REPORTABLE
Case No: 85/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

INTERCONTINENTAL EXPORTS (PTY) LTD
APPELLANT

and

F T FOWLES
RESPONDENT

CORAM: MAHOMED CJ, SMALBERGER, HOWIE, PLEWMAN JJA and FARLAM AJA

DATE OF HEARING: 9 MARCH 1999

DELIVERY DATE: 23 MARCH 1999

Suretyship - formal validity - rectification - costs.

JUDGMENT

. . . SMALBERGER JA

SMALBERGER JA:

[1] The appellant applied in the Witwatersrand Local Division for default judgment in terms of rule 31(2)(a) read with rule 31(4) of the Uniform Rules of Court in respect of an action instituted by it against the respondent to rectify a deed of suretyship ("the suretyship"), payment of the amount claimed to be due by the respondent in terms of the (rectified) suretyship, interest on such amount and costs on the attorney and client scale.

[2] The matter came before Malan J who refused the application. Leave to appeal was also refused but was subsequently granted by this Court on petition to the Chief Justice. At the hearing of the appeal there was no appearance on behalf of the respondent.

[3] The suretyship, ineptly adapted from a form apparently used by a commercial bank, describes the parties as follows in clause 1:

> "1.1. Intercontinental Exports (Pty) Ltd, its successors-in-title and assigns (hereinafter referred to as 'I.C.E.')
>
> 1.2. Mr Frank Fowles and Mrs. Linda Fowles c/o 113 Smit Street, Braamfontein, Johannesburg (hereinafter referred to as 'the Debtor') and
>
> 1.3. The party executing this suretyship as surety and co-principal debtor or each party executing this suretyship as a surety and co-principal debtors, as the case may be (hereinafter referred as 'the Surety')."

[4] In the preamble (clause 2) it is recorded:

"that this suretyship is furnished in consideration of I.C.E. allowing the Debtor or any third party all or any part of whose present or future indebtedness to I.C.E. has been or will be guaranteed by the Debtor such banking facilities as I.C.E. may in its sole discretion deem fit (either by way of the continuation of any existing facilities or by the provision of new or further facilities or both)."

[5] In terms of clause 3:
"The Suretyship [the word used] binds and interposes himself as surety and co-principal debtor in solidum for the Debtor's indebtedness generally to I.C.E. howsoever arising including . . ."

The suretyship is signed at its end by the respondent whose name is given in full as "Frank Turner Fowles".

[6] The appellant's particulars of claim alleged, *inter alia*, that:

a) A company, Security Depot (Proprietary) Limited ("the company"), was indebted to the appellant in the sum of R2 178 844,43 in respect of goods ordered by the company from the appellant between the first quarter of 1996 and April 1997;

b) During or about April 1997 the respondent bound himself in terms of the suretyship as surety and co-principal debtor for the company's indebtedness to the appellant;

c) The suretyship incorrectly reflected the agreement between the appellant and the respondent in the following respects:

"4.1 In clause 1.2 thereof Defendant [respondent] is

described as the debtor, whereas the debtor is the company.

4.2 Plaintiff [appellant] never carried on business as a bank and it was never the intention of the parties that the 'suretyship is furnished in consideration of ICE allowing the Debtor . . . banking facilities', as set out in clause 2 thereof.

4.3 It was never the intention that Defendant would bind himself as surety and co-principal debtor for his own indebtedness to Plaintiff.";

d) It was the intention of the parties that the respondent would bind himself to the appellant as surety for the company's indebtedness to the appellant;

e) The incorrect description in the suretyship of the debtor as the respondent instead of the company and the incorporation of clause 2 were occasioned by a common error;

f) The appellant was accordingly entitled to rectification of the suretyship by substituting the words "Security Depot (Proprietary) Limited" for the words "Mr Frank Fowles and" where they appear in clause 1.2, and the deletion of clause 2.

[7] Section 6 of the General Law Amendment Act 50 of 1956 ("the Act") provides:

> "No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety . . ."

[8] The "terms" contemplated in section 6 as essential to the validity of a contract of suretyship include the identities of the creditor, the principal debtor and the surety (*Fourlamel (Pty) Ltd v Maddison* 1977(1) SA 333 (A) at 345A - D).

[9] In *Magwaza v Heenan* 1979(2) SA 1019 (A) this Court held that

a contract for the sale of fixed property which is formally invalid (and consequently a nullity) for want of compliance with section 1(1) of the General Law Amendment Act 68 of 1957, cannot be rectified (at 1029A - C read with 1026A - D). This principle would apply equally to a contract of suretyship lacking in essential terms. The purpose of the governing statutory enactment in each case, namely, to achieve certainty as to the true terms agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary litigation, is the same (*Fourlamel (Pty) Ltd v Maddison* (*supra*) at 343A).

[10] That it is not competent to rectify a contract that is invalid for non-compliance with statutory formalities must therefore be taken to be established law despite the criticism that has been directed at this view (see eg De Wet en Van Wyk: *Die Suid-Afrikaanse Kontraktereg en Handelsreg*: 5th Ed: Vol 1: 323 ff; Tager: "*Rectification of Invalid Contracts*" (1977) 94 SALJ 8). On the other hand, where such formalities have been complied with, rectification is permissible if the requirements for rectification have been satisfied (*cf Litecor Voltex (Natal) (Pty) Ltd v Jason* 1988(2) SA 78 (D & CLD); *Lazarus v Gorfinkel* 1988(4) SA 123(C)). There are therefore two separate and distinct enquiries in a matter such as the present. The first relates to the formal validity of the deed of suretyship; the second to whether the requirements for rectification have been satisfied. The factual allegations relevant to the second enquiry should not be allowed to impinge on the first.

[11] Rectification is a well established common law right. It provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement. The requirement of formal validity in the case of a deed of suretyship flows from the Legislature's perceived need to provide safeguards in such matters. To the extent that the need to satisfy the

latter may preclude recourse to the former, tension will inevitably exist between the two. While care must be taken not to defeat the object of the Act, the formality requirements must not be allowed to become an unnecessary stumbling-block to rectification and, consequently, to giving effect to the true intention of the contracting parties.

[12] The undisputed averments made by the appellant in its particulars of claim would permit of rectification of the suretyship provided the requirements of section 6 of the Act have been complied with. The only issue on appeal is, therefore, whether the suretyship identifies a creditor, principal debtor and surety and is formally valid on that account. If it is, it is capable of rectification in the respects claimed by the appellant as its substantive validity is not in issue. If not, the appeal must fail. This judgment is confined to that issue.

[13] The formal validity of a suretyship agreement must be determined *ex facie* the document embodying the suretyship undertaking. In *Spiller and Others v Lawrence* 1976(1) SA 307 (N) Didcott J, in explaining the difference between a contract which is void for want of compliance with essential formalities, and one which is invalid for some other reason, said the following (at 312B - D):

> "The two situations are fundamentally different. In the one . . ., when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely to what was agreed. *In the other . . . the cause of nullity is indeed to be found in the transaction's form. When it is*

said to consist of a failure to observe the law's requirement that the agreement be reflected by a document with particular characteristics, the document itself is necessarily decisive of the issue whether the stipulation has been met; for it has been only if this emerges from the document."

(My emphasis.)

[14] The above passage from *Spiller*'s case was referred to with apparent approval by this Court in *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997(3) SA 1004 (SCA) at 1010F - H. It also appears to be in accordance with the approach adopted by this Court in other cases to the effect that one is basically confined to looking at the particular suretyship agreement to see if it contains the required *essentialia* (c*f Société Commerciale de Moteurs v Ackermann* 1981(3) SA 422 (A) at 438B - 440H; *Du Toit en 'n Ander v Barclays Nasionale Bank Bpk* 1985(1) SA 563 (A) at 570B to 571E).

[15] The learned judge *a quo* found, *inter alia*, that in the suretyship the identity of the surety "is left in blank" and that a space where the name of the principal debtor should have been entered was also left blank. I do not propose to review the provisions of the suretyship in detail. Clause 1.2 of the suretyship, to which I have referred, clearly identifies "Mr Frank Fowles" as the principal debtor. The failure to refer to him again as such in the space left blank cannot detract from the fact that the suretyship identifies a principal debtor. In clause 1.3 the surety has been identified as the party executing the suretyship. That party, below his signature, is described as "Frank Turner Fowles". The identity of the surety is therefore also established *ex facie* the suretyship. I accordingly disagree with the findings of the

judge *a quo* in this regard. That the suretyship identifies the creditor (I.C.E.) has never been in dispute.

[16] It was conceded by Mr *Engelbrecht*, who argued the appeal on behalf of the appellant, that where it appears conclusively from a deed of suretyship that the principal debtor and the surety are the same person or legal *persona*, the deed would be invalid for want of an essential term, because the person or legal *persona* could be either the principal debtor or the surety, but not both, as one cannot stand surety for one's own debt (Forsyth and Pretorius: *Caney's The Law of Suretyship*: 4th Ed: 40). One of the necessary parties to a suretyship would therefore be lacking. The position would be the same as if the identity of either the principal debtor or the surety were missing. A case in point is *Republican Press (Pty) Ltd v Martin Murray Associates CC and Others* 1996(2) SA 246 (N), where in the deed of suretyship "Republican Press (Pty) Ltd" featured as both principal debtor and creditor. Hurt J, delivering the majority judgment, held (at 251G - H) that:

> "In this case there is no question of the 'Republican Press (Pty) Ltd' cited as the principal debtor, being a different entity to the creditor."

The finding was clearly justified as there cannot be more than one registered company with the same name. In the result it was found that the deed of suretyship lacked formal validity. There is no reason to doubt the correctness of the majority decision in that case.

[17] The present situation differs factually from the one with which the court was confronted in the *Republican Press* case (*supra*). The principal debtor is referred to in clause 1.2 of the suretyship as "Mr Frank Fowles". The name of the surety is reflected as "Frank Turner

Fowles". The names, though similar, are not identical, and *ex facie* the suretyship do not necessarily refer to the same person. Even if the two names were identical, it would not follow as a matter of course that they referred to the same person. The parties might, for instance, be father and son who happen to have the same names, a not uncommon occurrence. In those circumstances, and *a fortiori* in the present, a deed of suretyship would be capable of being construed *ex facie* the document itself as reflecting a creditor, principal debtor and surety and would accordingly be formally valid on that score.

[18] This approach follows a line similar to that taken in exceptions. An exception ought not to be upheld unless "upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence (as the case may be) is disclosed" (*Sun Packaging (Pty) Ltd v Vreulink* 1996(4) SA 176 (A) at 183E - F). Likewise a deed of suretyship, in my view, ought not be held to be formally invalid where *ex facie* the document it is reasonably capable of an interpretation consistent with validity.

[19] In the *Republican Press* case (*supra*) Hurt J, confronted with the argument that where a father and son, both having the same initials (or names), are respectively stated to be principal debtor and creditor (or surety) in a suretyship undertaking, the undertaking could not be presumed to be formally invalid simply because the principal debtor and creditor were not identified by two different names, said the following (at 251D - G):

> "It seems to me that there are two conclusive answers to this proposition. The first is that if there *are* indeed two parties to the suretyship undertaking who have identical names, there will be no need for a rectification of the document and those parties would presumably be cited,

> and separately identified, in any proceedings in which the document and the question of its enforceability may come before the Court. If it were pleaded, in such a case, that the document was invalid for non-compliance with s 6, that plea could be disposed of by a replication to the effect that the identical names referred to two different juristic *personae*. The second is that evidence would be admissible for the limited purposes of identification of the parties to the undertaking, provided always that the evidence does not encroach into the prohibited territory demarcated by the parol evidence rule. (See *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978(4) SA 1 (A) at 12D.) It seems to me that such evidence would be admissible *ante omnia* in any situation where there is doubt as to whether the document refers to three separate parties to the contract of suretyship."

[20] With regard to the first answer, it seems to proceed from the premise that the suretyship undertaking is formally valid. With regard to the second, the envisaged evidence would be admissible not to establish the document's formal validity, but to give effect to an otherwise valid suretyship. It would, for example, permit extrinsic evidence to be led to identify the actual creditor, principal debtor or surety, as the case may be, from among a group of such named in the written document (see *Sapirstein*'s case referred to in the above quotation at 12E - H; *cf Federated Timbers (Pretoria) (Pty) Ltd v*

Fourie 1978(1) SA 292 (T) at 298F - H). To that extent the quoted passage is not inconsistent with the views expressed above. If by the last sentence is meant that evidence could be led to show, contrary to what appears *ex facie* the document, that a suretyship undertaking lacks formal validity (eg to show that two of the parties are the same) I would respectfully disagree. It is for that reason that regard cannot be had to the undisputed allegation in paragraph 4.1 of the Particulars of Claim that the respondent is the person described in the suretyship as the principal debtor in determining the issue of formal validity.

[21] In the result I am of the view that the suretyship was formally valid and that the appellant is entitled to rectification and default judgment as prayed.

[22] The appellant asks for attorney and client costs both in the court *a quo* and on appeal. It relies in this respect on clause 5 of the suretyship which provides, *inter alia*, for unlimited liability on the part of the surety (respondent) and “costs of recovery on the attorney and client scale”. This raises the question whether a court is obliged to give effect to such an agreement or whether it retains a residual

discretion with regard to costs.

[23] In *Claude Neon Lights (SA) Ltd v Peroglou* 1977(1) SA 575 (C) it was held (at 578C) that parties cannot by agreement deprive a court of the discretion it has in regard to costs. However, reliance for that proposition appears to have been placed on a decision where that was assumed, not decided. In *Western Bank Ltd v Meyer; De Waal; Swart and Another* 1973(4) SA 697 (T) the Full Court proceeded on the premise that agreement could not deprive it of its discretion as to costs (at 701C - G). In *Santam Bank Bpk v Kellerman* 1978(1) SA 1159 (C), after a review of the relevant authorities, the Full Court (*per* Grosskopf J) pointed out (at 1162A) that there existed "`n mate van onsekerheid... of die Hof `n residuêre bevoegdheid oorhou om te weier om so `n ooreenkoms af te dwing". The learned judge added: "Persoonlik vind ek dit moeilik om `n beginselgrondslag vir so `n bevoegdheid te vind".

[24] In *Sapirstein*'s case (*supra*, at 14E - F) this Court left open the question of whether or not a court retains a residual discretion in the face of an agreement with regard to costs. Earlier in the judgment (at 14A - D) it had been said:

> "Generally speaking, awards of costs are, of course, in the discretion of the Court and that discretion must be judicially exercised whenever the need arises. But, accepting this to be the position, I am of the view that there can be no objection, in principle, to a Court giving effect to an agreement between parties concerning their liability for legal costs arising out of a dispute between them. It is commonplace for parties to enter into agreements of this sort - for example, parties often agree that each party shall pay his own costs, or that no award as to costs shall be made, or that a party's liability for costs shall be limited to a particular amount, and so on - and for the Courts to make awards in terms of such agreements. In the present instance the plaintiff, in stipulating that costs should be paid on the attorney and client basis, obviously wanted to ensure that it would not be out of pocket in respect of any legal costs incurred in connection with disputes arising out of the agreement. The purpose of an award of costs is to indemnify a party

> ‘for the expense to which he has been put through having been unjustly compelled either to institute or defend litigation, as the case may be’ (*per Innes CJ in Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 485) and, if a contracting party wants to ensure that he is fully indemnified against such expenses, there is, in my view, no reason why he should not be entitled to stipulate that such costs, if incurred, should be paid on the attorney and client scale.”

[25] The basic rule is that, statutory limitations apart, all costs awards are in the discretion of the court (*Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69, a decision which has consistently been followed). The court’s discretion is a wide, unfettered and equitable one. It is a facet of the court’s control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done, as a mark of its displeasure at such party’s conduct in relation to the litigation. Is it to be precluded by agreement from doing so? A court should not be obliged to give its

imprimatur to an order of costs which, in the circumstances, it considers entirely inappropriate or undeserved. In my view, as a matter of policy and principle, a court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regard to costs.

[26] Because a court exercises its discretion judicially, not capriciously, it would normally be bound to recognise the parties' freedom to contract and to give effect to any agreement reached in relation to costs. But good grounds may exist, depending upon the particular circumstances, for following a different course. This might result, on a proper exercise of discretion, in a party being deprived of agreed costs, or being awarded something less in the way of costs than that agreed upon.

[27] As pointed out in *Sapirstein*'s case (*supra*) at 14C, the purpose of an award of costs is to indemnify a party. By stipulating for attorney and client costs a party seeks even greater indemnity for costs incurred through having to pursue a claim in court. In the present instance the appellant, in order to obtain judgment against the

respondent, was obliged to come to court in order to have the suretyship rectified. This was occasioned by its own ineptitude in using an inappropriate form for the deed of suretyship and then having it completed in respects which did not properly reflect what had been agreed upon. While there might have been some fault on the respondent's part in signing the suretyship in that form, it was of a much lesser degree than that of the appellant. The respondent did not oppose either the relief sought in the court below or the appeal. It was through no fault of the respondent that the court *a quo* found against the appellant on an issue which, largely through its own doing, it was obliged to take to court and thereafter on appeal. In the circumstances good grounds exist, in the exercise of our discretion, for not giving effect to the agreement in the suretyship relating to attorney and client costs, and for awarding costs only on the party and party scale.

[28] The following order is made:

1) The appeal is allowed with costs.

2) The order of the court *a quo* is set aside and there is substituted

in its stead the following:

"There will be judgment in favour of the plaintiff against the defendant for:

(a) An order rectifying the deed of suretyship, annexure 'WL1' to the particulars of claim, by the substitution of the words 'Security Depot (Proprietary) Limited' for the words 'Mr Frank Fowles and' where they appear in clause 1.2 thereof and by the deletion of clause 2 thereof in its entirety;

(b) Payment of the amount of R2 178 844,43;

(c) Interest at the rate of 24% per annum on the amount of R2 178 844,43 from 1 August 1997 to date of payment;

(d) Costs of suit on the party and party scale."

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J W SMALBERGER

JUDGE OF APPEAL

MAHOMED CJ)concur
HOWIE JA)
PLEWMAN JA)
FARLAM AJA)