Case no 406/92 IN

THE SUPREME COURT OF SOUTH AFRICA APPELLATE

DIVISION

In the matter between

HAMANT BULSARA Appellant

and

JORDAN & CO LTD (CONSHU LTD) Respondent

Coram: JOUBERT, EM GROSSKOPF, VAN DEN HEEVER,

OLIVIER JJA et SCOTT AJA Heard: 31

August 1995 Delivered: 21 September 1995

JUDGMENT

JOUBERT JA:

This matter originated in the Magistrate's Court, Port Elizabeth. The

respondent, Jordan & Co Ltd, ("the creditor") sued the appellant ("Bulsara") as surety Tor payment of the amount of R11 326-76 (subsequently reduced to R10 000-00 to bring it within the then magisterial jurisdiction) which Bulsara Outfitters (Pty) Ltd ("the principal debtor") had failed to pay. Bulsara successfully raised a special plea that the creditors's claim against him had prescribed. The magistrate accordingly dismissed the creditor's action against him. On appeal to the Eastern Cape Division the judgment of the magistrate was reversed by allowing the appeal and remitting the matter for further hearing on matters unrelated to the plea of prescription. The judgment of the Court a. quo (delivered by MULLINS J and concurred in by JANSEN J) is fully reported as Jordan and Co Ltd v Bulsara 1992 (4) SA 457(E). With leave of the Court a quo Bulsara now appeals to this Court.

The material facts which arc common cause and constitute the background to the appeal, are as follows:

1 On 29 August 1985 Bulsara signed a deed of suretyship in terms of which he bound himself as surety and co-principal debtor for certain in-

debtedness of the principal debtor to the creditor. I shall hereinafter consider the material provisions of the deed of suretyship and the interpretation thereof.

2 On 20 March 1987 the creditor issued summons in the Magistrate's Court against the principal debtor for payment of R3 220-63 in respect of goods sold and delivered "during September to December 1986". It was served on the same date. The judgment of the magistrate does not appear from the record but the matter was apparently taken on appeal to the Eastern Cape Division which gave judgment on 23 May 1989 in favour of the creditor against the principal debtor in the sum of R2 782-22. Various bills of costs relating to the action and the appeal were taxed until 13 February 1990. Eventually the total sum of capital, interest and costs owing by the principal debtor to the creditor amounted to R11 326-76.

3 On 21 May 1990 the creditor sued Bulsara, as surety, in the Magistrate's Court for payment of Rll 326-76 (reduced to R10 000-00 as stated supra), which arose from the judgment given on 23 May 1989 in favour of the creditor against the principal debtor. The summons was served on 28 May 1990.

4 On 14 March 1991 Bulsara raised a special plea that the creditor's claim against him had become prescribed.

5 On 29 August 1991 the magistrate found that prescription had taken place and upheld (he special plea. The magistrate held that the original debt became due and payable on 20 March 1987 when the summons was issued and served on the principal debtor. Prescription then commenced to run against the principal debtor. According to the magistrate the judgment of 23 May 1989 against the principal debtor did not amount to novation of the original debt and therefore did not give rise to a new cause of action. He held that a period of more than three years had elapsed since the debt became due and payable when service of the summons was effected on Bulsara on 28 May 1990.

According to the Court a quo the crisp question for decision was whether the judgment obtained against the principal debtor on 23 May 1989, and the costs involved in obtaining it, amounted to a new debt payable by the principal debtor for which Bulsara was liable as surety. It held that the running of prescription against the principal debtor was in terms of section 15 (1) of the

Prescription Act 68 of 1969 ("the Act") interrupted by the service of the summons on him on 20 March 1987. The judgment of 21 May 1989 against the principal debtor created an independent new cause of action binding both the principal debtor and Bulsara. This debt had not become prescribed when summons was served on Bulsara. The Court a quo accordingly upheld the creditor's appeal against Bulsara with costs. Bulsara's special plea of prescription was dismissed with costs and the matter was remitted to the magistrate for further hearing.

According to the creditor's summons of 21 May 1990 against Bulsara its cause of action was based on the latter's liability as a surety for the judgment debt obtained against the principal debtor on 23 May 1989. In this Court Mr De Bruyn on behalf of Bulsara contended that the wording of the deed of suretyship was not wide enough to include a judgment debt acquired by the creditor against the principal debtor. The fate of this contention depends upon the proper construction of the deed of suretyship.

In this Court Mr Gauntlett, who appeared for the creditor, adopted a

straightforward approach. He argued that the creditor did not sue Bulsara on the cause of action based on suretyship for goods sold and delivered, but on the suretyship for the judgment debt obtained against the debtor as a separate and new cause of action. He also argued that whatever may have been the late of the creditor's action against Bulsara based on "goods sold and delivered" - and even if" that cause of action had become prescribed - the creditor's present action against Bulsara is founded on a new and independent cause of action based on the judgment debt against the debtor. That cause of action arose only at the earliest on 23 May 1989. As summons was served on Bulsara on 28 May 1990, the debt could not have become prescribed.

The first leg of Mr Gauntlett's argument appears to be sound. In its Particulars of Claim, the creditor manifestly does not rely on an amount due in respect of goods sold and delivered, but on the judgment debt.

The second leg of Mr Gauntlett's argument was hotly debated at the Bar. The crux of the debate was whether the judgment debt constituted a new and separate cause of action, in respect of which prescription would commence

running independently of the cause of action based on goods sold and delivered.

Counsel were ad idem, in my view correctly, that this question has to be decided exclusively with reference to the interpretation of the deed of suretyship.

The main provisions of the deed of suretyship may be listed as follows:

(i) "I, the undersigned HAMANT BULSARA do hereby interpose and bind myself as Surety and Co-Principal Debtor for the due and punctual payment of all amounts or any obligations which may now or in the future become due by BULSARA OUTFITTERS (PTY) LIMITED (hereinafter referred to as the DEBTOR) to JORDAN & CO LIMITED (hereinafter referred to as the CREDITOR) in respect of goods sold and delivered by the CREDITOR to the DEBTOR or in respect of interest on overdue payments, legal costs or for any other causes of debt arising out of such transactions." (ii) The deed of suretyship proceeded to provide for the renunciation by

Bulsara of the exceptions of excussion, division and cession of action.

(iii) It was recorded that the suretyship was to remain in force as a

continuing security. (iv) It was also stated that it would be in the entire discretion of the creditor

to determine the extent, nature and duration of the debtors' indebtedness

toit.

It is clear from the wording of the deed of suretyship as a whole that the intention of the parties was not to limit the liabilities in respect of goods sold and delivered by the creditor to the principal debtor since the wording was very widely stated to include "any other causes of debt arising out of such transactions", i.e. out of transactions of sale and delivery of goods which would include judgment debts in respect of such sales. The deed of suretyship read as a whole supports the interpretation that the parties intended to include a judgment debt against the principal debtor for goods sold and delivered to the latter by the creditor as the subject of the suretyship. In other words, the deed of suretyship evinces an intention of the parties to cover both the original cause

of debt as well as a judgment debt. Mr Gauntlett's contention as regards the second leg of his approach, as set out supra, must also be upheld.

Before analysing the question of prescription raised by the special plea it is expedient to examine the nature of the legal relation of the parties:

1 The creditor and the principal debtor relation

The creditor as seller entered into contracts of sale of goods with the principal debtor. They were the only parties to these contracts which gave rise to the principal obligation and the contractual debt, also known as the principal or original debt.

2 The creditor and the surety relation

Surety is a contract which arises by agreement between the creditor and the surety. The suretyship contract is accessory to the principal contract between the creditor and the principal debtor. By signing the deed of suretyship as a surety and co-principal debtor and by his renunciation of the exceptions of excussion, division and cession of action, Bulsara did not in law become a party to the principal contract between the

creditor and the principal debtor. See Neon and Cold Cathode Illuminations 1978 (1) SA 463 (A) at p 471C - 472E.

The position here is that the principal contract and the suretyship contract arc two separate and distinct contracts existing side by side in respect of the same debt viz. the original debt. They give rise to two distinct obligations on the part of the principal debtor and Bulsara in respect of the original debt. The creditor, being the only party common to both contracts could, if he so elected, have sued them jointly in the same action, or separately in two different actions. He elected to proceed first against the principal debtor and subsequently against Bulsara. There was no obligation on the creditor to have joined Bulsara when it sued the principal debtor on 20 March 1987. Moreover, if he so wished he could have ceded his two actions to third parties.

I now turn to consider the question of prescription in regard to the two debts arising from the principal contract and the suretyship contract.

Section 12 (I) of the Act provides that prescription "shall commence to run as soon as the debt is due." (The provisos thereto mentioned in subsections

(2) and (3) arc not relevant for present purposes). The word "debt' in this context has a wide meaning. See Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere 1983 (1) SA 354 (A) at p 370B: "Volgens die aanvaarde betekenis van die begrip slaan 'n skuld' op 'n verpligting om iets te doen (hetsy by wyse van betaling of lowering van 'n saak of dienste), of nie te doen nie. Dit is die een pool van 'n verbintenis wat in die reel 'n vermoënsbeslanddeel en-verpligting omvat." The expression "debt is due" is construed in Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A) at p 532 H-I as follows: "This means that there has to be a debt immediately claimable by the debtor, or stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See The Master v I L Back & Co Ltd and Others 1983 (1) SA 986 (A) at 1004, read with Benson and Others v Walters and Others 1984 (1) SA 73 (A) at 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim (cf Van Vuuren v

Boshoff 1964 (1) SA 395 (T) at 401."

In terms of section 11 (d) of the Act the period of prescription in respect of the principal debt was three years. When judgment was given on 23 May 1989 in favour of the creditor against the principal debtor in respect of goods sold and delivered the prescriptive period of 30 years in terms of section 11 (a) (ii) of the Act became applicable against the creditor in respect of that cause of action.

The prescriptive period in respect of the suretyship debt was also three years according to section 11 (d) of the Act. When did the suretyship debt become due and enforceable against Bulsara? I indicated supra in construing the deed of suretyship that it included a judgment debt against the principal debtor as the subject of the suretyship. When judgment was given on 23 May 1989 against the principal debtor the amount due and payable by Bulsara became liquidated and shortly thereafter the amounts due and payable in respect of interest and costs were likewise liquidated when the various bills were taxed. Summons was served on Bulsara on 28 May 1990 well within the

aforementioned three year period of prescription. Hence Bulsara cannot rely on the plea of prescription.

The correctness or otherwise of the judgments in Rand Bank v De Jager 1982 (3) SA 418 (C) and Bank of Orange Free State v Cloete 1985 (2) SA 859 (E) does not arise for decision in this appeal.

It follows that the appeal is dismissed with costs which includes the costs of two counsel.

C.P. JOUBERT JUDGE
OF APPEAL

CONCUR

EM GROSSKOPF JA
VAN DEN HEEVER JA
OLIVIER JA SCOTT AJA