CASE NO. 572/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PATROKLOS TSAPERAS	1st APPELLANT
HARALAMBOS TSAPERAS	2nd APPELLANT
EURO MEAT AND FOOD INTERNATIONAL (PTY) LIMITED	3rd APPELLANT

and

BOLAND BANK

RESPONDENT

CORAM: JOUBERT, NESTADT, STEYN, HARMS, JJA et

SCOTT, AJA

HEARD: 7 NOVEMBER 1995

DELIVERED: 28 NOVEMBER 1995

J U D G M E N T

HARMS, JA:

HARMS JA:

The present respondent, Boland Bank Ltd ("the Bank"), applied to the Witwatersrand Local Division for a money judgment against Bap Meat & Food Distributors (Pty) Ltd ("Bap"). Judgment was also sought against the three appellants in their capacity as sureties of Bap. In addition, the Bank applied for the provisional winding-up of Bap. In the event the court a quo (Hoffman AJ) made the orders sought: He granted judgment against Bap and the appellants, jointly and severally, for the payment of R 507 206,27 with interest and costs and he issued the provisional winding-up order requested. He subsequently refused Bap leave to appeal but granted the appellants leave to appeal to this Court.

On 9 April 1993 a fire destroyed the business premises of Bap. Its equipment and stock were also damaged. As a result, it ceased to do business. At that stage the financial and legal relationship between the parties was the following:

[1] Bap had a cheque account with the Bank since

October 1991. The agreement between Bap and the Bank in terms of which the account had been established provided i a that should any overdraft or other banking facilities be granted to Bap, it would be at the sole discretion of the Bank; furthermore, that such facility might be cancelled by mere notice by the Bank. In this event the outstanding amounts would be immediately due and payable.

[2] The Bank had granted Bap an overdraft facility as from 2 November 1992. It was for R 450 000 at 19,50% interest. The loan was due on 1 February 1993. Bap had used the facility in full and had not made any capital or interest payments. The terms of this facility are contained in a written agreement dated 16 November 1992. The following clauses are relevant:

Clause 3 provides that an application for the renewal of the facility beyond 1 February 1993 would be considered by the Bank "against submission of the financial statements (audited where applicable) for the preceding financial year". Clause 8 provides that the amount and duration of the facility would be

in the discretion of the Bank. Clause 2 (of the general conditions) states that the overdrawn balance would be claimable and repayable on demand. Clause 10 (of the general conditions) states that "(t)his written document constitutes the whole agreement between the parties and no amendment of the provisions hereof or stipulation contrary to the provisions hereof shall be binding unless it is confirmed in writing by the Bank."

[3] On 24 November 1992 the appellants bound themselves in three separate, though identical, deeds of suretyship to the Bank for the due and proper payment by Bap of its indebtedness to the Bank. The liability of the appellants is, according to the deeds, unlimited. Of special consequence to this case is this term:

> "This deed of suretyship and my liabilities thereunder will only be terminated by the Bank's written consent thereto."

[4] By 11 December 1991 and in relation to an earlier overdraft. Bap and the third appellant had already ceded their book debts to the Bank. According to the Bank these cessions were

still in place, but according to the appellants they were cancelled by agreement during November 1992 .

The Bank became concerned about its claim against Bap. Bap settled its claim against its insurer for R 1 850 000. The first payment of R 750 000 was not used to liquidate the indebtedness towards the Bank. The balance of the insurance money was payable by noon on Friday 11 June 1993. For reasons good or bad the Bank believed that the money would be applied to pay it. That did not happen. The following Monday, 14 June, two bank officials paid a visit to the appellants. What took place on that occasion, is in serious dispute. According to the appellants these officials, contra naturam sui generis, and in a fit of magnanimity not usually associated with financial institutions, reached an oral agreement with them on these terms:

> [a] the Bank "would grant a fixed period overdraft facility" to Bap for R 650 000. The period was to end on 13 June 1994. The R 650 000 was not in addition to the existing facility. The intention was that about R

150 000 would thereby be made available to Bap as additional cash flow. This means that the existing facility of R 450 000 (plus about R 50 000 accrued interest) had to be extended;

[b] the Bank released with immediate effect the appellants from their unlimited suretyships;

[3] Bap would execute a cession of book debts the next day in favour of the Bank;

[4] the cession would not include the insurance money.

The effect of the agreement was that when the bank officials returned to their offices, the Bank had a claim against a company that was essentially dormant of about R 500 000. The Bank undertook to provide further finance of R 150 000. Its entitlement to repayment was extended for one year. It allowed the company to retain the insurance money. It abandoned its only security, the unlimited suretyships. Instead it accepted an undertaking to provide a cession of book debts.

One need only state the effect of the alleged agreement

to proscribe it. However, the appellants hold some trumps. They are in possession of the original deeds of suretyship. And, in addition, the Bank launched these proceedings relying on deeds of suretyship that had to be abandoned (at least during argument in this Court). Only after the appellants disclosed the deeds [3] in their possession in their answering affidavits did the Bank change its approach to the appellants' liability. In reply, the Bank alleged that someone on behalf of the appellants had removed these documents from its file during the meeting on 14 June. The circumstances were these: the bank officials had their file with them during the discussion; the appellants told them that their own documents had been destroyed in the fire; they asked to make copies of the file; it was handed to them and returned. Not having checked the contents of the file in advance or on return, they did not realize that documents had been removed. In response, the appellants were scornful of the Bank's suggestion that the file was available during the meeting. They had, unfortunately, forgotten that on their own version the officials

had the deeds in their possession during the visit and had handed them over to them.

The only reason counsel could advance for the strange behaviour of the officials was that they had been satisfied by the value of the book debts and that had motivated them to release the appellants. The problem with the submission is manifest. I shall limit myself to pointing out that the appellants never offered any reason for the unusual agreement; and in addition, there is no evidence that there were any book debts of value. On the contrary, the Bank in its application for winding-up alleged that Bap is unable to pay its debts. In answer to that no balance sheet or accounts were produced, and no reference was made to the book debts as an asset.

I conclude therefore that the version of the Bank is the correct one and that of the appellants dishonest. Mr Lazarus, on behalf of the appellants, has submitted that we ought not to brand the appellants as thieves without giving them the opportunity to defend themselves in a trial. I am tempted not to

comply with his request, but in the light of my conclusion on the balance of his argument, I shall proceed to dispose of the matter on another basis.

From the agreement alleged by the appellants two questions arise, namely, (a) was the claim due before 13 June 1994 (the application having been brought a year before) and (b) were the appellants released?

As far as (a) is concerned, the problem facing the appellants is the agreements numbered [1] and [2]. Agreement [1] was to govern all overdraft facilities. It provides for the discretionary cancellation of any future advances. The Bank was therefore entitled, as it did, to call up the existing overdraft on 15 June 1993. The argument that this agreement had been superseded by [2] is rejected. Agreement [2] was simply an agreement contemplated by [1] . The oral agreement of 14 June also amounts to an amendment of [2]. It changes the date of repayment and it removes the Bank's discretion to call up the facility at will. The oral agreement is clearly hit by the non-variation

clause of [2] . I therefore hold that the appellants are not entitled to rely on the defence that the claim was not due when the proceedings were instituted.

Turning then to (b), the question is whether the appellants can rely on an oral release from their obligations as sureties in the light of the term of their agreements that "(t)his deed of suretyship and my liabilities thereunder will only be terminated by the Bank's written consent thereto." Before considering the interpretation of this clause, it is convenient to state a few trite legal propositions. Although a suretyship agreement requires writing and the surety's signature for validity, there are no formalities for a valid cancellation. A surety is also generally entitled to cancel by notice and unilaterally his future obligations under a continuing guarantee. If the agreement prescribes formalities for the amendment or determination of the suretyship, these are binding upon both parties. Lastly, a deed of suretyship must be interpreted restrictively and in favour of the surety. It does not mean that

the agreement must not be interpreted sensibly.

The object of a clause such as the one under consideration is fairly obvious. It protects the creditor. It enables the creditor to determine its rights with reference to the documents in its possession. The creditor does not have to rely on the memory of employees or ex-employees. It protects the creditor against spurious defences and unnecessary litigation.

Mr Lazarus submitted that the present clause dealt only with the unilateral termination of the deed by the surety. In other words, it limited the surety's common law right to end his responsibility. In this regard he relied heavily on Morgan & Anotherr v Brittan Boustred Ltd 1992 (2) SA 775 (A). There a clause that bears some resemblance to the one now under consideration was given such a limited meaning. I find the exercise of interpreting a contract by way of this type of analogous reasoning particularly unhelpful. In any event, a surety does not have a common law right to unilaterally terminate his accrued liability. The term in issue not only requires the

creditor's consent for the termination of the deed of suretyship but also for the termination of his liability. It follows that the clause does not contain the limitation as argued. Counsel also placed some reliance on the use of the word "consent". Since the creditor has to give his consent to the termination, it showed that the clause did not relate to a consensual cancellation. The argument ignores the meaning of "consent". Its primary meaning as a noun is, according to the Concise Oxford Dictionary, "voluntary agreement".

In conclusion counsel repeated the argument set out in Morgan at p 783B-G. This Court then found it unnecessary to deal with it. I shall attempt to summarize the point briefly. It is based on Botha JA's explanation (in a minority judgment) in Ferreira & Another v SAPDC (Trading) Ltd 1983 (1) SA 235 (A) of the ratio of Neethling v Klopper 1967 (4) SA 459 (A) . Botha JA held that Neethling had laid down the principle that while an oral agreement varying (at least materially) the terms of a contract such as the present is not permissible

because the statutory formalities have not been complied with, there is no objection to allowing proof of an oral agreement relating to the cancellation of the contract by which its terms are not placed in issue. Similarly, counsel argued, because the oral agreement of 14 June did not place the terms of the deeds in issue, it was not in conflict with the statute or the clause in issue.

I wish to make it clear that I do not necessarily subscribe to these views of Botha JA. They are in any event not applicable to this case. No-one suggested that the oral cancellation agreement was prohibited by the statute regulating the formalities of suretyships. The clause in question prevents it. The argument could have had merit if the clause were a non-variation clause. But a non-variation clause is unnecessary in a contract of suretyship. The argument could also have had some value if the dictum of the learned Judge related to the oral cancellation of an agreement contrary to a statutory prohibition of such cancellation.

It follows that the appeal stands to be dismissed. In terms of the agreements of suretyship the Bank is entitled to costs on the attorney and client scale and such an order will follow.

The order is that the appeal is dismissed with costs on the attorney and client scale.

L T C HARMS JUDGE
OF APPEAL

JOUBERT, JA) NESTADT,
JA) AGREE STEYN, JA)
SCOTT, AJA)