THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

Case no: 485/02

In the matter between:

HNR PROPERTIES CC &
ANOTHER
Appellants

and

STANDARD BANK OF SA LTD
Respondent

Coram: SCOTT, NAVSA, NUGENT, LEWIS JJA et MOTATA AJA

Date of hearing: 11 NOVEMBER 2003

Date of delivery: 28 NOVEMBER 2003

Summary:

Suretyship agreement requiring release by creditor to be in writing – meaning of requirement. Release by waiver or estoppel constituting a release other than in writing and therefore ineffective.

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The respondent, Standard Bank of South Africa Ltd ('the bank'), instituted action in the High Court, Cape Town, against the two appellants in their capacity as sureties. They had previously on 29 July 1993 bound themselves in two separate deeds of suretyship to the bank for the due and proper payment by a company called HNR Computers (Pty) Ltd of its indebtedness to the bank. The liability of the first appellant was limited to a maximum of R1 000 000 while that of the second appellant was unlimited. The two deeds of suretyship were otherwise in identical terms. Clause 15 of both provided that 'the surety shall not be released from any liability of the surety hereunder or from any of the debtor's obligations unless such release be in writing signed on behalf of the bank by a duly authorised signatory.' Certain defences raised by the appellants in their plea were not pursued in this Court. The defence in which they persist is that they were released by the bank from their obligations in terms of their respective suretyship agreements. In this regard, they contend, first, that a letter dated 20 April 1998 signed on behalf of the Bank, and referred to in evidence as a 'facilities letter', on a proper

construction, constituted a written release within the meaning of clause 15 of the deeds of suretyship. Second, and in the alternative, they contend that they were released by virtue of the conduct of the bank coupled with a waiver of the requirement that the release be in writing and third, in the further alternative, that the bank is estopped from relying on the terms of clause 15 of the suretyship agreements. The trial Court (Foxcroft J) held that the appellants had failed to discharge the burden of proving a release on any of the grounds advanced. Judgment was accordingly granted in the sum of R1 000 000 against the first appellant and in the agreed sum of R11 759 456,20 against the second appellant, together with ancillary relief. The appeal is with the leave of the Court *a quo*.

[2] In this Court counsel for the appellants sought an amendment to the plea which would have the effect of introducing a defence, based on the reliance theory of contract, that an agreement had been concluded which provided for the release of the appellants from their obligations under the suretyship agreements. There was no suggestion that the introduction of the defence at this stage would cause prejudice to the bank and the amendment was granted without opposition.

[3] The facts are largely common cause. The second appellant, Mr Rasheed Hargey, and his partner, Dr H Gajjar, established HNR Computers (Pty) Ltd ('HNR') in 1987. Initially the business of HNR was confined to the importation of computer software but with the passage of time it increased the range of computer services offered to its clients. It operated from premises in the Cape owned by the first appellant, HNR Properties CC. The latter was a property owning corporation whose assets in 1993 were valued at R1 000 000. In that year the business of HNR expanded rapidly

and additional funding was required. The bank afforded it overdraft and other facilities and, as security for HNR's indebtedness to the bank, the deeds of suretyship referred to above were signed on 29 October 1993. On the same day HNR ceded its book and other debts to the bank. Dr Gajjar did not bind himself as a surety as he was about to become a sleeping partner in the business.

[4] By May 1994 the facilities afforded by the bank had been increased to include a short term overdraft facility of R3 million, a facility of R7 million for 'forward exchange contracts' and a facility of R3 million from the bank's factoring division. That year and the next were difficult years for HNR and its financial position was of great concern to the bank. It pressed for better security. It wanted an unlimited suretyship from Gajjar but settled for an agreement in terms of which the latter subordinated his loan account in favour of the bank in terms of a so-called backranking agreement. In the meantime, Hargey had ceded his loan account to the bank.

[5] In about 1996 HNR moved its head office to Johannesburg, where an employee, Kassiem Parak, had previously established a branch. At about the same time Hargey acquired Gajjar's shareholding in HNR and Parak became a 20 per cent shareholder in the company.

[6] Notwithstanding the move to Johannesburg, it was convenient for HNR to maintain its account with the bank at the latter's branch in Claremont, Cape. However, the bank appointed a Mr David Linnell to liaise with HNR regarding its banking requirements. Linnell was a commercial manager in the bank's relationship department whose main function was to obtain business for the bank. In that capacity he was obliged to keep abreast of the affairs of clients and to liaise with them. But he had no authority to grant overdraft or other facilities, nor did he have authority to release sureties. Only the credit division of the bank had such authority. If facilities were required, Linnell would apply to that division on behalf of the client for the facilities in question. If they were sanctioned, he was authorised to convey that information to the client. He would do so by letter referred to as a 'facilities letter'. Such letters were also sent to the client on a regular basis to confirm the facilities available to them.

[7] In 1997 Hargey and Parak became involved in negotiations which culminated in the sale of their entire shareholding in HNR to a company, Front Page Holdings (Pty) Ltd, which in due course changed its name to Infiniti Technologies Ltd ('Infiniti') and on 19 February 1988 was listed on the Johannesburg Stock Exchange. The shareholders of four other computer companies concluded

similar agreements so that Infiniti became the holding company of a group of computer companies including HNR.

[8] Clause 6.3 of the purchase agreement in terms of which the shares of Hargey and Parak were sold to Infiniti, dealt with existing guarantees. It provided that subject to certain exceptions, which are irrelevant for present purposes, -

'all guarantees, sureties or indemnities provided by the Vendor in a personal capacity to any third party for and on behalf of the company shall be fully discharged and/or satisfied by the Purchaser within 30 business days of the listing date and the Purchaser shall provide written proof of such a discharge and/or satisfaction to the Vendor upon request by the Vendor ……'

Hargey testified that prior to the conclusion of the agreement he had given a draft to Linnell. Subsequently, early in February 1998, Hargey and Mr Kevin Berthold met with Linnell, principally to discuss the granting of a group facility for all the companies in the Infiniti group. By that time Hargey had been appointed the chief executive officer of Infiniti with effect from the date of listing, 19 February 1998. Berthold had become the financial director. According to Hargey he made it clear to Linnell during the discussion that 'the suretyship issue should be sorted out from the bank's point of view and that Mr Berthold was going to handle it from the company's point of view'. This evidence was confirmed by Berhold who emphasized that it was made clear to Linnell that the sureties were to be released. Linnell was not a witness at the trial; he had died shortly before it commenced.

[9] Subsequently Linnell and Berthold met on a number of occasions. Their discussions centred around the terms of the group facility and it appears that little, if any, mention was made of the existing securities held by the bank. Berthold's attitude was that since Infiniti was a listed company it should not offer any of its assets as security. He was also anxious to obtain an overdraft and other facilities not only from the respondent bank but also from a competitor, Nedbank Ltd. It appears that ultimately he had no option but to agree to Nedbank taking a cession of the group's book debts. As far as the respondent bank was concerned, he was prepared to offer no more than unlimited interlinking suretyships by the subsidiaries and 'downward' unlimited suretyships by Infiniti in favour of the subsidiaries. The events leading to the respondent bank ultimately affording Infiniti a group facility are briefly the following. By letter dated 19 February 1998 Linnell sought approval from the credit division of the bank for an overall credit facility of R41 million. Mr Charles Moon, who was then the assistant general manager of the credit division, had little confidence in Infiniti and the application was rejected on 4 March 1998. It was reinstated and again considered by the credit division. On 11 March 1998 Linnell wrote a letter to that division further motivating the application. In it, he 'suggested' that facilities be granted to Infiniti subject to confirmation that all existing security be cancelled. According to both Moon and Mr Anthony Walker, then a manager in the credit division, the suggestion was unacceptable and simply ignored. On 17 March 1998 the application was again declined by Moon. On this occasion, however, it was referred to a Mr Godlonton who was a senior manager in the bank and who considered the application in a capacity akin to that of an arbitrator. He upheld Moon's decision but thought that with additional information regarding the prospects of the group the bank could 'try and structure something around [the application]'. On 23 March 1998 Linnell met with Hargey and Berthold and on the same day addressed a further letter to the credit division in which he sought approval for a reduced facility. The application was finally approved and on 17 April 1998 a letter, referred to in evidence as a 'sanction letter', was sent to Linnell authorising the facilities that were to be afforded to Infiniti. On the strength of this letter Linnell addressed a facilities letter dated 20 April 1998 to Infiniti in which he set out the facilities to be granted to the group and recorded the terms on which they were to be so granted.

[10] The letter requires closer scrutiny. It commences with an unnumbered paragraph which reads:

'we refer to our recent discussions and are pleased to confirm our agreement to the following facilities which would be subject to the terms and conditions on the reverse side of this page and those indicated elsewhere in this agreement.'

Paragraph 1, under the heading 'types of facility', records the facilities granted. They are a group overdraft with a limit of R17,5 million as well as facilities in respect of 'Stannic liquidating credit' and 'forward exchange contracts'. Thereafter there is a reference to the specific terms and conditions applicable to Stannic facilities. Paragraph 2 is headed 'Security' and reads:

'Security offered/proposed
> Unlimited interlinking suretyships by all the trading entities.
> Downward Unlimited suretyships by Infiniti Technologies Limited in favour of the trading entities.'

Another relevant paragraph is headed 'Availment' and reads:

'In terms of normal practice, we shall only permit drawdown of the facilities sought once all the security documents have been signed and found to be in order.'

The letter was signed by Linnell on behalf of the bank and subsequently on 22 April 1998 by Hargey and Berthold on behalf of each of the five trading entities.

[11] According to Berthold, on receipt of the letter of 20 April 1998 and following a conversation with Linnell at the time, the details of which he could no longer recall, he was satisfied that he had achieved his goal and that the sureties had been released. However, his conclusion in this regard was inconsistent with subsequent events. Some difficulty was experienced in putting the interlocking suretyships in place. This was finally achieved in November 1998. Nonetheless, both before and after April 1998,

HNR continued to utilise its existing overdraft facilities on the strength of the securities held by the bank. Indeed, during the period February 1998 to December 1998, and in pursuance of applications by HNR to the bank, the former's overdraft and other facilities rose from R5 million to approximately R8.6 million. It is clear that the increases were both sought and granted on the strength of the suretyship agreements signed by or on behalf of the appellants. This was readily conceded by Hargey. Berthold's assertion that the facilities were afforded in pursuance of the interlocking securities which were not yet in place, is clearly untenable.

[12] Little more need be said to complete the picture. Hargey stepped down from his position as chief executive of Infiniti in August 1998 following a disagreement between the members of the board. He remained on as non-executive chairman of the company until May 1999 when he resigned and ceased to have anything further to do with the company. In the meanwhile, the fortunes of the group declined rapidly and it ultimately went into liquidation owing millions of rands.

[13] Against this background, I turn to the grounds advanced on behalf of the appellants in support of their contention that they were released as sureties. The first is that the facilities letter of 20 April 1998, properly construed, amounted to a release in writing within the meaning of clause 15 of the deeds of suretyship. Such a release, it was argued, was apparent from a reading of the first (unnumbered) paragraph and paragraph 2 of the letter (both of which are quoted in para 10 above) in the light of the background circumstances. In short, counsels' contention was that the security referred to in paragraph 2 had to be construed as the exclusive security for the group facility and that by implication any other security which the bank may have held in respect of the indebtedness of any of the trading entities had to be regarded as cancelled.

[14] At the outset it is necessary to say something about clause 15. Being a provision in a suretyship agreement it must be construed restrictively and in favour of the surety. But that does not mean it must be construed in a manner other than sensibly. If the language is clear effect must be given to it.

[15] There can be little doubt as to the object of the clause. In *Tsaperas and Others v Boland Bank Ltd* 1996 (1) SA 719 (A) at 724D-E Harms JA observed in relation to a similar provision:

'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.'

I would add that the need for a provision such as clause 15 is all the greater where the creditor, as in the present case, is a large organisation comprising different divisions and employing a large number of people. The surety, on the other hand, is unlikely to be prejudiced. Institutions such as banks do not lightly release sureties while the debt of the principal debtor remains extant. If there is release, it is in the interest of both parties that it be readily capable of proof.

[16] The clause, of course, requires that the release 'be in writing'. This does not mean that when construing the writing it is impermissible to have regard to background circumstances or, in the event of ambiguity, surrounding circumstances. Nonetheless, in every case the intention to release must appear from the writing itself. It may be explicit or implicit. But if the latter, the intention to release must be apparent from the writing on an ordinary grammatical construction of the words used or, stated differently, the release of the surety must be a necessary implication of the words used. It is therefore not permissible to import into the writing, whether by reference to background or surrounding circumstances or any other source, an intention to release which is otherwise not ascertainable from the actual language of the document relied upon. If the position were otherwise the very object of the requirement of writing would be frustrated.

[17] Returning to the facts, the letter of 20 April 1998 contains no reference whatsoever to the existing suretyships, let alone to the release of the appellants as sureties. The security referred to in paragraph 2 of the letter is security 'offered/proposed', ie security not yet in existence. That does not as a matter of linguistic construction justify, in my view, the inference that sureties under any existing suretyship were released; nor does a reference to background circumstances assist the appellants. As I have said, a release which is not in writing cannot be imported into the writing from some other source.

[18] It is necessary to add that the evidence does not, in my view, establish an intention on the part of the bank to release the appellants as sureties. The matter was discussed at a meeting in February 1998 between Linnell, Berthold and Hargey. Although the latter wished to procure his release, no agreement was reached. This was conceded by Berthold. Both he and Hargey were aware that only the credit division of the bank had authority to release

sureties and that Linnell had no such authority. It was also common knowledge that any such release had to be in writing. It is true that in a letter dated 11 March 1998 addressed to the credit division, Linnell suggested that the existing security be cancelled. According to Moon and Walker, the suggestion was simply ignored. Both insisted that it was never the bank's intention to release the appellants as sureties. This is hardly surprising. The bank was increasing its exposure considerably by granting the facility. The security offered, namely interlinking suretyships, was described by Berthold as 'technical'. In these circumstances, the bank would not lightly have abandoned the existing security it held in respect of the debts of one of the main trading entities of the group. The first ground of appeal advanced on behalf of the appellants must therefore fail.

[20] The further grounds upon which the appellants rely in support of their contention that they were released as sureties are waiver, estoppel and the reliance theory of contract. I shall deal with each in turn. Clause 16 of the suretyship agreements provides as follows:

'No cancellation or variation of this suretyship shall be of any force or effect whatsoever unless and until it is recorded in writing signed by or on behalf of the Bank and the surety.'

In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) this Court held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. The principle has been consistently reaffirmed, most recently by this Court in *Brisley v Drotsky* 2002 (4) SA 1 (SCA). (A non-variation clause is not necessary in a contract of suretyship by reason of the provisions of s 6 of Act 50 of 1956 - *Tsaperas and Others v Boland Bank Ltd, supra,* at 725B-C - but that does not detract from the legal force of such a clause where it exists.) Courts have in the past, often on dubious grounds,

attempted to avoid the *Shifren* principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the *Shifren* principle, eg where it amounts to a *pactum de non petendo* or an indulgence in relation to previous imperfect performance. (For an interesting discussion on the topic, see Dale Hutchison *Non-variation Clauses in Contract : Any Escape from the Shifren Straitjacket (*2001) 118 *SALJ* 720.) But nothing like that arises in the present case.

[21] The appellants contend that they were released as sureties by virtue of the conduct of the bank, coupled with a consensual waiver of the provisions of clause 15. In my view, a factual basis for such a contention was not established on the evidence. But even if it had been, it would have amounted, in the circumstances of the present case, to no more than a variation of clause 15 which was not in writing. This is precluded by clause 16. To hold otherwise, would be to render the principle in *Shifren* wholly ineffective.

[22] The same applies to the appellants' reliance on estoppel. In their plea, the appellants alleged that Linnell had represented to Berthold that the appellants were released from their suretyship obligations and that, relying on such a representation, the appellants had acted to their prejudice. The representation was clearly not established and in argument counsel sought to rely on

a representation based more generally on the bank's conduct together with the letter dated 20 April 1998. But even if there had been such a representation, it would not assist the appellants. Where a release is required to be in writing, as in the present case, it may perhaps be possible, in limited circumstances, to frame an estoppel in such a way as not to violate the *Shifren* principle. It is unnecessary to consider what those circumstances would have to be. What is clear is that an estoppel cannot be upheld when the effect would be to sanction a non-compliance with provisions in a suretyship agreement of the kind contained in clauses 15 and 16. It follows that the appellants' reliance on waiver and estoppel must similarly fail.

[23] Finally I turn to the defence, based on the reliance theory of contract, that the agreement recorded in the facilities letter contained a term releasing the appellants from their obligations under the suretyship agreements. The contention, shortly stated, is this : the facilities letter contained a representation that it was the bank's intention that the appellants would be released as sureties once the 'proposed/offered' security was in place; the subsidiary companies (represented by Hargey and Berthold) which accepted the offer understood the facilities letter to reflect that to be the intention of the bank; in so accepting the offer they intended to

confer on the appellants the benefit of the agreement to the extent that it related to the latter's release; the fact that the declared intention of the bank, as reflected in the facilities letter, was not its true intention, does not assist it as the letter was such as to lead the accepting parties reasonably to believe that the declared intention was the bank's actual intention.

[24] The reasonableness of the accepting parties' belief is crucial to the success of the appellants' submission. This is apparent from the following passage in the judgment of Botha JA in *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) at 61C-E:

'Where it is shown that the offeror's true intention differed from his expressed intention, the outward appearance of agreement flowing from the offeree's acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeree accepted the offer in reliance upon the offeror's implicit representation that the offer correctly reflected his intention. Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror, in accordance with the objective criterion formulated long ago in the classic *dictum* of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607. Only if this test is satisfied can the offeror be held contractually liable.'

For the purpose of this leg of counsels' argument it is accordingly unnecessary to consider, as a separate issue, the meaning to be attributed to the offer. It is enough, following the approach adopted by Botha JA in the *Steyn* case (at 62B-E), to pose what is ultimately the 'decisive question', namely whether a reasonable person in the position of Hargey and Berthold would have believed without further ado that upon acceptance of the offer, the release of the appellants as sureties would be procured, whether then or sometime in the future.

[25] It was common knowledge that in terms of clause 15 of the suretyship agreements the release of the sureties had 'to be in writing signed on behalf of the bank by a duly authorised signatory'. As I have said, the facilities letter contains no reference whatsoever to the existing suretyships or to the release of the appellants as sureties. In these circumstances a reasonable person, in my judgment, would not simply have assumed that his or her understanding of the offer was the correct one. The obvious

and reasonable step to have taken was to obtain clarity on the issue. Had this been done, any misunderstanding would have been removed. In the event, neither Hargey nor Berthold made any such inquiries. They simply signed the acceptance. Hargey, in his capacity as chief executive officer of Infiniti, thereafter permitted HNR to continue to utilise its overdraft facilities on the strength of the existing suretyships.

[26] In the result, the bank cannot be held to the accepting parties' understanding of the facilities letter regarding the release of the sureties. It follows that this defence, too, must fail.

[27] The appeal is dismissed with costs.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

NAVSA JA
NUGENT JA
LEWIS JA
MOTATA AJA