letter from Murray & Co. constituted an offer which was accepted by Veitch when he executed the order. That case is

very /.....

very different from the present case.

The legal principles which are to be applied in interpreting annexure A have been set out above. Annexure A in itself or as analysed in a (i) & (ii) and b (i) & (ii) cannot in my view be read to contain an offer to guarantee. It goes no further than what is set out in the above discussion re A. Hence the submission in B must fail.

As to C above. As set out in the discussion re A and B there was no guarantee given or offer made by second defendant hence the execution of any order placed cannot be said to be pursuant to a guarantee or offer to guarantee. It follows that submission C must fail.

As to D above. Counsel urged that if this Court did not sustain the submission in A above then it should find that annexure A could have one of two meanings viz.,

(i) that a definite guarantee was given to cover all future orders or

(ii) that a guarantee would be issued with each order as it was placed in the future.

Counsel /.....

Counsel then urged that this ambiguity would have to be cleared up and that evidence of the surrounding circumstances would be admissible to clear up the ambiguity and therefore the matter should not have been disposed of on exception but should have been allowed to go to trial. Reliance was placed on the dicta appearing in Delmas Milling Co. Ltd v. du Plessis 1955 (3) SA 447 (A) at pages 454 and 455 and especially at 455 C to E. This oft quoted case at p. 454 G lays down that when interpreting a contract "if the difficulty cannot be cleared up with sufficient certainty by studying the language, recourse may be had to 'surrounding circumstances' i.e. matters that were probably present to the minds of the parties when they contracted". It is clear from what was said when considering submission A that I am of the view that there is no uncertainty which would require a court to construe annexure A in the light of surrounding circumstances. Hence it is not the type of case referred to in the Delmas case sup. cit. at p 455.

In the result the submission /.....

submission in D fails.

I turn now to consider the exception to the alternative claim.

In paragraphs 5 and 8 of the main claim it is alleged that Peughold had accepted and undertook to honour certain bills of exchange drawn by plaintiff.

In paragraphs 2 and 3 of the alternative claim it is alleged that

> " 2. On or about the 30th May 1975 the Second Defendant in writing bound himself jointly and severally liable with the First Defendant and one Gratz to honour the bills which had been accepted by the First Defendant as set out in paragraphs 5 and 8 of Plaintiff's Main claim and to pay such bills as were due on the 30th June as follows:- ..... "
>
> (The bills are then tabulated)
>
> " 3. Neither the First Defendant nor the said Gratz have honoured the said bills."

In response to a request for a copy of the writing the plaintiff furnished a type-written letter, annexure C, dated 30 May 1975 typed on Peughold's letter-head and addressed to plaintiff. It reads:-

"Dear Sirs,

We have been obliged due to the consolidation

and /.....

and expansion of the Company to request that you extend the payment of the bills due to yourselves on the 30th June 1975.

The bills due 30th June total F.F.1216546,23 including interest on the extensions calculated at 14% p.a. We request to have these bills extended to be paid during the months of September to December 1975 inclusive. The overall result would be that bills will be met as follows:- ....."

(The amounts and new due dates are then tabulated.)

"This will have the effect of discharging the liability of all current purchases by the end of the current year.

As a complement to the letter dated 12th March 1975 (sic) and signed on behalf of the Directors by Mr. G. Solomon we, the undersigned, do hereby bind ourselves jointly and severally to honour the repayments tabulated above.

Signed: W.J. ACKERMAN (sgd)
F.C.E. GRATZ (sgd)
J.A. STANTON
CAPT. T. MEREDITH
CAPT. C.H. SNELGAR
CAPT. C.J. BALT "

It is common cause that this document was signed only by Ackermann (second defendant) and Gratz.

This exception alleges that annexure C provides for a joint undertaking by six persons; that inasmuch as it was signed only by second defendant and Gratz and not by the other persons whose names appear it was incomplete and unenforceable without the signatures of the other persons whose names appear on the document.

The Court below held, on the authority of Nelson v. Hodgetts Timbers (East London) (Pty) Ltd., 1973 (3) SA 37 (A.D.), that the intention of the parties had to be inferred from the words used in the written document, which clearly indicated that the proposed signatories intended it to be signed by all six of them; ex facie the document it was therefore incomplete and unenforceable against the second defendant without the signatures of all the other proposed signatories.

At the outset it is necessary to refer to section 6 of Act 50 of 1956 which reads:-

> "'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.'"

It thus becomes necessary to decide whether annexure C complies with the requirements of the section.

In his written "Heads of Argument" counsel for the appellant submitted that by the use of the word "we" and

the phrase "jointly and severally" the signatories, including second defendant, intended to be bound individually and hence Nelson's case was distinguishable. He placed some reliance on the case of Manufacturers Development Co (Pty) v. Repcar Holdings (Pty) Ltd & others 1975(2) SA 779 (W) at p. 781 H. However at the outset of his oral argument in this Court he conceded that he could not, if the matter fell to be decided on an interpretation of the document, distinguish Nelson's case. He urged however that the question whether it was the intention of the plaintiff and of all the persons named in annexure C that it should not be binding on any of them until all had signed was a matter for evidence; hence it should not have been dealt with on exception. Support for this latter submission was placed on the case of Johnston v. Leal 1980(3) SA 927 (A). As to which more later.

The first thing which must be emphasized is that annexure C is written on a Peughold letter head setting out the address of Peughold. This in itself negatives any suggestion that it emanates from second defendant and Gratz

as individuals.

The wording of the first paragraph is significant. I repeat it for ease of reference — the underling is mine:-

> "We have been obliged due to the consolidation and expansion of the Company to request that you extend the payment of the bills....."

This paragraph can only mean that Peughold, and not second defendant and Gratz, is obliged to ask for an extension. It is unthinkable that only two members of a board would ask for such an extension. The "we" used here can only refer in the first place to the company Peughold and because six typewritten names appear at the bottom of the letter it also conveys that all six are party to the request and were all intended so to be.

In the second paragraph we find "We request to have the bills extended....." This request also can only be a request by the company Peughold and again it conveys that the six typed names are party to the request and were intended so to be. Thereafter in the last sentence the wording is "we the undersigned do hereby bind

ourselves jointly and severally". There then follow the six typewritten names. Clearly, in the above context, what was being conveyed was that the company, Peughold required the extension that the persons named were all party to the request for the indulgence sought and that the six persons named would all be signatories to the suretyship. Ex facie the document it was clear that it was not emanating from an individual but from a group. Even if one seeks to interpret only the last paragraph, the form in which it is cast clearly indicates that it was intended that the persons whose names were typewritten intended that all should be bound. Were it not so the typist would not have been instructed to insert all the names.

In the light of the above it cannot be suggested that annexure C emanated from second defendant and Gratz or that they intended that it should be sent in its present uncompleted form. Certainly there is nothing in the particulars of claim which suggests this.

The /.....

The suggestion mentioned earlier that by the use of the phrase "jointly and severally" those who signed intended to be bound individually takes the matter no further. Co-sureties always intend to be bound individually without losing their right of recourse against the co-sureties. The issue in this case is whether the document indicates the intention that if only one of the proposed co-sureties

signs /.....

signs he alone is bound even if one or more of the others fail to sign. As pointed out in Nelson's case sup. cit. at page 46 "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". From what has been said above and having regard to the form not only of the whole document but also of the last paragraph I have no doubt that the document reflects a clear intention, as in Nelson's case, that there should be a joint contract of co-suretyship and not six separate contracts of suretyship. On this aspect, i.e. of the intention as expressed in the document, more will be said when discussing the Johnston case.

I turn now to consider the submission based on Johnston's case, sup. cit. In that case the subject matter of the sale was land. In terms of Act 71 of 1969 such a contract, as in this case, had to be reduced to writing. The contract of sale was complete as to the essentialia viz., price, the merx and the parties. It was

on an "Offer to Purchase" printed form, of the type used by estate agents. It was signed by both parties. In its original form it had 18 clauses with many blank spaces in which particulars of the contract were to be inserted. One of these clauses, clause 11, contained a suspensive condition providing for the obtaining, by the purchaser, of a bond. The period within which the bond was to be obtained was left blank and the "blank" clause had not been deleted. This had been done in the other clauses having blank spaces. After setting out the possible reasons why this material clause had been left in that state, as to which see page 940 of the report, Corbett JA went on to say at page 941:-

> "Having weighed these and other indicia I can find no clear preponderance in favour of one construction or another. It seems to me that the document itself — and by itself — is equally capable of giving rise to an inference that clause 11 was intended to be pro non scripto and for that reason was left uncompleted or that clause 11 was intended to be part of the contract but was not completed for some other reason....."

At page 942 the learned Judge said the following:-

> "It seems to me that, prima facie, there is

> much to be said for the view that extrinsic evidence ought to be admissible in such a case. The written document, on the face of it, is incomplete. The blanks left may, as I have shown, be indicative of an intention on the part of the parties to the agreement to omit the relevant clause from their integrated written contract; or they may be due to the parties having agreed that the particulars of the clause be settled by later agreement; or they may reflect an omission by the parties to insert agreed particulars. A determination of which of these possible alternatives represents the factual situation is vital to the validity of the document. If no positive conclusion can be drawn from the document itself, then the facts should be investigated to ascertain why it is that the blanks were left."

It was for the above reasons that it was held in that case that "the integration rule" did not constitute an obstacle to the reception of evidence to explain the non-completion of clause 11.

In the present case we have a very different set of circumstances. Annexure C is a document typed specially for the occasion. It asks, as we have seen, for an indulgence and the persons named were party to the requests. It goes on to set out the names of six persons who, "do hereby bind ourselves jointly and severally to honour the repayments tabulated above". Only two of

the six persons have signed. The other four have not signed. The form and whole tenor of annexure C indicates an intention that all six persons should sign the document. Their names were inserted, not left blank, when the document was prepared. Hence the difficulties, quoted above, which existed in the Johnston case do not exist here. A positive conclusion can be drawn from the document itself. A further feature which bears on the interpretation of annexure C is the fact that its very form indicates that it was intended to be a contract between the plaintiff on the one hand and the company, Peughold, and the six named persons on the other. Whatever rights plaintiff may have had against any one or all of the six sureties the rights of sureties inter se are, as stated in Nelson's case sup. cit., of great importance. The omission of their signatures constitutes an omission not merely of a material term but the omission of essentialia, viz., the parties to the contract. In all these circumstances it is clear that annexure C is /.....

is incomplete and does not comply with section 6 of Act 50 of 1956.

It follows from what has been said above that, in its particulars of claim as presently framed, plaintiff has not made out a cause of action on either the main or alternative claim and the appeal must therefore fail.

The order made is

1. The appeal is dismissed with costs including the costs of two counsel.

2. Leave is granted to plaintiff to amend its particulars of claim, within 30 days from date hereof, if it so desires.

O. Galgut

GALGUT, AJA

VESSELS, JA
JOUBERT, JA } CONCUR