REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 29/04

In the matter between:

EKKEHARD CREUTZBURG 1st Appellant

EMIL EICH
2nd Appellant

and

COMMERCIAL BANK OF NAMIBIA LTD Respondent

CORAM: **MPATI AP, STREICHER, NUGENT, HEHER JJA and PONNAN AJA**

HEARD: **5 NOVEMBER 2004**

DELIVERED: **1 DECEMBER 2004**

Summary: Contract – suretyship – where choice of proper law made – *lex loci*

contractus determines formalities otherwise not in compliance with proper law.

JUDGMENT

MPATI AP:

[1] The two appellants, who are resident in South Africa (Cape Town), were the directors of a Namibian company, Pacific Best Namibia (Proprietary) Limited ('Pacific Best'). On 3 May 1995 and 22 May 1995, at Swakopmund, Namibia, the two appellants respectively signed a document in terms of which they bound themselves as sureties and co-principal debtors with Pacific Best for the latter's indebtedness to the respondent bank ('the bank').

[2] On 14 October 1996 the second appellant resigned as a director of Pacific Best and determined his suretyship, as he was entitled to do in terms of the deed of suretyship. At the time of determination Pacific Best's indebtedness to the bank stood at N$597 808.34. (It was common cause that at all relevant times one Namibian Dollar was equivalent to one South African Rand.) Pacific Best was provisionally wound up on 27 April 1998 and that order was made final on 26 June 1998. The bank instituted action against the appellants as sureties, jointly and severally, out of the

Cape High Court on 9 May 2000 for payment of R663 152.27 plus interest, such amount being what was allegedly due by Pacific Best to it. The appellants raised as a defence the validity of the suretyship agreement. Two further defences were pleaded by the second appellant, viz (a) that his liability had been discharged by payments made by Pacific Best since his suretyship had been determined and (b) if not, the bank's claim against him had in any event become prescribed.

[3] It was agreed between the parties that in the event of the trial court finding against the appellants on the issue of the validity of the suretyship agreement and that the second appellant had not determined the suretyship on 14 October 1996 the appellants would both be liable to pay to the bank the sum of R1 103 282.90 plus interest at 25% per annum compounded and capitalised monthly from 16 May 2000 until date of payment. But in the event of it being held that the second appellant had terminated his suretyship on 14 October 1996 and that the claim against him had not prescribed, then his liability, if any, would be limited to R597 808.34 plus interest at 25% per annum compounded and capitalised monthly from 15 October 1996 to date of payment.

[4] The trial court, Louw J, found the deed of suretyship to have been validly executed. He held further that the second appellant had terminated

his suretyship on 14 October 1996 and that the bank's claim against the second appellant had not become prescribed. The learned judge accordingly ordered the appellants to pay to the bank, jointly and severally, the amounts agreed to, the one paying the other to be absolved, with the second appellant's liability being limited to the sum of R597 808.34 plus interest. It is against that order that this appeal is before us with leave of the trial court.

The validity of the Deed of Suretyship

[5] The deed of suretyship is headed 'COMMERICAL BANK OF NAMIBIA' in bold print. Immediately below the heading and between bold tramlines appear, in capitals, the following: 'THE COMMERCIAL BANK OF NAMIBIA LIMITED REG. NO. 73/04561'. On the left of the page below the tramlines the word 'SURETY' is printed in bold and beneath it is printed: 'TO:'. In the middle of the page and in line with the words just mentioned is a revenue stamp and to the right of it appears a stamp reading: 'THE COMMERCIAL BANK OF NAMIBIA LTD Risk Management Head Office of the CBN Group'. According to a statement of agreed facts signed by the parties' legal representatives on 31 March 2004, it is common cause that at the time the appellants signed the deed of suretyship the stamp bearing the bank's name did not appear on the document; that the stamp was only

placed on the document at Windhoek during the period 1997-98; that the absence of the identity of the creditor, namely the bank, on the document offends against the provisions of s 6 of the General Law Amendment Act No 50 of 1956 and thus, according to South African Law, the suretyship is invalid. It is further common cause that the Law of Namibia does not require any formalities for the conclusion of a valid deed of suretyship and that according to Namibian law the suretyship is valid.

[6] Although Louw J referred to 'the plaintiffs' dilemma . . . that the identity of the creditor, being a term of the suretyship, is not "embodied" in the written document as is required by the provisions of section 6 of Act 50 of 1956'[1], he was persuaded that 'at least the formalities concerned, are governed by the law of Namibia' and that the provisions of the section 'do not apply in the Republic of Namibia'.

[7] The clause at issue in the deed of suretyship reads thus:

'This suretyship shall in all respects be governed by and construed in accordance with the law of the Republic of South Africa and/or the Republic of Namibia, and all disputes, actions and other matters in connection therewith shall be determined in accordance with such law . . . .'

The deed of suretyship also entitles the bank, as creditor, 'to institute all or any proceedings' against the appellants in connection with the suretyship

1 Section 6 of Act 50 of 1956 reads: '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. . . .'

'in any Supreme Court of South Africa and/or the Republic of Namibia'. In considering the proper law of the contract Louw J held that the parties 'did not make a clear choice in regard to the law which should govern the applicable formalities'. At best, he said, they agreed that South African or Namibian law would apply. He held accordingly, that the general principles that the *lex loci contractus* will govern questions of formalities applies.

[8] Counsel for the appellants submitted in this court that the court *a quo* erred in finding that the parties did not make a clear choice of law which would govern the formalities of the suretyship agreement and in applying the *lex loci contractus* principle. He contended that not only did the parties make an express choice regarding the *fora* but also in respect of the law applicable to the agreement 'in all respects'. He argued that the proper law of the contract is the law of the Republic of South Africa and/or the Republic of Namibia 'in all respects, including formalities', and that given the ordinary and grammatical meaning of the wording of the agreement, it follows that the parties intended that in South African courts South African law would apply and in Namibian courts Namibian law would apply.

[9] The expression 'proper law of a contract' has been used to indicate the appropriate legal system governing an international contract as a whole or a particular issue raised by the contract[2], and where parties have made an express choice of law to govern such contract their choice should be upheld.[3]

2 Joubert, *Law of South Africa* 2ed (2) para 328.

3 Forsyth C F *Private International Law* 4ed 304; Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale*

[10] The general principle is that the *lex loci contractus* (the law of the place where the contract is entered into) determines the formalities of a contract.[4] In

Ex Parte Spinazze and Another NNO[5]*,* a case dealing with the proper law of
an antenuptial contract, Corbett JA, after a review of the old authorities and the position in foreign jurisdictions, concluded as follows[6]:

'Having regard to the aforegoing, I am of the opinion that modern South African law should adopt a facultative approach to the well-entrenched rule that an antenuptial contract executed in accordance with the forms required by the *lex loci contractus* is formally valid, and hold that a contract which alternatively complies as to form with the *lex causae*, or proper law, is formally valid, even though it may not comply with the formal requirements of the *lex loci contractus*. Such an approach would maintain in South Africa a conformity to modern jurisprudential trends in the Western World in the sphere of private international law.'

Although Corbett JA mentions only antenuptial contracts in his conclusion his *excursus* shows that the facultative approach has been applied in respect of contracts generally, though not in all foreign jurisdictions he has referred to (in particular England). It is plain, however, that if a contract is formally valid in terms of the *lex loci contractus* one need look no further. The facultative approach was intended to ensure that a contract was not rendered invalid merely for lack of the forms required by the *lex loci contractus* when it complied as to form with its proper law.

[11] In the present matter the proper law of the contract is stipulated to be the law of the Republic of South Africa and/or the Republic of Namibia. It being common cause that the deed of suretyship is invalid under the law of the Republic of South Africa[7] it follows that the general rule applies, ie the *lex loci contractus* determines the formalities of the contract. Under

Privaatreg at 72.

4 *Johnson and Another v Registrar of Deeds* 1931 CPD 228 at 230-1; *Way v Louw and Another* 1924 CPD 450 at 453-4; *Bishops and Others v Conrath and Another* 1947 (2) SA 800 (T) at 803.

5 1985 (3) 633 (A).

6 at 665 B-C.

7 By section 6 of Act 50 of 1956 (see note 1 above).

Namibian law the deed of suretyship was validly executed and it is therefore enforceable through South African courts.

Has second appellant's liability been discharged?

[12] It was common cause in this court that the second appellant, upon resignation as a director of Pacific Best on 14 October 1996, determined his suretyship in writing in terms of the deed of suretyship. Pacific Best's indebtedness to the bank as at that date was R597 808.34 (the same figure in Namibian currency). It is also common cause that since that date the sum of N$3 109 170.88 was deposited into Pacific Best's cheque account with the bank and that that account was credited with N$68 157.20 in respect of reversal of debit orders.

[13] Counsel for the bank contended that the submission on behalf of the second appellant that his liability has been discharged by virtue of the deposits into Pacific Best's cheque account ignores the fact that the debits subsequent to the date of determination of his suretyship exceeded the credits by more than the outstanding balance as at that date. He relied in this regard on a clause in the deed of suretyship which reads:

'Upon determination of this suretyship by notice in writing by the undersigned as set out above you may in your entire discretion continue any then existing facility or open a fresh facility with the Debtor and any moneys paid in respect of such facility/ies by or on behalf of the Debtor shall not affect your right to recover from the undersigned the full indebtedness of the Debtor to you at the date of such determination, subject to the

limitation in amount aforementioned.'

Counsel for the bank accordingly argued that despite payments and fluctuations in the balance of the principal debtor's account the sureties would remain liable for the 'full indebtedness' of the principal debtor as at the date of determination.

[14] According to the pleadings Pacific Best's original account number with the bank was changed. It was not contended, however, that the change of account number means that a fresh facility was opened. A surety's liability is always accessory to that of the principal debtor – if the principal debtor does not owe the creditor the surety cannot be liable to the creditor under the suretyship agreement. The common law rule relating to the appropriation of payments made by a debtor is that where the debtor fails to specify payments

are appropriated to the most onerous debt or to the oldest.[8] It was not suggested in the present matter that the bank had appropriated the payments in any way different from the common law rule I have just mentioned. The liability of the surety being accessory to that of the principal debtor no agreement between the creditor and the surety as to how payments by the principal debtor are to be appropriated can alter the

8 *Eaton Robins & Co v Nel* (2) (1909) 26 SC 624 at 630; *Zietsman v Allied Building Society* 1989 (3) SA 166 (O); *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 572 F-J.

position without the involvement of the principal debtor. That is also in accordance with the terms of the deed of suretyship in that the surety is liable only for the indebtedness of the debtor at the date of the determination.

[15] It was not suggested that if the common law rule mentioned above applied the second appellant would still be liable to the bank in any amount. It follows that the liability of the second appellant has been discharged. This finding renders it unnecessary for me to consider the issue of prescription.

[16] The following order is made:

(a) The first appellant's appeal is dismissed with costs.

(b) The second appellant's appeal is upheld with costs. Paragraph 2 of the order of the court *a quo* is set aside and replaced with the following:

‘(2) Plaintiff’s claim against the second defendant is dismissed with costs.’

(c) Paragraph 3 of the order of the court *a quo* is altered to read:

‘(3) Against first defendant, payment of the costs of suit.’

L MPATI AP

CONCUR:

STREICHER JA
NUGENT JA
HEHER JA
PONNAN AJA