LL Case No 185/1988

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

INCORPORATED GENERAL INSURANCES LIMITED Appellant

and

CEMENT DISTRIBUTORS (SOUTH AFRICA)
(PROPRIETARY) LIMITED Respondent

CORAM: BOTHA, VIVIER et MILNE JJA

HEARD: 14 SEPTEMBER 1989

DELIVERED: 29 SEPTEMBER 1989

JUDGMENT

BOTHA JA:-

This is an appeal against a judgment granted against the appellant in favour of the respondent in the Witwatersrand Local Division for payment of the sum of R40 000, interest and costs.

The respondent's claim against the appellant was based on a document styled a "Surety Bond", in terms of which the appellant had bound itself to the respondent as surety and co-principal debtor for the due payment by "V N B Meestersbouers (Edms) Beperk" of all amounts due and payable or which became due and payable "by them" to the respondent for the supply of materials, up to a total maximum amount of R40 000. The respondent alleged that it had, over a period of time, sold and delivered large quantities of cement to the principal debtor mentioned in the deed of suretyship (hereinafter referred to as "Meesterbouers"), in consequence of which the latter was indebted to it in an amount in excess of R40 000.

The appellant raised two defences to the

respondent's claim. The first defence was that the cement in question had been sold and delivered, not to Meesterbouers, but to another company, V N B Meubel Hipermark (Edms) Bpk (hereinafter referred to as "Hipermark"). The second defence was that the respondent was deemed to have ceded its right, title and interest in the deed of suretyship to the offeror in terms of a deed of arrangement between Meesterbouers and its creditors, which had been duly sanctioned by the Court pursuant to the provisions of section 311 of the Companies Act 61 of 1973.

The trial Judge (DE KLERK J) rejected both defences, but in granting the appellant leave to appeal, he differentiated between their respective demerits, as follows. In regard to the second defence he had no hesitation in granting leave to appeal, expressing the view that this Court might very well come to a different conclusion. In regard to the first defence, however, the learned Judge stated that

he was unpersuaded that the appellant would succeed in convincing another Court that it should take a different view of it. He was nevertheless disinclined to refuse leave on that score, saying that the Court of Appeal would be able to deal with the first defence "without much difficulty or time being consumed".

In my opinion the appeal in respect of the first defence is, indeed, wholly devoid of merit. In the circumstances I propose to dispose of it in a few words. Meesterbouers and Hipermark were two of a number of subsidiaries of a holding company. At the trial the respondent led the evidence of one Van Niekerk, who was in control of all the companies in the group, and one Beukes, who occupied the post of buyer for all the companies in the group. On their evidence, read with the relevant documents, there can be no doubt that the respondent at all times intended to sell and supply the cement to Meesterbouers. Nor, on their evidence, can there be

any doubt that they intended that the cement would be purchased in the name and for the account of Meesterbouers. Hipermark came into the picture solely in the context of certain internal and, as far as the respondent was concerned, unilateral arrangements and book entries between the companies in the group inter se. These could not, and did not, in any way affect the legal relationship between the respondent and Meesterbouers, as seller and buyer of the cement respectively. Nor can there be any doubt, on the evidence as a whole, that Beukes was duly authorised to purchase the cement for and on behalf of Meesterbouers, and that, vis-à-vis the respondent, he intended to do just that. The evidence simply leaves no room for the argument, manfully advanced by counsel for the appellant, that the cement was sold to or bought by Hipermark, and not Meesterbouers.

The second defence, as I have indicated, rested on the terms of a deed of arrangement between

Meesterbouers and its creditors. The deed of arrangement was entered into after Meesterbouers had been placed under judicial management. It is a bulky document, but its general tenor and its particular provisions are of a kind so very familiar to the deeds of arrangement regularly encountered in practice, that I do not consider it necessary to enter upon the details of it. Suffice it to say that it contains the usual provisions relating to the appointment of receivers, the proof of creditors' claims, whether secured, preferent or concurrent, the payment of such claims, whether in full or in part, and so forth, and that, overall, it is replete with the customary references to the procedures laid down in the Insolvency Act 24 of 1936, read with the relevant provisions of the Companies Act 61 of 1973.

The appellant relied upon clause 16.1 of the deed of arrangement, which provides as follows:

"16.1 Upon arrival of the final date and

> upon the due fulfilment by the offeror of its obligations hereunder in consideration of the payment to be made by the offeror in terms hereof, all creditors shall be deemed to have ceded to the offeror their claims against the Company, together with their right, title and interest in and to any security held therefor ....."

It was argued on behalf of the appellant that the expression "any security", is, on the face of it, of wide and unrestricted import, and that it should accordingly be construed as embracing a security in the form of a deed of suretyship such as that held by the respondent in this case. For the respondent, on the other hand, it was argued that the word "security" should be given the meaning assigned to it in section 2 of the Insolvency Act, the relevant part of which provides as follows:

> "'security', in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention."

The issue of interpretation is not a difficult one to resolve, in my opinion, and I shall base my judgment on it. Before I deal with it, however, I should refer briefly to a question of law that was raised in argument, in order to avoid a possible misconception of the effect of this judgment. Section 311(3) of the Companies Act provides as follows:

> "No such compromise or arrangement shall affect the liability of any person who is a surety for the company."

Counsel for the appellant argued that this provision constituted no obstacle in the way of the contention that the respondent had lost its right to sue the appellant on the deed of suretyship, since the deed of arrangement had been sanctioned by the Court and accordingly, in terms of section 311(2), it had become "binding on all the creditors." In support of his argument, counsel relied on the decision of LEON J in Ex parte Voysey Bond Property Investments Ltd 1978 (2)

SA 134 (D & C L D) at 137A-138B. It was there held, with reference to section 311(3), that

> "the section does not either expressly or by necessary implication prevent parties from contractually altering the position which the statute would otherwise bring about."

On that ground LEON J held that the Court had the power to sanction an arrangement providing for the cancellation of a guarantee in favour of debenture holders, the majority of whom had voted in favour of the acceptance of the scheme of arrangement (see at 138D-F), apparently with the result that the minority who voted against it would nevertheless be bound by it, presumably by virtue of section 311(2). With respect, I have grave doubts about the validity of such a view. No doubt the effect of section 311(3) is that

> "a scheme need not expressly reserve the rights of any creditors against sureties for debts against the company as such rights are unaffected by the scheme",

(at 138A, quoting from Halsbury), and, as counsel for the respondent rightly pointed out, the ordinary effect

of a cession of a claim on a suretyship in respect of it, as explained in Pizani and Another v First Consolidated Holdings (Pty) Ltd 1979 (1) SA 69 (A) at 77H-78E, is excluded in respect of a deed of arrangement by virtue of section 311(3); but it is a far cry from that to hold that a creditor who has voted against the acceptance of an offer of arrangement is bound to abide by a clause in it providing for the termination of his right to proceed against a surety, for, ex hypothesi, he has in fact not contracted out of the protection afforded to him in terms of section 311(3). In the present case, the appellant relied simply on clause 16.1 of the deed of arrangement as it stands; no information was placed before the Court a quo as to whether or not the respondent had voted for, or against, the acceptance of the offer, or at all. Accordingly, counsel for the respondent argued that there was no foundation for a finding that the respondent had in fact contracted out of section

311(3), and that section 311(2) in itself was not enough to render section 311(3) inoperative in respect of the respondent. It seems to me that there is considerable force in this argument. However, there is no need to express a final opinion on it, and I refrain from doing so. I would merely wish to make it clear that this judgment is not to be construed as approving of the view adopted in the Voysey Bond case supra. Whether or not that case was correctly decided is left open for consideration when the need for it should arise.

Reverting to the interpretation of clause 16.1, there are a number of reasons why the wide meaning of "security" contended for on behalf of the appellant falls to be rejected. I shall mention what I consider to be the major reasons for holding in favour of the respondent on this issue. To begin with, section 311(3) is of importance. The mere existence of the provision contained in it militates against the

notion that a deed of suretyship is included within the ambit of "security" for the purposes of the clause. If it were included, it would mean that creditors who held deeds of suretyship would forfeit the protection they enjoyed under section 311(3) by relinquishing their rights to look to their sureties for payment of the company's debts, without receiving any compensation or advantage in return for doing so. They would, in effect, be making a present to the offeror of their rights to recover from the sureties (cf Friedman v Bond Clothing Manufacturers (Pty) Ltd 1965 (1) SA 673 (T) at 678A-679A). It is, inherently, highly unlikely that the draftsman of the deed of arrangement, or any party interested in or connected with it, would have envisaged or intended such a result. The suggestion put forward by counsel for the appellant, that the offeror might well have wished to procure a benefit for itself in this way, in the expectation that creditors with sureties to look to would be outvoted by other

creditors, appears to me to be too fanciful to carry any weight. This is all the more so in view of the absence of any evidence at the trial that the offeror, or any other interested party, was aware of the existence of the respondent's deed of suretyship, or of any other creditors' deeds of suretyship.

The meaning of "security" in clause 16.1 must, of course, be assessed in the context of the deed of arrangement as a whole. I have already mentioned that the deed abounds with clauses incorporating various procedures of the Insolvency Act. To put it broadly, the receivers are obliged in terms of the deed to deal with creditors' claims as if they were the trustees in an insolvent estate. They have to differentiate between secured creditors, preferent creditors and concurrent creditors, in relation to proof of claims, the realization of securities, the payment of secured creditors in full, and so forth. The deed of arrangement itself, in clauses 1.2.2.34 and

35, defines "secured creditor" as a creditor who has a secured claim, and a "secured claim" as

> "any claim which would rank as a secured claim in a distribution account in a Final Winding-Up of the company, to the extent thereof."

To a very substantial extent the entire scheme by which the arrangement is to be put into operation and carried out is permeated with concepts which are peculiar to the administration of insolvent estates in accordance with the provisions of the Insolvency Act. That being so, it is in the highest degree likely that the word "security", where it occurs in the deed, will bear the specialized and restricted meaning that is ascribed to it in the Insolvency Act, rather than the wide meaning sought to be put on it on behalf of the appellant. Similarly, in the sphere of the liquidation of insolvent companies, the word "security" would not ordinarily include a deed of suretyship, and, having regard to the setting, it would be surprising to find

that it bears such a meaning in the deed of arrangement.

Finally, to place the matter beyond doubt, there are, apart from clause 16.1, two other clauses in the deed of arrangement which contain the word "security", and there it plainly bears the restricted meaning it has in terms of the Insolvency Act. Clause 9 deals with the lodgment of claims. Clause 9.1.2 requires claims to be proved, accompanied by supporting documents, in accordance with the provisions of section 44 of the Insolvency Act. Section 44(4) of the Act refers specifically to "security", which means, of course, security as defined in section 2. Form C, which must be used in proving claims, refers to "security" in the same sense. Clause 9.1.3 then has the following:

> "The admission or rejection of claims whether in whole or in part or the admission or rejection in whole or in part of any security or preference sought to be attached to any claim lodged for proof shall be a matter in

the discretion of the receivers....."

Clause 10 deals with the rejection of claims. Clause 10.1 provides as follows:

> "Should the receivers reject any claim either in whole or in part, or reject in whole or in part any security of preference sought to be attached to any claim the affected creditor ..... shall be obliged and entitled to institute review proceedings ....."

The draftsman of the deed of arrangement having used the word "security" in clauses 9.1.3 and 10.1 in the sense assigned to it in the Insolvency Act, it must follow, I consider, as a matter of simple but compelling logic, that he used the word in the same sense in clause 16.1, unless there is to be found in the latter any indication of an intention to the contrary. In my view no such indication can be found there. (I may mention in passing that the attention of the learned trial Judge was apparently not drawn to the use of the word "security" in clauses 9.1.3 and 10.1.)

Counsel for the appellant sought valiantly

but vainly to escape the consequences of the logic postulated above, in a number of ways. He pointed to the fact that, in the context of clauses 9.1.3 and 10.1, the word "security" was incapable of bearing any meaning other than that in conformity with the Insolvency Act. But that cannot assist him. It is the fact of the particular meaning that counts, not the reason for it. Next he said that the word was used in clause 16.1 in a different context. Again, that cannot assist him. The supposed different context can be of any significance only if it serves to suggest that the draftsman now had in mind a different concept, which it does not. Finally, counsel argued that a reference to security in clause 16.1, in the sense of property subject to a real right, would be out of place and inappropriate, because on the "final date", to which the clause relates, all secured creditors, in that sense, would already have been paid their claims in full, to the extent of the value of such security, in

terms of other provisions of the arrangement. But if counsel were right, it would involve ascribing to the draftsman of the deed an awareness of such a situation, coupled with a deliberate intention, because of it, to jettison entirely the meaning in which he had used the word before, and to replace it with a wholly different meaning, restricted solely to deeds of suretyship. That would ascribe to the draftsman a degree of perspicacity, ingenuity and subtlety of thought and expression which I am quite unable to accept, for, if his intention were as submitted by counsel, he must have chosen to give effect to it in the most weirdly oblique fashion imaginable.

For these reasons I conclude that the Court a quo was right in rejecting the second defence.

In the result the appeal is dismissed with costs.

A.S. BOTHA JA

VIVIER JA

CONCUR

MILNE JA