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/CCC CASE NO 410/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ANTHONY CLARENCE MORGAN FIRST APPELLANT

NORMAN FRANK MORGAN SECOND APPELLANT

and

BRITTAN BOUSTRED LIMITED RESPONDENT

CORAM: BOTHA, NESTADT JJA NICHOLAS, VAN COLLER et HARMS AJJA

DATE HEARD: 13 MARCH 1992

DATE DELIVERED: 26 MARCH 1992

J U D G M E N T

NESTADT, JA:

The respondent sued the appellants in the

Witwatersrand Local Division for payment of the sum of R348 606,58. Its cause of action was based on separate though identical deeds of suretyship signed by the appellants in favour of the respondent. The amount claimed represents the alleged indebtedness of the principal debtor to the respondent. The appellants filed a lengthy plea in which they alleged a number of defences. The respondent excepted to certain of them on the grounds that in each case no defence was disclosed. STAFFORD J upheld the exception. This appeal is against certain parts of such order. It is brought with the leave of this Court.

The plea must be considered with clause 4 of the deeds of suretyship, and in particular the second sentence thereof, in mind. The clause reads:

> "This suretyship is a continuing suretyship and shall remain of full force and effect notwithstanding the fluctuation in or

> temporary extinction of the debtor's indebtedness to the creditor. It may not be withdrawn revoked or cancelled without the creditor's prior written consent."

I do not propose to set out the plea in any detail. I would rather summarise its effect. The central averment, insofar as is presently relevant, is that subsequent to the conclusion of the suretyship, but prior to the principal debt having arisen, the parties orally agreed that "the Plaintiff releases the first and second Defendants from (the) deeds of suretyship...and such deeds...are cancelled". The plea goes on to state that it was a term of the oral agreement that clause 4 was "amended prior (to the deeds) being cancelled"; and that such amendment "had the effect that the Plaintiff waives its rights to insist on a written discharge in terms thereof".

It is well established that sec 6 of the

General Law Amendment Act, 50 of 1956, which requires that a contract of suretyship be in writing, does not preclude its oral cancellation. The essential issue raised by the exception is whether clause 4 does. As I have indicated, the court a quo gave a positive answer to the question. The reasoning was that sec 6 renders invalid subsequent oral variations of any of the material terms of such a contract; that the oral agreement alleged by the appellants, relating as it did to the duration of the suretyship, constituted such a variation, namely the deletion or waiver of that part of clause 4 which prohibits the withdrawal, revocation or cancellation of the suretyship without the creditor's prior written consent; and that the oral agreement was, accordingly, not a defence.

Before us, Mr van Niekerk, on behalf of the

appellants, attacked the correctness of this approach. The pith of his submission was that the oral agreement pleaded brought about a cancellation of the whole suretyship; this did not amount to a variation of clause 4; alternatively even if it did, this was not the type of variation which was prohibited by sec 6. The argument is an interesting one. On the one hand, there are cases such as Oceanair (Natal) (Pty) Ltd vs Sher 1980(1) SA 317 (D & CLD) and Plascon-Evans Paints (Transvaal) Ltd vs Virginia Glass Works (Pty) Ltd and Others 1983(1) SA 465(O) which would seem to be against it. They decided that a purported oral cancellation of a suretyship does amount to a variation of a stipulation in it that the creditor's written consent to any cancellation is required; and that such variation can have no effect because of the statutory

entrenchment of the "no cancellation unless in writing" clause. Consider, however, what BOTHA JA said in Ferreira and Another vs SAPDC (Trading) Ltd 1983(1) SA 235(A). This, too, was a case where the validity of an oral variation of a suretyship was in issue. At 247 B, having analysed the effect of what STEYN CJ said in Neethling vs Klopper en Andere 1967(4) SA 459(A), the learned judge made the following significant remarks:

> "From Neethling's case I venture to abstract this principle: while an oral agreement varying (at least materially) the terms of a contract of the kind in question is not permissible, there is no objection to allowing proof of an oral agreement relating to the cancellation of the contract by which its terms as such are not placed in issue."

This was because the object of provisions such as sec 6 was to avoid or minimise disputes concerning the terms of the contract in question (see at 246 A). And whilst there may well be disputes as to the fact or contents of

a subsequent oral agreement cancelling the contract, a dispute as to the terms of the contract alleged to be cancelled was not involved (see at 247 A). Counsel for the appellants relied heavily on these statements and on the strength of them submitted that the Oceanair and Plascon-Evans decisions were wrong.

The problem thus raised is not an easy one. It is however unnecessary to resolve it. This is because on behalf of the appellants another point was taken which in my view must succeed. It was that properly construed the relevant part of clause 4 did not require the creditor's written consent to the type of cancellation pleaded, viz a consensual or as it was put a bilateral cancellation; the "no cancellation" clause (so it was said) was confined in its application to a case where the surety seeks to bring about the

withdrawal, revocation or cancellation of the suretyship; only then did the creditor have to give its prior written consent.

This point was not pleaded. On the contrary, the plea proceeds on the premise that the restrictive effects of clause 4 apply to the cancellation relied on. It seeks to avoid the consequences of this by the variation or waiver referred to. Even so, I do not think that the appellants are precluded from raising the issue. It would have been permissible and indeed proper (see for example Garlick vs Smartt and Another 1928 AD 82 at 87 and Schultz vs Nel 1947(2) SA 1060(C)) for the appellants to have pleaded the interpretation of clause 4 now advanced. But an acceptance that clause 4 applies to all types of cancellations cannot properly be inferred from their failure to do so. Nor can it be

said that there was a waiver or abandonment of the point. This is obviously a case of it not having occurred to the pleader that the allegations of variation and waiver should be relied on in the alternative to a plea based on an interpretation of clause 4. In fact when the exception was argued the contention under consideration was put forward. The point is purely a legal one. There was no obligation to plead it. The respondent has not been prejudiced (within the accepted meaning of this word) by the appellants not having done so.

I turn to a consideration of the merits of the contended for interpretation of the provision that the suretyship "may not be withdrawn revoked or cancelled without the creditor's prior written consent". As is apparent from clause 4, the suretyships are typical

examples of what has been termed a continuing guarantee. Generally speaking, this kind of surety has, apart from a provision to the contrary in the contract, the right by notice given to the creditor to bring about a termination (in relation to amounts becoming due by the principal debtor after the notice) of his liability under the deed (Kalil vs Standard Bank of SA Ltd 1967(4) SA 550(A) at 555 G). Clause 4 is to be interpreted against the background of this principle. The clause must be taken to have been inserted to deprive the appellants of this right. Hence (unlike the clauses in Oceanair and Plascon-Evans) the reference to and emphasis on the contingency of withdrawal and revocation. Conduct of this kind can plainly only be that of the surety. The same applies to "cancelled". Though this word is often used to indicate a

cancellation by agreement between the parties, ie a consensual cancellation or one brought about by the exercise of a right to terminate (Van Streepen and Germs (Pty) Ltd vs Transvaal Provincial Administration 1987(4) SA 569(A) at 588 H), this is not always so. A New Zealand case illustrates this. In Willcocks vs New Zealand Insurance Co [1926] NZLR 805 (CA) the insured in a proposal form had stated that no policy of his had previously been "cancelled". It was held that the word meant the determination of the policy by the unilateral act of the company and that the termination of the policy by mutual arrangement did not amount to a cancellation. Similarly, "cancelled" in clause 4 is, in my opinion, used in the sense of a purported unilateral termination of the contract at the instance of the surety. The requirement of "the creditor's

prior written consent" is a strong indication of this. These words can only mean a consent to something to be done by the surety. So they serve to confirm that the clause was intended to deal with the situation where the surety attempts to revoke the suretyship; not with the case where there is a discharge consequent upon a mutual agreement between creditor and surety, or (a fortiori), where the creditor waives his rights under the suretyship. It is true that this construction of "cancelled" brings about an element of tautology. But by the use of "withdrawn" and "revoked", this already exists. And to the extent that there is ambiguity, there is the consideration that any restriction on the right of parties to informally terminate a suretyship should be strictly construed.

The distinction referred to may often be a fine one to draw in practice. It may even be said to be somewhat artificial. Where there is a withdrawal, revocation or cancellation at the instance of the surety, the creditors' written consent would be required. But that having been given the resulting cancellation would become a consensual one. Nevertheless, as I have attempted to show, it is a distinction with a difference. And, in my opinion, on the allegations made in the plea, the oral agreement relied on is at least capable of falling within that class of case which is not hit by clause 4. On this approach the plea that clause 4 was amended prior to the deed being cancelled was unnecessary. On the other hand a deletion of the allegation would not have avoided the leading of any evidence. Applying the principle

stated in Barclays National Bank Ltd vs Thompson 1989(1) SA 547(A) at 553 F-I, the exception in that respect was therefore not warranted. It follows that the exception under consideration should have been dismissed.

As indicated at the commencement of this judgment, this appeal is against the upholding of the exception in relation to only certain of the paragraphs of the plea; there is no appeal against the upholding of the exception to other paragraphs. There is therefore no reason to alter the order for costs of the court a quo, namely that the appellants pay the respondent's costs in that court (on the attorney and client scale as provided for in the deeds of suretyship). The appellants are, of course, entitled to their costs on appeal.

The following order is made:

(1) The appeal succeeds with costs. Such costs are to include the costs of the application to the court a quo for leave to appeal as well as the costs of the petition for leave to appeal.

(2) The order of the court a quo is set aside and the following substituted:

"1. The exception to paragraph 4 of the plea is dismissed.

2. The exception to paragraphs 10(b)(i) and (ii) and 10(e)(i) and (ii) is upheld. These paragraphs are struck out.

3. The defendants are ordered to pay the plaintiff's costs as between attorney and client in terms of clause 9 of the two deeds of suretyship."

NESTADT, JA

BOTHA, JA)
NICHOLAS, AJA) CONCUR
VAN COLLER, AJA)
HARMS, AJA)