RH. 59/89

Case No 133/87

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

C E BOTHA (now GRIESSEL)	First Appellant/ First Defendant in the Court a quo
VERWOERDBURG BELEGGINGS (PROPRIETARY) LIMITED	Second Appellant/ Third Defendant in the Court a quo
and	
FINANSCREDIT (PROPRIETARY) LIMITED	Respondent/Plaintiff In the Court a quo

CORAM: HOEXTER, NESTADT, MILNE, JJA et
F H GROSSKOPF, NICHOLAS, AJJA

HEARD: 13 March 1989

DELIVERED: 19 May 1989

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

In the Transvaal Provincial Division Finanscredit (Pty) Ltd obtained a money judgment against Mrs C E Botha (now Griessel) and Verwoerdburg Beleggings (Pty) Ltd, jointly and severally, with costs (including the costs of two counsel) on the scale as between attorney and client. In what follows reference will be made to Finanscredit (Pty) Ltd as "the plaintiff"; to Mrs C E Botha as "the defendant"; and to Verwoerdburg Beleggings (Pty) Ltd as "VBL". With leave of the trial Judge (HUMAN, AJ) the defendant and VBL appeal against the whole of the judgment of the Court below.

The plaintiff's action was based upon two deeds of suretyship undertaken on 1 May 1973 by the defendant and VBL respectively. In each deed of suretyship the principal debtor was a company known as Pretoria Aardwerke & Kontrakteurs (Edms) Bpk ("Aardwerke"). In each suretyship the

surety .....

surety bound herself or itself to the plaintiff as creditor, in solidum with Aardwerke -

> ".....and all such other persons, who may be or become indebted or owe obligations to the Creditor as a result of claims of whatever nature acquired from the Principal Debtor/s (such other persons hereinafter referred to as the Debtor/s) and in respect of which the Principal Debtor/s remain/s liable in any way, for the due and punctual payment of all amounts of whatever nature and/or the performance of any obligation, all of which may now or in future become owing by the Principal Debtor/s and/or the Debtor/s for any reason whatsoever."

Appended to this judgment as Annexure "A" is a copy of the deed of suretyship undertaken by the defendant ("the 1973 suretyship"). It was signed by two sureties : the defendant herself and her then husband, one J C Botha ("Botha"). The deed of suretyship undertaken by VBL ("the VBL suretyship") was signed by three sureties : VBL and two companies respectively known as Hupert Lessors

(Edms).....

(Edms) Bpk ("Lessors") and Verwoerdburg Vervoer (Edms) Bpk ("VV"). Save as to the identity of the sureties the terms of the VBL suretyship are identical with those set forth in the 1973 suretyship.

Whereas in the 1973 suretyship and in the VBL suretyship the principal debtor in each case was Aardwerke, the defendant and Botha had previously, on 28 July 1972, bound themselves as sureties to the plaintiff in solidum with the Lessors as the principal debtor ("the 1972 suretyship"). The identity of the principal debtor apart, the 1972 suretyship was in terms identical with those set forth in the 1973 suretyship.

To complete the picture of suretyships it should further be mentioned that there were cross-guarantees between Aardwerke and Lessors. It has already been noticed that in the VBL suretyship one of the co-sureties for

Aardwerke .....

Aardwerke was Lessors. In turn Aardwerke was a surety for Lessors's debt to the plaintiff. On 28 July 1972 Aardwerke (as a co-surety with VV and VBL) had bound itself to the plaintiff as creditor in solidum with Lessor as principal debtor ("the Aardwerke cross-guarantee").

The defendant and Botha were married to each other in 1968, out of community of property and with the exclusion of the marital power. They were divorced in 1982. In 1972 and 1973 the defendant and Botha were equal shareholders in and sole directors of Aardwerke and Lessors. VBL was an investment company in which the defendant and Botha were equal shareholders and sole directors.

The business of Aardwerke was that of earth-removal and road-making. The equipment used by Aardwerke in its business was, in the main, leased to it by Lessors. The plaintiff was a financial house which granted credit facilities

to.....

to clients with adequate securities. In order to obtain the equipment for their business Aardwerke and Lessors required credit facilities. The plaintiff acquired equipment which it then sold, by way of hire-purchase, or leased to either Aardwerke or Lessors, as the case might be. In the main such contracts were entered into in the name of Lessors.

On 28 February 1974 a written contract of sale was concluded between the defendant and Botha as sellers and Aardwerke as purchaser in terms whereof Aardwerke bought from the defendant and Botha their entire shareholding in Lessors and VV. On the same date a memorandum of agreement ("the Vanacht contract") was concluded between the defendant and Botha as sellers and a public company known as S M Van Achterberg Bpk ("Vanacht") as purchaser. In terms of the Vanacht contract Botha sold 10%, being one-fifth of his shareholding, and the defendant sold her entire shareholding (i e the

sellers.....

sellers sold 10% + 50% = 60% of the issued share capital) in Aardwerke to Vanacht for R1,08m. In this way Vanacht acquired control both of Aardwerke and its subsidiary, Lessors. The Vanacht contract also provided for the issue of further shares at par to Botha and Vanacht; for the allocation of R200 000 of the purchase price payable by Vanacht in payment of debts owed by the defendant and Botha to Aardwerke; and for the appointment of Botha as the managing director of Aardwerke, subject to the control of Aardwerke's new board of directors, the majority of whom would be appointed by Vanacht. In the Vanacht contract Aardwerke is described as "Die Maatskappy". Clause 6.1 of the Vanacht contract contained the following provision -

> "6.1 Vrystelling van sekuriteit:
> Die Maatskappy sal:
> - .....
> - daarbenewens sy bes probeer om alle waarborge en sekuriteite wat deur mev Botha (the defendant) vir die doeleindes van die besigheid van die Maatskappy of die Filiale gegee of beskikbaar gestel

is.....

> is oor te neem en/of die vrystelling van mevrou Botha ten opsigte daarvan te bewerkstellig."

Subsequent to the conclusion of the Vanacht contract, and during the period June to September 1974, Vanacht bound itself on three separate occasions to the plaintiff as surety in solidum for Lessors as the principal debtor. On 21 June 1974 Vanacht so undertook a suretyship to a limit of R300 000; on 23 July 1974 Vanacht so undertook a surety-ship to a limit of R150 000; and on 23 September 1974 Vanacht so undertook a suretyship to a limit of Rlm. The last-mentioned deed of suretyship recorded that it was in substitution for -

> ".....alle vorige waarborge onderteken deur S M van Achterberg Beperk, verskaf aan Finanskrediet (Edms) Bpk., vir fasiliteite toegestaan aan Hupert Lessors (Edms) Beperk."

During 1976, however, Vanacht was placed in liquidation. Thereafter, and during November 1976, Botha concluded a contract with the provisional liquidators of Vanacht in terms whereof Botha bought Vanacht's entire shareholding in Aardwerke for R150 000.

During the period March 1979 to April 1980

Aardwerke bought vehicles and equipment from the plaintiff under 43 separate hire-purchase agreements which provided for payment of monthly instalments over periods stretching from 12 to 36 months. The total purchase price under the 43 hire-purchase agreements was R2 906 637,30. During October 1978 the plaintiff and Aardwerke concluded three separate agreements of lease in terms whereof the plaintiff leased to Aardwerke one payloader and two tractors at monthly rentals payable, in the case of each lease, over a period of 36 months. The total rentals payable under the three leases was R103 022,28.

On 4 November 1980, and during the currency of the aforementioned hire-purchase and lease agreements, Aardwerke was placed under judicial management; but its judicial manager elected to continue with each of the said hire-purchase and lease agreements. Aardwerke thereafter breached

each.....

each of the aforesaid hire-purchase agreements by failing to pay the instalments thereunder on due date or at all; and the plaintiff by reason thereof lawfully cancelled each such hire-purchase agreement. Aardwerke likewise breached each of the aforesaid three lease agreements by failing to pay the rental due thereunder on due date or at all; and the plaintiff similarly cancelled each such lease agreement.

During June 1982 the estate of Botha was sequestrated. In July 1982 Aardwerke was placed in liquidation.

In November 1982 the plaintiff instituted its action against the defendant and VBL. In its particulars of claim the plaintiff averred that in consequence of Aardwerke's breaches of the hire-purchase agreements it had suffered damages amounting in all to R1 241 916,66 (reduced during the trial to R1 203 555,00) -

"...representing...

> ".....representing the difference between what the Plaintiff would have received from the principal debtor" (Aardwerke) "had the latter honoured all its obligations under the hire purchase agreements and what the Plaintiff in fact received from the principal debtor in terms of the hire purchase agreements together with the value of the subject matter of the hire purchase agreements."

In respect of the lease agreements breached by Aardwerke the plaintiff averred that at the date of their cancellation the total rentals due but unpaid totalled R43 898,90 (reduced during the trial to R42 543,00); in addition to which sum the plaintiff claimed damages in the sum of R9 157,48 (reduced during the trial to R8 874,00) -

> ".....being the difference between the amount which the Plaintiff would have received had the principal debtor honoured all of its obligations under the lease agreements and not breached the lease agreements and the amount that it in fact received....."

The particulars of claim set forth that the aforementioned

amounts.....

amounts (respectively representing (1) damages in respect of the hire-purchase transactions; (2) arrear rentals in respect of the lease transactions; and (3) damages in respect of the lease transactions) were owed by Aardwerke to the plaintiff; and, on the strength of the suretyships by the defendant and VBL, the plaintiff accordingly claimed from the defendant and VBL, jointly and severally, payment of the aforesaid three amounts; interest thereon; and costs of suit on the scale as between attorney and client, as provided for in the hire-purchase and lease agreements.

The defendant and VBL resisted the plaintiff's action. In response to the plaintiff's particulars of claim there was filed a lengthy and discursive plea. A multiplicity of defences was raised. A number of the defences pleaded were bolstered up with a series of alternative defences. By agreement between the parties

evidence.....

evidence was led first on behalf of the defendant and VBL. (It was a term of such agreement that this procedure entailed no admission by the defendant and VBL that they bore any onus.) Four witnesses, including Botha and the defendant, were called on behalf of the defendant and VBL. Thereafter three witnesses testified for the plaintiff.

In the course of the proceedings in the Court below some of the defences raised in the plea were jettisoned. Those defences in which the defendant and VBL persisted at the stage of argument before HUMAN, AJ were five in number; and they are conveniently summarised by the learned trial Judge in the following way:-

> "(1) that the suretyship agreements were void ab initio because there was no compliance with the provisions of section 6 of Act No 50 of 1956;
> (2) that the exceptio doli generalis was available to the defendants on the proven facts;

(3) that.....

(3) that plaintiff waived its rights in terms of the suretyship agreements;

(4) that the plaintiff could not claim damages in addition to a penalty in conflict with the provisions of Act No 15 of 1962;

(5) that whereas there was only one credit line, namely, that of Hupert Lessors, and whereas plaintiff relieved defendants of their suretyship agreements in respect of Hupert Lessors, the plaintiff therefore did not have any claim against the defendants in regard to the suretyship agreements dated 1 May 1973."

HUMAN, AJ rejected each and every defence raised at the trial and gave judgment for the plaintiff, as claimed, in the three reduced amounts above indicated. Having regard to the judgment of this Court in Bank of Lisbon and South Africa Ltd v De Ornelas and Another 1988 (3) SA 580 (A), the argument based on the exceptio doli generalis was abandoned in this Court. For the rest, and subject to certain variations and elaborations which will be noticed later, substantially the same defences as in the Court a quo were advanced on behalf of the appellants during the argument on appeal.

It.....

It is convenient to consider them in the same sequence in which they were dealt with in the Court below.

(A) THE VALIDITY OF THE SURETYSHIPS:

The appellants attacked the validity of the suretyships along a broad front involving no less than eight different objections. Many of these objections were grounded upon a proposition that the suretyships fell foul of the provisions of sec 6 of the General Law Amendment Act, No 50 of 1956. It was said that there were incapable of ascertainment, within the meaning of sec 6 of Act 50 of 1956, various essential matters such as, for example, the identity of the co-debtors, i e "all such other persons" described in clause 1 of the suretyships; and the nature, indentity and extent of the debts secured by the surety-ships. Again, it was urged that certain of the terms of the suretyships were irreconcilable with each other.

Both .....

Both in the Court below, and again before us, counsel for the plaintiff stressed that none of the objections taken related to any term of the suretyships material to the plaintiff's action. It was furthermore pointed out that, in the main, the provisions attacked were notionally and grammatically severable and distinct from the main suretyship obligation upon which the plaintiff's case rested. There is force in these contentions, but it is unnecessary, I consider, to say anything more about them. Upon a proper reading of the suretyships, so it seems to me, HUMAN AJ, rightly concluded that the suretyships in fact complied with the provisions of sec 6 of Act 50 of 1956. That section prescribes formal requirements for contracts of suretyship. It reads as follows:-

> "No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a
>
> written.....

> written document signed by or on behalf of the surety : Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

In the instant case it is common cause that the two suretyships in question were signed by or on behalf of the appellants. The requirement that the terms of the suretyship must be embodied in the written document so signed means that both the terms which are essential for the material validity of any contract of suretyship (the identity of the creditor, the surety, and the principal debtor, and the nature and amount of the principal debt), as well as the additional terms upon which the parties (the creditor and the surety) may have agreed, must be in writing; supplemented, if necessary, by extrinsic evidence of identification other than the evidence of the parties as to their negotiations and consensus. (See: LAWSA vol 26 par 156.)

In.....

In the judgment of the Court below HUMAN AJ, fully considered each of the objections based on the formal validity of the suretyships with reference to the relevant provisions of the suretyships and the authorities on the subject. Suffice it to say, in my opinion, that none of these objections has any merit; and that each was properly rejected by HUMAN AJ. To the extent that extrinsic evidence as to identification of any matter covered by the terms of the suretyships may be necessary, such evidence does not involve the evidence of the parties as to their negotiations or the consensus achieved by them.

In upholding the validity of the suretyships HUMAN, AJ further rejected as unsound an argument that clauses 4 and 9 were contrary to public policy. On appeal clauses 5 and 11 were also attacked as being contrary to public policy. Suffice it to say that, in my view, none of

these.....

these four clauses can be said to offend against public policy. What does require attention, however, is a further argument, not specifically advanced in the Court below, but which was forcibly urged on appeal : that the suretyships were void for the reason that the provisions of clause 7 were contra bonos mores.

Clause 7 reads:-

> "This Deed of Suretyship and Indemnity shall not be cancelled save with the written consent of the Creditor."

In support of a submission that clause 7 was clearly inimical to the interests of the community, counsel for the appellants sought to rely on the recent decision of this Court in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A), to which reference will be made hereafter as "the Sasfin case". That case concerned a deed of cession executed by the respondent Beukes, a specialist anaesthetist, in favour of, inter alios,

the appellant Sasfin, a finance company. The cession contained provisions whose effect was to put Sasfin, from the date of the cession and at all times thereafter, in effective control of all Beukes's professional earnings; to entitle Sasfin on notice of cession to the debtors of Beukes to recover all Beukes's book debts and to retain all amounts recovered, irrespective of whether Beukes was indebted to Sasfin in a lesser amount or at all. Nor was this the full extent of Beukes's bondage to Sasfin. Beukes was further rendered powerless to end this situation by the provisions of clause 3.14 and 3.14.1 of the deed of cession which provided:

> "3.14 This cession shall be a continuing covering cession and shall remain of full force and effect at all times notwithstanding -
> 3.14.1. any intermediate discharge or settlement of or fluctuation in my/our obligations to the creditors;"

The.....

The majority judgment of this Court in the Sasfin case held that an agreement to such effect was unconscionable; incompatible with the public interest; and unenforceable on the grounds of public policy. SMALBERGER JA, who delivered the judgment of the majority, pointed out (at 12 F/G):-

> "Contrary to the common law position, however, on a proper interpretation of clauses 3.4 and 3.14 Sasfin was entitled, from the moment the deed of cession was executed, to recover all or any of Beukes's book debts, despite the fact that no amount was owed by Beukes to it then, nor might be owed in the future....."

Later in his judgment (at 13G-14A) SMALBERGER, JA observed:-

> ".....Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What is more, this situation could, in terms of clause 3.14, have continued indefinitely

at.....

> at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to an end, as clause 3.14 specifically provides that 'this cession shall be and continue to be of full force and effect until terminated by all the creditors'. Neither an absence of indebtedness, nor reasonable notice to terminate by Beukes in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end. An agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy. Eastwood v Shepstone (supra); Biyela v Harris 1921 NPD 83; Raubenheimer and Others v Paterson and Sons 1950(3) SA 45 (SR); King v Michael Faraday and Partners Ltd (1939) 2 KB 753 (1939 2 All ER 478).

(I should add that counsel for Sasfin conceded (see 14 A/B) that if the above interpretation of clauses 3.4 and 3.14 were correct, the clauses as they stood were contrary to public policy.)

In the present appeal counsel for the appellants urged upon us that the provisions of clause 7 of the sure-

tyships.....

tyships were so gratuitously harsh and oppressive that public policy could not tolerate them. On the other hand counsel for the respondent submitted that in all the circumstances of the case the provisions of clause 7 were in no way untoward; and that they did no more than to mirror the commercial realities of the situation in which the creditor, the principal debtor and the surety carried on business. I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgment in the Sasfin case (at 8 C/D) -

> "...clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience....."

and, accordingly, unenforceable on the grounds of public policy. In such an investigation (see the remarks of SMALBERGER, JA at 9 A/G of the Sasfin case) there must be

borne.....

borne in mind: (a) that while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest.

So approaching the inquiry in the instant matter, I am not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first blush the provisions of clause 7 may seem somewhat rigorous they cannot, I think, having regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive. The inquiry is directed to -

> ".....the tendency of the proposed transaction, not its actually proved result."

(per .....

(per INNES, CJ in Eastwood v Shepstone 1902 TS 294 at 302; the Sasfin case (supra) 81-9A; 14F). The simple fact of the matter is that the defendant stood surety herself, and she was a party to the suretyship of VBL, in order to obtain essential credit facilities for Aardwerke. That the accessory liability of the appellants should have subsisted for so long as Aardwerke owed money to the plaintiff is a proposition which is not only commercially sound but also both legally and morally unexceptionable. The obverse proposition is that if either (a) Aardwerke paid off its debt to plaintiff in full and no longer sought to avail itself of the plaintiff's credit facilities or (b) Aardwerke were able to procure, as substitutes for the defendant and VBL, other sureties acceptable to the plaintiff, the appellants would have been entitled to obtain their release as sureties for Aardwerke. The feasibility of possibility (b)

above.....

above is exemplified by the facts of the present case in relation to the defendant's accessory liability for the debt of Lessors. Mention has already been made of the 1972 suretyship in terms whereof the defendant and Botha bound themselves as sureties to the plaintiff as creditor in solidum with Lessors as the principal debtor; and of the further fact that on 23 September 1974 Vanacht undertook a suretyship to a limit of Rlm to plaintiff guaranteeing payment of Lessors's indebtedness to the plaintiff. The latter suretyship represented the sequel to a decision on behalf of the plaintiff on 27 August 1974 which approved the substitution of Vanacht's suretyship for that of the defendant pursuant to the 1972 suretyship; and which further resolved to release the defendant from that suretyship. The second paragraph of the minutes of a management committee meeting of the plaintiff on 27 August

1974.....

1974 reflect the following resolutions:-

> "2.2 Op 27/8/74 BESLUIT dat 'n fasiliteit van R1 000 000 aan Hupert Lessors (Edms) Beperk toegestaan word op die volgende voorwaardes:
> Sekuriteit - Borg R1 000 000 van S M van Achterberg Beperk.
> Onbeperkte waarborge deur J C Botha, Pretoria Aardwerke en Kontrakteurs (Edms) Bpk, Verwoerdburg Vervoer (Edms) Bpk en Verwoerdburg Beleggings (Edms) Bpk en dat Mevr C E Botha onthef word van haar waarborg. (besluit eers van krag om 9.15 vm op 28.8.1974)."
> (my emphasis)

In the instant case Clause 7 of the suretyships did not leave the defendant helpless in the clutches of the plaintiff. The plaintiff was prepared on 27 August 1974 to release her from her liability under the 1972 suretyship; and her release from liability under the

1973.....

1973 suretyship depended simply on the ability of Aardwerke to provide suitable alternative security. It was, no doubt, the defendant's appreciation of this fact which underlay the inclusion of clause 6.1 of the Vanacht contract. Clause 6.1 was, however, couched in somewhat loose and unbusinesslike terms. Had she wished to protect herself properly at the time of the Vanacht contract the defendant should have insisted upon her release from suretyship as an absolute pre-condition to the sale of her shares in Aardwerke.

(B) THE ALLEGED WAIVER BY THE PLAINTIFF OF ITS RIGHTS UNDER THE SURETYSHIP AGREEMENTS AGAINST THE APPELLANTS:

A consideration of this issue requires some reference to portions of the evidence adduced at the trial. In addition to Botha and the defendant herself, one

J E Muller....

J E Muller, a former employee of the plaintiff, testified for the appellants. For the plaintiff the main witness was Dr C A Porter.

From the evidence it emerges that the plaintiff was a wholly-owned subsidiary of a company known as Finansbank Beperk ("Finansbank"); and that the latter also acted as the secretary for the plaintiff. In October 1973 a man called Sills was appointed to the staff of the plaintiff as a salesman. In April 1980 Sills became the plaintiff's marketing manager. During 1979 the Association of Finance Houses decided that its members, of which the plaintiff was one, should standardise the suretyships held by them. Botha testified that Sills had arranged a meeting between them in order that Sills might "update" or revise the suretyship position. When the meeting took place Botha found that revised suretyships ready for signature.....

nature had already been prepared. Sills submitted to Botha four deeds of suretyship ("the revised suretyships") which were intended to replace -

(1) the 1972 suretyship (in respect of Lessors as principal debtor). The revised suretyship in question provided for the suretyship of Botha alone;

(2) the defendant's 1973 suretyship (in respect of Aardwerke as principal debtor). The revised suretyship in question provided for the suretyship of Botha alone;

(3) the VBL suretyship (in respect of Aardwerke as principal debtor). The revised suretyship in question provided, as did the VBL suretyship, for three sureties : Lessors, VV and VBL;

(4) the Aardwerke cross-guarantee (in respect of Lessors as principal debtor). The revised suretyship in

question.....

question provided, as did the Aardwerke cross-guarantee, for three co-sureties : Aardwerke, VV and VBL.

In regard to revised suretyships (1) and (2) Botha was asked during his evidence in chief why the defendant had not been required to sign these as surety. Botha's answer was:-

> "Omdat op daardie stadium daar geensins meer sprake was dat sy iets met die maatskappy (Aardwerke) te doen gehad het nie."

With reference to the revised suretyships (3) and (4) Botha gave the following account of what had transpired between him and Sills:-

> "Wel, ek het aan mnr Sills genoem dat Verwoerdburg Beleggings (VBL) nie my maatskappy alleen is nie en dat ek nie kan dié maatskappy laat 'n waarborg teken vir skulde waarvoor hy nie - as ek alleenaandeelhouer was, was dit 'n ander saak, maar ek was nie, ek het nie magtiging gehad om so 'n dokument te kan teken nie. En op sterkte daarvan is die naam (VBL) toe geskrap en ek en mnr Sills het dit parafeer."

On.....

On the revised suretyships (3) and (4) produced at the trial the name of VBL has in each case been deleted as a surety; and in fact Botha signed revised suretyship (3) on behalf of Lessors and VV only; and revised suretyship (4) on behalf of Aardwerke and VV only.

In the course of his evidence Botha told the trial Court that, in his view of matters, a director of a company who had undertaken a suretyship for the company's debts was liable thereunder only in respect of debts incurred by the company during the period of the surety's shareholding and directorship; and not in respect of debts incurred thereafter. Botha conceded, however, that the provisions of clause 6.1 of the Vanacht contract (in which Aardwerke had undertaken to use its best endeavours to secure the defendant's release from her suretyships in respect of Aardwerke or its subsidiaries) might run counter

to .....

to the view held by him. Further in connection with clause 6.1 of the Vanacht contract, Botha admitted that he had at no stage obtained written consent from the plaintiff for such release.

The defendant testified that upon the conclusion of the Vanacht contract she had resigned as a director of Aardwerke and Lessors. After 1974 she had nothing to do with either Aardwerke or Lessors; and from that date until she was sued in 1982 she received no intimation at any time either from the plaintiff or Finansbank which suggested that the plaintiff was holding her liable under the 1973 suretyship.

The defendant told the trial Court that she had no knowledge of the revised suretyships; and that in 1979 no approach had been made to her to sign any further sureties. She was ignorant of the fact that in the revised

suretyships.....

suretyships (3) and (4) the name of VBL as a surety had been deleted; and she told the trial Court that in 1979 she regarded herself as the "alleeneienaar" of VBL. This state of affairs in relation to VBL had been achieved because during or about 1979 Botha had transferred his shareholding in VBL to her.

During her cross-examination the defendant professed ignorance of the provisions of clause 7 of the 1973 suretyship, and she told the Court that when she signed it she had not read its terms at all. At the time of conclusion of the Vanacht contract, however, she was aware of the provisions of clause 6.1 thereof. In regard to clause 6.1 she gave the following evidence:-

> "....ek stel dit aan u ....as u op daardie stadium geweet het wat in die borgakte (the defendant's 1973 suretyship) gestaan het, dan sou u seersekerlik aangedring het dat hy hierdie skriftelike toestemming van Finanskrediet
>
> verkry?.....

verkry?----Ek glo wel so.

Al wat u geweet het, is dat mnr Botha het verantwoordelikheid geneem om u vry te kry van die borgakte?----Nie mnr Botha nie, maar mnr Botha en mnr Martin van Achterberg van Van Ach.

Ja, die twee van hulle.-------Ja.

En u het net aanvaar dat alles wat hulle moes doen om u vry te kry, sou hulle gedoen het? -----Heeltemal reg.

Geen vrae gevra?----Nee.

Het Van Achterberg op enige stadium aan u gesê dat u is wel vry van hierdie waarborg? -----Nee.

En u man? --- Ook nie."

Muller was associated with the plaintiff from June 1976 to March 1980. Initially he was appointed as a manager, but in 1978 he became a director. In Muller's dealings with Aardwerke and Lessors those companies were represented by Botha.

In .....

In November 1976 a meeting was held of various financial insitutions which had made financial facilities available to Aardwerke and Lessors, to consider whether a moratorium should be granted to these companies by their creditors. As at 31 October 1976 Lessors was indebted to the plaintiff in the total sum of R848 893. The meeting in question was attended by Porter and Muller on behalf of the plaintiff, and each of the various creditors present disclosed what securities for its claims it held. Muller testified that at the meeting the plaintiff did not disclose the defendant's suretyship. Muller said that at the time he was unaware of the fact that the defendant had ever undertaken a suretyship to the plaintiff; and, indeed, that Porter informed him of the defendant's suretyship only some four or five months before he (Muller) left the plaintiff.

Questioned.....

Questioned about Sill's deletion of VBL as a surety in the revised deed of suretyship signed by Botha on 21 March 1979, Muller conceded that Sills lacked authority on behalf of the plaintiff to cancel suretyships or to release sureties bound to the plaintiff; and that any decision thereanent could be taken only by the plaintiff's "bestuurskomitee". In cross-examination Muller nevertheless contended that by appending his signature to the deletion of the name of VBL as a surety on the deed in question, Sills had effected a valid release of VBL from its pre-existing suretyship, and that such release was binding on the plaintiff.

With reference to the decision of the plaintiff's management committee on 27 August 1974 -

> "...dat mev C E Botha onthef word van haar waarborg ....."

Muller.....

Muller expressed the opinion that although the resolution in question purported to relate to the debt owed by Lessors to the plaintiff, the resolution served equally to release the defendant from her 1973 suretyship to the plaintiff in respect of Aardwerke as principal debtor.

Much of the evidence at the trial was devoted to the role and significance of what was described as a "kredietlyn" or "credit line" in relation to the credit facilities granted by the plaintiff to Aardwerke and Lessors. In his evidence Muller gave the following definition of a "credit line":-

> "'n Kredietlyn is 'n ..... globale fasiliteit, wat toegestaan word aan 'n maatskappy of 'n groep van maatskappye wat hulle in staat stel om tot en met 'n maksimum bedrag te opereer .....Dit is 'n kredietfasiliteit."

Muller told the trial Court that, according to his recollection, a single credit line for Rlm had been granted by the

plaintiff.....

plaintiff to Aardwerke and/or its subsidiaries, including Lessors; and that it was a matter of indifference to the plaintiff whether the debtor which availed itself thereof was Aardwerke or Lessors. This proposition was qualified somewhat by the witness under cross-examination. I quote from his evidence:-

> "I am assuming at all times one is acting responsibly and one certainly does not allow money to be lent to a company in a group which has not got proper securities, that would have been your first reservation, would it not?---- Korrek.
>
> Let me put it to you in this way: Let us assume they come along to ask for credit for a company in the group which had no sureties and which had no good performance, would you have allowed it? ----Nee.
>
> .....
>
> So really this allowing of another company to use part of the credit line of Hupert Lessors is a matter in the discretion of the bank, is that right?---Korrek.

Which.....

> Which the bank will allow provided that it is satisfied with the suretyships of the would-be borrower?----Dit is korrek."

In the evidence of Muller (and again later, when Porter came to testify) a good deal of time was devoted to an examination of the plaintiff's internal control sheets affecting the hire-purchase agreements and the lease agreements relevant to the plaintiff's action. These control sheets reflect certain data in regard to the credit transactions involved and also set forth the names of the sureties involved. Muller described the control sheets as "gewone werksdokumente" and said that they were preceded by a "mandaat" given at a "bestuursvergadering" by a "bestuurskomitee" consisting usually of two head managers and two managers. According to Muller these control sheets should have mirrored accurately decisions by the plaintiff's directorate as to the sureties involved in any particular transaction.....

transaction. I quote from Muller's evidence in chief:-

> "Op die mandaat word daar inligting gegee van borge?---Dit is korrek.
>
> En is daardie inligting weer oorgedra op hierdie werkstuk(ke) wat u hier vind van 270 tot 325?---Dit behoort so te wees."

The relevant control sheets cover dates of various payments authorised by the plaintiff over a period extending from 28 October 1978 to 1 April 1980. An examination of these control sheets reveals that:-

(a) between 28 October 1978 to 7 March 1979 seven of the control sheets reflect the defendant as one of the sureties;

(b) the control sheet authorising payment on 21 March 1979 reflects the defendant as one of the sureties, but the name of the defendant has been deleted thereon;

(c) after 21 March 1979 the list of sureties does not again include the name of the defendant;

(d) between 28 October 1978 and 21 March 1979 eleven of the control sheets reflect VBL as one of the sureties;

(e) the control sheet authorising payment on 26 March 1979 does not mention VBL as one of the sureties;

(f) between 20 April 1979 to 6 September 1979 ten of the control sheets reflect VBL as one of the sureties;

(g) after 6 September 1979 the list of sureties does not again include the name of VBL;

(h) Muller himself signed the control sheet authorising payment on 7 March 1979 in which

both.....

both the defendant and VBL are mentioned as sureties.

The inconsistencies in the control sheets, the possible reasons therefor, and the significance thereof in the light of the defences raised by the appellants, were considered at some length by the trial Judge. His findings in this connection will be indicated in due course.

The witness Porter was the managing director of Finansbank and a director of the plaintiff. During the years 1973 and 1974 he was a director of the plaintiff and the general manager of Finansbank. Porter had personal knowledge of the 1972 suretyship, the 1973 suretyship and the VBL suretyship. Porter explained to the trial Court that at the times relevant to the action the plaintiff could on its own grant credit facilities up to an amount of R150 000, but that for facilities exceeding that limit

the.....

the managing director of the plaintiff was obliged to refer the matter to a "kredietkomitee" consisting of two general managers and two managers in the group. As an example of such a referral by the plaintiff to the "kredietkomitee" Porter cited an application in August 1974 for a "credit line" increase from R750 000 to Rlm. The document submitted to the "kredietkomitee" was prepared and signed by one J J Botha, one of the plaintiff's administrative employees. I quote in full the concluding paragraph of J J Botha's "voorlegging" to the "kredietkomitee":-

> "3.2.5 Recommendation
>
> It is recommended that the increase in the credit line be approved by Management. As Mrs C E Botha is no longer a director or shareholder, the waiving of her personal guarantee has been requested. S M van Achterberg Ltd will guarantee for the full amount of the credit line extended.
>
> 'Resolved that the credit line increase be approved subject to the following qualifications:

Credit.....

Credit Line Limit	R1 000 000
Type of Facility	Direct hire purchase transactions up to 3 years with no deposit.
Security	That guarantee of Mrs C E Botha be waived and that a new guarantee for R1 million be obtain from S M van Achterberg Ltd.'

Van Achterberg is heavily involved with Finansbank. Already there is a R650 000 acceptance facility.

J J Botha
22.8.74 "

Porter stressed that the "voorlegging" embodied no more than a recommendation, which the "kredietkomitee" was at liberty to turn down. From the documentary evidence it appears that the "voorlegging" quoted above was appended as an annexure to the notice of a "bestuursvergadering" on 27 August 1974 (to which meeting reference has already been made) and at which Porter was one of the members of the "kredietkomitee" which voted unanimously in favour of the resolution there

adopted.....

adopted and set forth in para 2.2 of the minutes. That resolution, it will be recalled, approved the granting of a facility of Rlm to Lessors on certain conditions (including the undertaking by Vanacht of a suretyship for Rlm); and the resolution further approved the release of the defendant "van haar waarborg."

Porter pointed out that the plaintiff held suretyships securing the debts both of Aardwerke and Lessors. His evidence was to the effect that the resolution of the "kredietkomitee" on 27 August 1974 released the defendant from the 1972 suretyship (in respect of the principal debtor Lessors) but not from the 1973 suretyship (in respect of Aardwerke as the principal debtor).

Porter was closely cross-examined both as to why Vanacht had undertaken a suretyship in respect of the debt of Lessors to the plaintiff; and why Porter contended that

the.....

the plaintiff's resolution of 27 August 1974 had served to release the defendant from the 1972 suretyship only, and not also from the 1973 suretyship. I quote from Porter's evidence on these points:-

> "Maar is dit dan net bloot toevallig dat hy (Vanacht as borg vir) Hupert Lessors geteken het? Waarom kon hy nie maar net sowel vir Pretoria Aardwerke geteken het nie? En onthou Pretoria Aardwerke was die houermaatskappy?-----Op daardie stadium, ja. Ek dink ek het die vraag reeds beantwoord, dat op daardie stadium toe Van Achterberg se borgskappe bygekom het, was die skuld in die maatskappy Hupert Lessors en ons wou addisionele sekuriteit gehad het en ek dink dit is net logies dat ons sal sekuriteit neem in hierdie maatskappy wie die geld skuld, en dit was Hupert Lessors gewees, en dit is waarom die borgskap in alle waarskynlikheid geneem was vir Hupert Lessors."
>
> .....
> .....
>
> "Kan u vir Sy Edele een rede gee waarom u mev Botha in 1974 sou vrystel van Hupert Lessors se skuld, maar nie van Pretoria Aardwerke s'n nie?----Ek dink dit is voor die hand liggend. Ons het hom vervang op daardie stadium met 'n sogenaamde

goeie.....

goeie borg en dit is Van Achterberg. Ons het nie 'n borg van Van Achterberg gekry vir Pretoria Aardwerke nie."

Porter denied the existence of any practice in the plaintiff's business according to which a company director who had undertaken a suretyship to the plaintiff as creditor for the debt of the company became entitled to his release as surety upon the sale of his shareholding and his resignation as a director of the company; and he denied that the result of the Vanacht contract had been to release the defendant from her suretyships. Porter insisted that such a release could be authorised only by the "kredietkomitee". During cross-examination Porter admitted that, as a shareholder, he had a personal interest in the plaintiff's action; and that the failure of the action would involve the plaintiff in a heavy loss.

Dealing with the control sheets, Porter said that

these.....

these were purely internal documents used in the discounting section, and that they did not go to clients. Porter admitted the omission of the names of the defendant and VBL as sureties from many of the relevant control sheets; and he said that these omissions were wrong and due to an administrative oversight. Porter was unable to explain why it was that in 1979 (when Botha had been approached in this connection by Sills) the defendant herself had not been requested to sign revised suretyships in replacement of the 1972 suretyship and the 1973 suretyship.

Where there were conflicts between the evidence of Botha or Muller on the one hand and that of Porter on the other, the trial Judge had no hesitation in preferring the testimony of the latter. In this connection HUMAN, AJ observed in the course of his judgment:-

> "Dr Porter het my beïndruk as 'n bekwame besigheidspersoon.....

> heidspersoon en as 'n geloofwaardige getuie ten spyte van sy aandeelhouding wat hy erken het. Sy getuienis strook ook met logiese besigheidspraktyk en waar sy getuienis bots met dié van Botha en Muller het ek nie die minste huiwering om hulle getuienis te verwerp en sy getuienis te aanvaar nie."

Counsel for the appellants sought to persuade us that the trial Court had erred in its assessment of the merits of Porter as a witness; and that in truth Porter's evidence was quite unworthy of credence. I am unable to accept that submission. In my view a careful reading of the record not only reveals that Porter was a satisfactory and credible witness, but it further points to the conclusion that his testimony is more consistent and cogent than that of Botha and Muller. In my judgment no good reason exists for disturbing the credibility findings made by the learned trial Judge.

Regarding the omissions in the control sheets to which reference has already been made, HUMAN, AJ remarked in his judgment:-

> "Hierdie werksdokument word opgestel deur die verdiskonteringsafdeling.....

verdiskonteringsafdeling, 'n departement van Finanskrediet. Dit word gedoen deur 'n dames-klerk wat nie die vergadering van die krediet-komitee bywoon nie. Die werksdokument word geteken deur Coetzee, 'n bestuurder van Finans-krediet. Hy kontroleer dat die sekuriteite wat gevra is op die mandaat korrek weergegee is op hierdie werksdokument. Muller sê hy weet nie of Coetzee na die oorspronklike dokumente kyk nie. Coetzee vervul bloot 'n administratiewe funksie. Hierdie verwerkingsdokument gaan nie terug na die bestuurskomitee of kredietkomitee nie. Die kredietkomitee aanvaar dat sy besluit uitgevoer word. Hy erken dat die doel van hierdie dokument is om iemand te magtig om 'n tjek vir die spesifieke transaksie te trek.
.....

Dit is duidelik dat 'n blote werksdokument nie altyd korrek die besluit van die kredietkomitee weerspieël nie en dat foute deur klerke gemaak word. Sulke foute kan nie die eiser se oor-spronklike besluit wat van krag bly in die minste beïnvloed nie. Dit is 'n interne dokument wat nie altyd die besluit van die kredietkomitee weergee nie .....
.....
Hierdie administratiewe foute, na my mening, kan nie op staatgemaak word om 'n afleiding te reg-verdig dat òf sy (the defendant) òf derde ver-weerder (VBL) as borge onthef was deur eiser nie.

Ek.....

> Ek aanvaar die getuienis van dr Porter in dié verband. Dit is tog immers duidelik dat Muller se getuienis .....dat dit aandui dat hulle onthef is as borge deur eiser, nie korrek betroubaar en aanvaarbaar kan wees nie. Vanuit 'n besigheidsoogpunt gesien, kon alleen die kredietkomitee 'n besluit neem om hulle te onthef as borge en kan klerke wat bloot administratiewe take vervul, deur hulle oorsig die verweerders nie onthef as borge nie."

It is common cause that neither the defendant's liability under the 1973 suretyship nor VBL's liability under the VBL suretyship was cancelled (in terms of clause 7 of the suretyships) with the written consent of the plaintiff. On behalf of the appellants it was contended, however, that the evidence before the trial Court established that the plaintiff had waived its rights under the 1973 suretyship against the defendant; and also its rights under the VBL suretyship against VBL. The onus of establishing this defence rested on the appellants.

Insofar.....

Insofar as VBL is concerned the corner-stone of the argument was that when in March 1979 Sills deleted the name of VBL from the revised suretyship (3), and that deletion was initialled by Sills and Botha, these events - to quote from the heads of argument for the appellants:-

> "....conveyed the consent of Finanskrediet to the omission of Second Appellant (VBL) as a surety...."

For a number of reasons this argument does not, in my opinion, bear scrutiny. I agree, with respect with the following analysis of the essential facts sets forth in the judgment of HUMAN, AJ:-

> "Dit was geargumenteer dat omdat Sills, wat by die eiser werksaam was en 'n senior amptenaar aldaar was, dat eiser dus derde verweerder (VBL) onthef het. Hierdie argument kan nie opgaan nie. Sills was ..... in leketaal 'n verkoopsman. Sy verantwoordelikheid was om kliënte te besoek om uit te vind of daar nuwe besigheid kon wees vir die finansiering van kapitaalgoedere en toerusting. Sy normale taak was om kliënte te

gaan.....

gaan soek met wie eiser nuwe besigheid of nuwe finansieringstransaksies kon aangaan.

Hy het geen bevoegdheid gehad - of besluitnemingsvermoë of funksie gehad nie. Hy het volgens dr Porter geen bevoegheid besit om derde verweerder (VBL) van enige borgskap te onthef nie. Alleen die kredietkomitee kon so 'n besluit neem .....Aanvanklik het die kredietkomitee besluit dat derde verweerder (VBL) as borg sou optree vir fasiliteite toegestaan aan Aardwerke en Lessors. Die oorspronklike borgakte van 1973 het bly bestaan of die nuwe borgakte nou onderteken was of nie.....Dit is ook voor-die-hand-liggend dat as die kredietkomitee vir 'n bepaalde transaksie besluit dat sekere persone en instansies borge moet wees dat Sills nie op eie houtjie so 'n besluit ongedaan kon maak op 'n later stadium nie. Dit sou chaos tot gevolg hê as so iets kon gebeur."

In the case of the defendant the defence of waiver was a more elaborate one. Briefly stated, it came to the following. In passing that portion of the resolution of 27 August 1974 which bore on the release of the defendant as a surety, so the submission ran, the intention of the "kredietkomitee" had.....

had in truth been to release the defendant not only from the 1972 suretyship (in respect of Lessors) but also from the 1973 suretyship (in respect of Aardwerke); and "in reality" that part of the resolution represented a release of the defendant from both the suretyships. Such a double release, so the argument proceeded, was confirmed by the fact that the revised surety (2) - in respect of Aardwerke as the principal debtor - which Sills had requested Botha to sign in March 1979, involved only one surety (Botha); that the defendant herself had not been requested to sign any revised suretyships in 1979; that on 21 March the name of the defendant as a surety was deleted from a control sheet; and that thereafter her suretyship was never mentioned in the control sheets.

To counter the defendant's defence based on waiver the plaintiff relied on two arguments. The first

was.....

was based on evidence adduced at the trial that the contents of the resolution of 27 August 1974 had never been communicated, whether by letter or by word of mouth, to the defendant. Therefore, so it was contended, whatever the proper meaning to be assigned to the part of the resolution dealing with the defendant's release from "haar waarborg", and since waiver is a form of contract, such lack of communication was fatal to the defence. In the alternative it was argued that, in any event, the tenor of the said resolution was manifestly to release the defendant only from liability under the 1972 suretyship (in respect of Lessors).

The plaintiff's first argument did not commend itself to the learned trial Judge. HUMAN, AJ took the view that, at any rate in relation to the 1972 suretyship, the resolution of 27 August 1974 - whether communicated to her or not - was legally effective to release the defendant

from.....

from her 1972 suretyship in respect of the debt of Lessors:

> "Alhoewel eerste verweerderes onthef is deur die kredietkomitee as borg vir die skulde van Lessors is daar nooit 'n brief in dier voege aan haar gerig nie. Dit is vir my egter duidelik dat as die kredietkomitee so 'n besluit geneem het sy nie meer aanspreeklik gehou kan word ingevolge haar borgskap vir die skulde van Lessors nie.
>
> Daar is egter nooit so 'n besluit geneem deur die kredietkomitee insake haar borgskap van Aardwerke nie."

There is, I think, much to be said, for the view expressed by HUMAN, AJ in the first of the two paragraphs from his judgment quoted above. Even in the absence of communication to the party released waiver or release may, in an appropriate case, be established by proof of an overt act or acts clearly evincing the creditor's intention to surrender his right against the debtor. In Mutual Life Insurance Co of New York v Ingle 1910 TS 540 INNES, CJ pointed out at 550:-

"After....

> "After all, waiver is the renunciation of a right. When the intention to renounce is expressly communicated to the person affected he is entitled to act upon it, and the right is gone. When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes. But a mere mental resolve, not so evidenced, and not communicated to the other party, but discovered by him afterwards, seems to me.....to have no effect upon the legal position of the person making the resolve."

In the instant case, so it appears to me, the taking and minuting of the resolution on 27 August 1974 may well have constituted an ineluctable overt act on the part of the plaintiff clearly evidencing the latter's intention to release the defendant from a suretyship. Because of the opinion I have formed as to the meaning of the resolution, however, it is unnecessary to express any firm opinion on the plaintiff's first argument. For purposes of the present appeal I shall assume.....

assume, in favour of the defendant, that the view expressed by HUMAN, AJ is correct, and that non-communication of the resolution does not preclude the defendant's reliance upon it insofar as it may be relevant to the defence of waiver raised.

Turning to the second limb of the argument, I agree with the submission of the plaintiff's counsel that the resolution of 27 August 1974 cannot be construed in the manner for which the appellants contend; and that it served merely to release the defendant from liability in respect of the 1972 suretyship. As correctly pointed out by the plaintiff's counsel:-

(a) the resolution granted a credit facility specifically to Lessors;

(b) the credit facility is granted on condition that a suretyship for Rlm (which is precisely the.....

the amount of the facility granted to Lessors) be given by Vanacht;

(c) while in the notice of the meeting the name of the client is stated to be Aardwerke, the credit facility is granted against the security also of an unlimited suretyship by Aardwerke itself;

(d) the suretyship in respect whereof the defendant is released is described in the singular ("haar waarborg");

(e) the suretyship for Rlm thereafter undertaken by Vanacht was for the debt of Lessors only.

In my opinion the appellants have not shown on a balance of probability that in relation to the 1973 suretyship or the VBL suretyship the plaintiff waived its rights against the.....

the appellants or released them from the said suretyships.

Before us it was also argued, albeit somewhat faintly, that the defendant was further entitled to rely on an implied or tacit term to the effect that upon the termination of her shareholding and directorship in Aardwerke and Lessors the plaintiff would consent to her release from the suretyships undertaken by her; and consequently that the conclusion of the Vanact contract had operated to secure the defendant's release from the 1973 suretyship. Apart from the fact that there is no acceptable evidence to support such a term, it is irreconcilable with the express terms of the suretyships as to the duration of the surety's liability. A similar argument addressed to the trial Court was properly rejected by HUMAN, AJ. In the course of his judgment the trial Judge remarked:-

"Direkteure...

> "Direkteure van 'n maatskappy word nie onthef as borge as hulle van die direkteurskappe afstand doen en hulle aandeelhouding verkoop nie. Daar bestaan nie so 'n praktyk by eiser nie. Die eerste verweerderes was nie outomaties vrygestel as borg toe sy haar aandeelhouding aan Van Ach verkoop het en nie langer direktriese was nie. Alleen die kredietkomitee kon haar van haar borgskap onthef het."

(C) THE DEFENCE THAT THE CLAIMS FOR DAMAGES AGAINST AARDWERKE ARE IN CONFLICT WITH THE PROVISIONS OF SEC 2(1) OF THE CONVENTIONAL PENALTIES ACT NO 15 OF 1962:

The defences here raised relate to the damages (R1 203 555,00) in respect of the breach of the hire-purchase agreements and the damages (R8 874,00) in respect of the breach of the lease agreements. It will be recalled that in each case the plaintiff computed its damages as the difference between what the plaintiff actually received and what it would have received had Aardwerke duly performed its contractual obligations.

In.....

In the case of the hire-purchase agreements provision for acceleration of payments or cancellation is made in clause 5 of the agreements. The provisions of clause 5 relevant to the present appeal are the following:-

> "5.(a) Should the Buyer commit any breach of the terms and conditions of this agreement, or fail to pay any amount due hereunder on due date..... the Seller shall have the right, without prejudice to any other rights which he may have against the Buyer, to recover forthwith the total amount of any balance of the purchase price of the said goods, and any other sums payable by the Buyer hereunder, and all such payments as are due or to become due shall be deemed to have become due and recoverable forthwith, notwithstanding that payment in terms of any relative bills of exchange or promissory notes has not yet fallen due, or to terminate this agreement without notice to the Buyer.
>
> (b) In the event of the Seller terminating this agreement, the Buyer shall be obliged, at his own risk and expense, to return the goods to the Seller who

shall.....

> shall, without prejudice to his other rights, be entitled to claim all expenses of and incidental to the resumption of possession, and any damages, depreciation or loss sustained by him, and any other amounts payable by the Buyer (Seller ?). The Buyer shall not be entitled to recover any moneys paid by him under this agreement nor any allowance in respect of any article which he may have handed over to the Seller in part payment of the said purchase price, and such moneys shall be forfeited to the Seller."

It is common cause that the plaintiff's claim for damages in respect of the breach of the hire-purchase agreements is based on the provisions of clause 5(b) quoted above.

In the case of the lease agreements the rights of the lessor in the case of a breach by the lessee are governed by clause 10 of the agreements. The provisions of clause 10 relevant to the present appeal are the following:-

"10. Breach.....

"10. Breach

(a) Should the Lessee breach any of the terms of this Lease or fail to pay any amount on due date..... the Lessor shall have the right without prejudice to any other rights which it might have against the Lessee to -

(i) terminate this Lease; and

(ii) retake possession of the goods; and

(iii) claim immediate payment of all arrear rentals and any other amounts due, including overdue interest in terms of Clause (c) hereof; and

(iv) claim compensation for any loss or damage of whatever nature the Lessor may have suffered or may suffer in consequence of the Lessee's default; or

(b) Demand full payment of the balance owing under this Lease plus all amounts unpaid together with overdue interest in terms of Clause 1(c) hereof.

(c) The Lessee shall not be entitled to recover any monies paid by him under this Lease and all such monies shall be forfeited to the Lessor."

(In passing it should be pointed out that clause 10 is the product of slovenly draftmanship. Clause 10(b) is clearly

designed.....

designed as an alternative not to the whole of 10(a) but only to the provisions of Clause 10(a)(i) to (iv).)

On behalf of the appellants it was contended that the plaintiff's claim for damages in respect of the breach of the lease agreements is based upon Clause 10(b). That contention is clearly untenable. Clause 10(b) is invoked where the lessee has breached the contract but the lessor prefers not to terminate the lease. In the instant case it is common cause that the plaintiff did cancel the lease agreements. It is obvious, I think, that the plaintiff sought to invoke Clause 10(a)(i) - (iv); and that its claim for damages is based upon the provisions of Clause 10(a)(iv). This was the contention correctly advanced on behalf of the plaintiff.

One of the witnesses called by the plaintiff was Mr R C Sacks, an attorney, who had been involved in

the.....

the preparation and presentation of the plaintiff's case. Sacks was the draftsman of an agreement between the plaintiff and the judicial manager of Aardwerke in terms of which vehicles and equipment under the hire-purchase and lease agreements which had been repossessed by the plaintiff were disposed of by public auction or by private treaty under strictly controlled conditions. In terms of the agreement the net proceeds of these sales were applied in satisfaction or reduction of Aardwerke's liabilities to the plaintiff. In his evidence Sacks further explained on what basis the damages claimed had been computed. The vehicles and equipment in question had been valued for the plaintiff by a sworn appraiser. In respect of each repossessed item Aardwerke was credited with a value which was the greater of the appraised value or the actual price realised upon sale by auction or private treaty. The

broad.....

broad basis of the plaintiff's method of calculation of damages appears from the following answers given by Sacks in cross-examination:-

> "What are the elements of your computation? ----The elements of my computation are..... take the hire purchase contract. The total purchase price that was payable under the contract and would in the ordinary course, but for the default, have been received by Finanscredit.
>
> Now you must make certain deductions. ---- Now, I give you full credit for every payment made by Pretoria Aardwerke under that contract or the judicial manager, - whoever has paid you give credit for that, you deduct that off. You also deduct the higher value of the proceeds.
>
> Yes?---Less your cost of repossession. So the net difference is your damages. There is nothing forfeited, there is full benefit given."

The picture which emerges from the evidence of Sacks and the documents identified and explained by him in the witness-stand is, I consider, accurately summed up in the following passage ....

passage of the judgment of HUMAN, AJ:-

> "It is clear from his evidence that in no case did the plaintiff elect to enforce a penalty. The principal debtor and therefore the sureties had the full benefit of every payment that was made and of the value to be attributed to the articles repossessed and the calculation of the damages was done in a manner calculated to ensure that the least possible amount was claimed."

Sec 2(1) of the Act is in the following terms:-

> "A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty."

Sec 4 of the Act reads:-

> "A stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto shall forfeit the right to claim restitution of anything performed by him in terms of the agreement, or shall, notwithstanding the withdrawal, remain liable for the performance of anything thereunder, shall

have.....

> have effect to the extent and subject to the conditions prescribed in sections one to three, inclusive, as if it were a penalty stipulation."

Counsel for the appellants point out that in terms of the relevant clauses of the hire-purchase and lease agreements, upon breach by Aardwerke the plaintiff is not only entitled to recover damages, but there is also a penalty stipulation. The complaint made on behalf of the appellants is this. Although the plaintiff may seek only to recover damages, its claim is legally impermissible in terms of sec 2(1) of the Act for the reason that the relevant contracts do not expressly provide that the plaintiff may recover damages in lieu of the penalty.

I do not think that this argument can be sustained. A somewhat similar contention was raised, and in my opinion rightly rejected, by a full bench of the Orange Free State Provincial Decision in De Lange v Deeb 1970(1)

SA 561 (O). In that case a deed of sale for a house provided in clause 8 -

> "Indien die koper versuim om die terme en voorwaardes hiervan stiptelik na te kom, sal die verkoper die reg hê om hierdie ooreenkoms te kanselleer, die eiendom weer in besit te neem, enige gelde wat alreeds inbetaal is as 'rouwkoop' te behou sonder enige verbeurding van sy reg om geregtelike eise in te stel vir enige skade....."

When the buyer failed to pay the instalments the seller cancelled the contract of sale and resold the house. The seller then sued the buyer for damages which were calculated as the difference between the contract price and the resale price, less the amount paid by the buyer as a deposit. On behalf of the buyer it was contended that clause 8 provided for the recovery of the penalty in addition to damages; and that it did not "expressly" provide for the recovery of damages "in lieu of the penalty". SMIT, JP (in whose judgment DE WET, J concurred).....

concurred) dealt with this argument in the following words:-

(at 562G - 563F) -

> I do not think that the use of the word 'expressly' in the section is so stringent that it requires the provision to recover damages to be in identical words, namely, 'in lieu of damages'. In Commissioner of Inland Revenue v Dunn, 1928 E D L 184 at p 195, GANE, AJ, said this:-
>
> > 'The words are stringent and there are many cases illustrating the strong force of the words 'express' and 'expressly.' On the other hand there are cases in which it has been held that 'express' does not mean 'by special reference' or 'in identical words' but only 'with reasonable clearness' or 'as a necessary consequence'.'
>
> The Act provides in sec 1 for the enforcement of penalty stipulations in contracts. It does not deprive the creditor of his right to claim damages in respect of the act or omission which is the subject of the penalty stipulation but prescribes that right : thus he is not entitled to recover both the penalty and damages. His right to recover is accordingly in the alternative - he can only recover either the penalty or damages. That means that he can only recover either the penalty 'in lieu of damages' or damages 'in lieu of the penalty'. But the section prescribes this

right.....

right to recover 'damages in lieu of the penalty' still further, by providing that he can only recover such damages where the contract expressly so provides. In my opinion a contract does so provide where it expressly reserves to the creditor the right to recover damages even where the words 'in lieu of the penalty' are not added. This is necessarily so because the only right to recover damages which the creditor has is 'in lieu of the penalty'. The express addition of those words are of no consequence. What is necessary is that the choice to recover damages be expressly provided for. There is no merit in adding the words 'in lieu of the penalty' because the creditor can get no damages other than in lieu of the penalty and is in any case not bound to sue for damages rather than claim the penalty. He has a choice whether to do so or not.

The respondent did expressly reserve his right to claim damages in clause 8 of the contract, where it provides for the payment of the penalty therein stipulated:

> 'sonder enige verbeuring van sy reg om geregtelike eise in te stel vir enige skade.'

The right to recover damages is an alternative right according to the Act and I do not agree with the submission that

clause 8.....

> clause 8 provides for the recovery of the penalty and, in addition, damages. If, however, that is what it means then it would seem that, if the creditor is given the right by contract to claim damages in addition to the penalty, that would include the lesser right of claiming damages in lieu of the penalty. If then the right to recover damages in addition to the penalty is not enforceable by reason of the provisions of the Act, the creditor must still have the right to claim it in lieu of the penalty.
>
> I am of opinion that respondent was entitled in the circumstances of this case to claim damages as he did. He claimed no part of the penalty but gave appellant credit for the R100 he paid in reduction of the purchase price."

(See further: Tierfontein Boerdery (Edms) Bpk v Weber 1974(3) SA 445 (C) at 449H-451H; Custom Credit Corporation (Pty) Ltd v Shembe 1972(3) 462 (A) at 474E/G.)

Having due regard to the wording of clause 5(b) of the hire-purchase agreements and clause 10(a) (iv) of the lease agreements it seems to me that the reasoning adopted by the Court in De Lange v Deeb (supra) is entirely

applicable.....

applicable to the facts of the instant case. HUMAN, AJ concluded that there was no merit in the contention that the plaintiff's claims for damages offended against sec 2(1) of the Act. I would, with respect, agree with that conclusion.

(D) THE DEFENCE BASED ON THE CREDIT LINE ARGUMENT:

The argument relied upon on behalf of the appellants on this part of the case in the Court below was summarised by the learned trial Judge in the following words:-

> "Mr Muller also contended that because Aardwerke and Lessors had one credit line and because first defendant was released by the plaintiff as surety for Lessors, which is common cause, therefore she can no longer be held liable for the debts incurred by Aardwerke.
>
> This argument means that the plaintiff granted Aardwerke and Lessors a single line of credit, that this line of credit was secured by suretyships by the first defendant and when the plaintiff decided to release the first defendant from her suretyship for Lessors it followed

that.....

> that she was also released from her suretyship for Aardwerke because there was only one credit line .....
> .....
> The argument therefore really amounts to this: Hupert Lessors and Aardwerke are indistinguishable. The sureties were not standing surety for one or other of the companies but for a 'credit line' and it did not matter what name was used."

HUMAN, AJ rejected this line of reasoning as unsound. He agreed with counsel for the plaintif:-

> "....that the fallacy lies in the equation of a credit line with a legal transaction such as a loan. One cannot possibly say that because Aardwerke and Lessors shared a credit line that a transaction with one is the same as a transaction with the other."

Before this Court the thrust of the credit line argument altered somewhat. On appeal particular emphasis was laid on the fact that the credit line originally approved in the name of Aardwerke had lapsed during or about July 1975; and that upon an examination of the relevant

control.....

control sheets it emerged that the payments approved by the plaintiff pursuant to the lease and hire-purchase agreements in question had been approved against the credit line of Lessors.

It hardly matters, I consider, in what guise the credit line argument is dressed. It remains legally unsound for the reason that it overlooks that suretyship is an undertaking in favour of a creditor by a particular person (the surety) to satisfy the obligations owed to the creditor by a particular debtor. A credit line, according to the evidence led at the trial, is a notional credit limit. The existence of an approved credit line by itself creates no debt. A credit line cannot be secured by suretyship. The identity of the particular credit line against which the plaintiff decided to approve actual payments did nothing to affect or alter the essential facts (1) that in the

lease.....

lease and hire-purchase agreements concerned the plaintiff was the creditor and Aardwerke was the debtor; and (2) that by the 1973 suretyship the defendant had bound herself to the plaintiff to satisfy the debts, present and future, owed by Aardwerke to the plaintiff.

In my opinion HUMAN, AJ rightly concluded that the credit line argument was incapable of sustaining a valid defence.

For the aforegoing reasons the appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

G G HOEXTER, JA

NESTADT, JA)
MILNE, JA)
F H GROSSKOPF, AJA) Concur
NICHOLAS, AJA)

ANNEXURE A

IN SUPPORT OF MEMORANDUM OF AGREEMENT

25c Revenue Stamp to be cancelled by surety/sureties initials and dated

DEED OF SURETYSHIP AND INDEMNITY

1. I/We, the undersigned, 1. J.C. BOTHA
2. MEV. C.E. BOTHA
3.
4.

Full Names of Surety/ Sureties

do hereby bind myself/ourselves unto and in favour of FINANSKREDIET (EDMS) BPK., POSBUS 62343, MARSHALLTOWN, TVL.(10) or its successors in title or assigns (hereinafter referred to as the "Creditor") as surety/sureties and co-principal debtor/s in solidum with PRETORIA AARDWERKE & KONTRAKTEURS (EDMS) BPK., POSBUS 791, PRETORIA (hereinafter referred to as "The Principal Debtor/s", and all such other persons, who may be or become indebted or owe obligations to the Creditor as a result of claims of whatever nature acquired from the Principal Debtor/s (such other persons hereinafter referred to as the Debtor/s) and in respect of which the Principal Debtor/s (20) remain/s liable in any way, for the due and punctual payment of all amounts of whatever nature and/or the performance of any obligation, all of which may now or in future become owing by the Principal Debtor/s and/or the Debtor/s for any reason whatsoever.

2. The Creditor shall be at liberty, at its sole and absolute discretion, without my/our prior knowledge or consent, and without releasing me/us from my/our liability hereunder:

(i) to institute such proceedings or take such steps as it may deem fit against the Principal (30)

Debtor/s/...

Debtor/s and/or the Debtors including the right to re-possess any goods sold to the Debtors and to deal therewith or sell same in such manner, at such price and on such terms as the Creditor in its sole discretion may decide, in which event the selling price shall be deemed to be the true market value of the goods sold;

(ii) to compromise with or make other arrangements with the Principal Debtor/s and/or the Debtors and/or with any other sureties;

(iii) to grant any leniency, indulgence or extension of time to the Principal Debtor/s and/or Debtors or vary any agreement, undertaking and/or arrangement with the Principal Debtors and/or Debtors in any other manner whatsoever;

(iv) to enter into agreements of cancellation with the Principal Debtor/s and/or the Debtors in respect of any existing or future arrangement and/or to enter into new arrangements and/or to substitute new purchasers for the Principal Debtor/s and/or any of the Debtors;

(v) to cede, assign and transfer any of its right, title and interest in and to any or all of its claims against the Principal Debtor/s and/or Debtors which are now in existence or may come into existence in its own discretion and on such cession my/our liability shall continue in favour of the cessionary for both the existing liability at the date of the cession and also in respect of any future liability incurred by the Principal

Debtor/s/...

Debtor/s and/or Debtors with the Cessionary arising from any cause whatsoever.

3. In any or all of the events described above, my/our liability shall be co-extensive with that of the Principal Debtor/s and/or Debtors.

4. I/We hereby indemnify and hold the Creditor harmless against any loss or damage which it may sustain for any reason whatsoever, irrespective of the validity and/or enforceability of its cause/s of its claim/s against the Principal Debtor/s and/or Debtors. (10)

5. In giving this suretyship, I/we do hereby voluntarily waive, renounce and abandon the benefits of excussion, division, cession of action, errore calculi, non numeratae pecuniae, revision of accounts, de duobus vel pluribus reis debendi, as well as all benefits, rights and privileges to which I/we may be, or become, entitled under the Agricultural Credit Act (No. 28 of 1966) and/or the Moratorium Act No. 25 of 1963) as amended from time to time. I/We furthermore agree that the provisions of the waivers, renunciations and abandonments contained herein, the full meaning, (20) force and effect whereof I/we understand, shall also be binding upon my/our successors in title, assigns, etc.

6. It is agreed and declared that all admissions of acknowledgements or indebtedness by the Principal Debtor/s and/or Debtors shall be binding on me/us.

7. This Deed of Suretyship and Indemnity shall not be cancelled save with the written consent of the Creditor.

8. In the event of insolvency, liquidation, assignment or compromise by the Principal Debtor/s and/or Debtors, the Creditor shall be entitled to prove against the Estate (30)

for/...

for the full amount of the indebtedness and/or to accept any offer of compromise, whether at common law or in terms of any statutory provision, without prejudice to its rights to recover from me/us to the full extent hereof any sum which may be owing by the Principal Debtor/s and/or Debtors.

9. I/We do hereby furthermore cede and make over unto and in favour of the Creditor, as its sole and absolute property, any claim, of whatever nature, based hereon or flowing or arising herefrom, which I may have or acquire against any of the persons covered hereby, for the benefit of any indebtedness which I may have hereunder. I/We furthermore undertake and bind myself/ourselves to take whatever necessary action to enforce settlement of any such claim, upon the Creditor's request and in terms of its directions. Nonetheless the Creditor shall be and remain entitled to use its own or our name and to take such action as it may elect for purposes thereof. The other provisions of this document shall also mutatis mutandis apply to this clause.

10. I/We hereby agree and consent that the Creditor shall be entitled, at its option, to institute any legal proceedings which may arise out of or in connection herewith in any Magistrate's Court having jurisdiction in respect of my/our person, notwithstanding that the claim or the value of the matter in dispute might exceed the jurisdiction of the Magistrate's Court.

11. I/We acknowledge and agree that a certificate signed by the Secretary of the Creditor for the time being setting out the amount of my/our indebtedness hereunder shall be sufficient and satisfactory evidence and shall constitute

prima/...

prima facie proof per se of the amounts of my/our indebtedness to the Creditor.

DATED at Pretoria this 1st day of May 1973.

AS WITNESSES:	AS SURETY/SURETIES:
1. (Sgd) ? ?	1. (Sgd) J.C. Botha
2. (Sgd) ? ?	2. (Sgd) C.E. Botha
3.	3.
4.	4.

Full addresses of surety/sureties:

Addresses 1. P.O. Box 791, Pretoria (10)

2. P.O. Box 791, Pretoria

3.

4.
