THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1334/2018

In the matter between:

LIBERTY GROUP LIMITED **APPELLANT**

And

WARREN PATRICK BROUGHTON ILLMAN **RESPONDENT**

Neutral citation: *Liberty Group Limited v Illman* (1334/2018) [2020] ZASCA 38 (16 April 2020)

Coram: SWAIN, MAKGOKA, MOKGOHLOA AND NICHOLLS JJA AND KOEN AJA

Heard: 13 March 2020

Delivered: This judgment is handed was down electronically by circulation to the parties' representatives by email and by publication in the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 09h45 on the 16th day of April 2020.

Summary: Suretyship – a surety who binds himself as co-principal debtor does not become a co-debtor with another surety and co-principal or with the principal debtor.

Prescription – service of summons on surety and co-principal debtor – prescription in favour of another surety and co-principal debtor not interrupted thereby.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Rabie J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Makgoka JA (Swain, Mokgohloa and Nicholls JJA and Koen AJA concurring)

[1] The anterior issue in this appeal is whether sureties who also bind themselves as co-principal debtors become co-debtors with the principal debtor, and with each other. Ancillary thereto, is whether the service of a summons on any of the sureties interrupts the running of prescription in favour of the others. The court a quo, the Gauteng Division of the High Court, Pretoria, answered the question in the negative. It upheld the respondent's special plea of prescription and dismissed the appellant's claim with costs. Aggrieved with that order, the appellant appeals with the leave of the court a quo.

[2] The factual background against which the issue arises is briefly this. On 10 March 2003 Charter Life Insurance Company Ltd (which later changed its name to Liberty Active Ltd (Liberty)) concluded a written broking agreement with ECE Financial Holdings (ECE)[1] in terms of which ECE was to act as an independent intermediary for its financial products. As compensation for its services, ECE would be paid commission on premiums received by Liberty during the currency of the agreement on contracts issued pursuant to proposals submitted by ECE.

[1] ECE was placed in final deregistration on 24 February 2011.

[3] On various dates between March 2003 and February 2005, eight individuals, including the respondent, each signed separate but identical deeds of suretyship in terms of which they bound themselves as sureties and co-principal debtors *in solidum* with ECE for the payment to Liberty of all monies which ECE could in future owe to Liberty, 'from whatsoever cause arising'.

[4] During March 2003 and March 2011, and before receiving any premiums in respect of contracts issued by the appellant on proposals submitted by ECE to it, Liberty advanced commissions to ECE. However, during the same period, up to August 2011, the contracts in respect of which commissions were advanced to ECE, either lapsed, were cancelled or terminated, because of non-payment of premiums to Liberty.

[5] As a result, the commissions which Liberty had paid in advance, became repayable to it by ECE in terms of the agreement, and by the sureties in terms of the deeds of suretyship. The total amount of the commissions was R1 029 963.50. Liberty later ceded to the appellant all its rights to claims arising from the claw-back commissions in respect of the broking agreement.

[6] On 22 September 2011, the appellant, as cessionary, issued summons against all the sureties and co-principal debtors for the re-payment of the amount of R1 029 963.50 referred to above. It alleged in its particulars of claim, among others, that the agreement between the parties was terminated on 14 March 2011. On 29 September 2011 the summons was served on one of the sureties, Mr Russel John September (Mr September), who was the seventh defendant. He failed to deliver a notice of intention to defend. As a result, the appellant obtained default judgment against him on 27 January 2012.

[7] With regard to the respondent, who was the sixth defendant, the summons was served on him on 31 March 2016, approximately five years after it was issued. The respondent raised a special plea of prescription to the appellant's claim. He asserted that to the extent that the appellant's claim against him was based on the alleged termination of the agreement on 14 March 2011, such claim became

prescribed after three years of that date, in terms of s 11 of the Prescription Act 68 of 1969.

[8] The appellant delivered a replication to the respondent's plea of prescription, the essence of which was that: as the appellant and Mr September had bound themselves to the appellant as sureties and co-principal debtors *in solidum* with ECE, they became 'co-debtors.' The claim against ECE and the sureties became due on 14 March 2011. Service of the summons on Mr September within the prescription period, interrupted the running of prescription in favour of ECE and all co-debtors, including the respondent. Accordingly, it was pleaded, the claim against the respondent had not prescribed.

[9] In order to resolve this issue three decisions of this court must be considered, namely *Kilroe-Daley v Barclays National Bank* [1984] 2 All SA 551; 1984 (4) SA 609 (A) and *Neon and Cold Cathode Illuminations (Pty) v Ephron* [1978] 2 All SA 1; 1978 (1) SA 463 (A) and *Jans v Nedcor Bank Ltd* [2003] 2 All SA 11; 2003 (6) 646 (SCA).

[10] It is convenient to commence with *Jans.* There, the issue was whether the interruption in the running of prescription in favour of the principal debtor, interrupted the running of prescription, in favour of a surety. The court considered two opposing views on the effect of a surety binding himself as a co-principal debtor. The one view was that the effect thereof was that such a surety would be jointly and severally liable with the principal debtor and prescription would begin to run in favour of both at the same time. He would not be liable to the creditor in any capacity other than that of a surety, who had renounced the benefits ordinarily available to him against a creditor. The opposing view stressed that the surety's liability was accessory to that of the principal debtor, despite that it was based on a different contract. The surety's obligation is merely to guarantee performance by the principal debtor. Given a suretyship's accessorial nature, the liability of a surety is tied to that of the principal debtor. If the claim against the principal debtor became prescribed or ceased to exist, the claim against the surety likewise became prescribed or otherwise ceased to exist.

[11] After an extensive review of the authorities, Scott JA pointed out that there were significant differences between the relationship existing between the principal debtor and surety on the one hand, and that between co-debtors, *in solidum* on the other. He accordingly concluded that an interruption or delay in the running of prescription in favour of the principal debtor, interrupted or delayed the running of prescription in favour of the surety. As between co-debtors, the common law allowed the judicial interruption of prescription of a co-debtor by service on another co-debtor.

[12] In this regard, it is significant that the appellant in its replication, referred to the respondent and other sureties as 'co-debtors'. This is at the heart of the appellant's case. The sum total of the appellant's case is that the sureties, by binding themselves also as 'co-principal debtors *in solidum*' with ECE, the subsidiary nature of their obligations lapsed. Their liability became equal to that of the principal debtor, and they in fact, became co-debtors.

[13] In this court, counsel for the appellant submitted that the effect of a renunciation of the benefit of the legal exception of excussion is that the surety's liability is no longer subsidiary to the primary liability of the principal debtor. The addition of the words 'co-principal debtor *in solidum*' signaled an intention that the liability shall be of the same scope and nature as that of the principal debtor. This made the principal debtor and the surety, co-debtors. Thus, service of summons on any of them, Mr September in this case, interrupted prescription running in favour of the rest.

[14] Counsel for the appellant was fully cognisant that this submission was contrary to the jurisprudence of this court in the decisions of *Kilroe-Daley* and *Neon.* In *Kilroe-Daley*, the accessorial nature of a suretyship agreement to the main contract was emphasised, despite it being a separate contract from that of the principal debtor and his creditor. The addition of the words 'co-principal debtor' did not transform the contract into any contract other than one of suretyship. Consequently, it was held that if the principal debt became prescribed the surety's debt also became prescribed and ceased to exist. In *Neon* it was held that the sole consequence (albeit an important one) of a surety binding himself as a co-principal debtor is that, as regards the creditor, he renounces the benefits such as excussion and division available to him, and he

becomes liable with the principal debtor jointly and severally. It did not make him a co-debtor.

[15] The appellant submitted that *Kilroe-Daley* and *Neon*, to the extent that they limited the effect of the phrase 'and co-principal debtor' to only a tacit renunciation of the legal exceptions, had been wrongly decided. To that end, reliance was placed on the following dictum by Wessels JP in *Union Government v Van der Merwe* 1921 TPD 318 at 322:

'The present case is however stronger for the surety has signed as surety and co-principal debtor. We must give some meaning to the words "co-principal debtor". That the addition of these words operate as a renunciation of the benefits of the surety is clear, but they have a still greater force. The addition of these words shows that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor.'

[16] The appellant submitted, in reliance upon an article by Prof Sonnekus,[2] that this passage correctly reflects the effect of inserting the words 'co-principal debtor' in suretyship agreements. Prof Sonnekus in reliance upon this decision, expressed a view that a surety who binds himself as a co-principal debtor becomes a co-debtor and the suretyship loses its accessory nature. The obligations of the principal debtor and the surety are then one and the same i.e. to pay the debt of the principal debtor. The words 'co-principal debtor' do not only operate as a renunciation of the benefits of the surety, but have a 'still greater force', namely that these words show that the surety intended that his obligation shall be co-equal in extent with that of the principal debtor; or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor. The appellant therefore submitted that this court ignored this phrase in *Kilroe-Daley* and *Neon*, and the cases which followed these decisions. This phrase, so was the submission, should have been given a textual interpretation. This criticism has merely to be stated, to be rejected. In all of the cases

[2] J C Sonnekus 'Borg en Tegelyk Medehoofskuldenaar is 'n contradictio in terminis en onversoenbaar.' TSAR (2) 2018 at 256.

sufficient attention was devoted to the phrase, and a proper contextual meaning attributed to it.

[17] The flaw in the criticism of the decisions of this court, is the conflation of two distinct concepts: co-debtors and co-principal debtors. As explained by the authors of *Caney's Law of Suretyship*,[3] the undertaking of the surety is accessory to the main contract. It is an undertaking that the obligation of the principal debtor will be discharged, and if not, that the creditor will be indemnified.

[18] What is more, the dictum in *Union Government van der Merwe* was explained in *Neon* at 472-473 where Trollip JA said that he did not think that Wessels JP, when saying that the surety's obligation 'shall be of the same scope and nature as that of the principal debtor', meant to convey that by signing as co-principal debtor, the surety became a party to the main contract. Earlier, at 471C-472E it was pointed out that the correct legal position was as follows: although the surety binds himself as co-principal debtor, that does not render him liable to the creditor in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor. He does not become a party to the contract between the creditor and the principal debtor.

[19] *Union Government* is therefore no authority for the proposition that by binding himself as a co-principal debtor, the nature and ambit of the obligation of a surety mutates from an accessory undertaking that the obligation of the principal debtor will be discharged, and if not, that the creditor will be indemnified, to one where the surety assumes the obligation to discharge the principal debtor's obligation.

[20] It only remains to reiterate the position in our law. A surety and co-principal debtor does not undertake a separate independent liability as a principal debtor; the addition of the words 'co-principal debtor' does not transform his contract into any contract other than one of suretyship. The surety does not become a co-debtor with the principal debtor, nor does he become a co-debtor with any of the co-sureties and

[3] C F Forsyth and J T Pretorius *Caney's Law of Suretyship* 5 ed (2002) at 26-29.

co-principal debtors, unless they have agreed to that effect. The jurisprudence of this court in *Kilroe-Daley and Neon* accordingly correctly reflects our law on this topic.

[21] There was another string to the appellant's bow, based on Justinian's decree formulated in Codex 53 C8.39(40).4(5) which deals with the interruption of prescription where there are several co-debtors. Its effect is that if a creditor, through the service of a process, claimed payment from one co-debtor who bound himself jointly and severally with others, the remaining co-debtors could not rely upon extinction of the debt by prescription. The principle was received into Roman-Dutch law. Voet extended this to sureties by adopting the view that interruption of prescription in respect of a principal debtor served to interrupt prescription in respect of a surety.

[22] The appellant urged us to apply this principle to the converse situation. In other words, we should decide that the interruption of prescription in respect of a surety serves to interrupt prescription in respect of a principal debtor. Once so decided, it was said, the further logical extension of the principle would be that interruption of prescription in favour of a surety would also interrupt prescription in favour of a co-surety. The result would therefore be that service on Mr September interrupted prescription in favour of the respondent.

[23] The court a quo dealt with this submission as follows:

'I do not agree with the aforesaid submissions. Neither in the Roman law nor in the Roman Dutch law had it ever been suggested that the converse should apply - in other words that interruption of prescription against the surety should constitute interruption of prescription against the principal debtor. The Roman Dutch writers, who wrote extensively on the topic and debated the pros and cons thereof, were *ad idem* that the converse should not apply. It is consequently simply not part of our common law.

It was submitted on behalf of the plaintiff that it is not necessary to amend the common law in order to find for the plaintiff but that it merely requires a consistent application of a principle already accepted by the common law. I do not agree. As mentioned, our common law writers have considered the extension of Justinian's decree and had decided that it should be done to the extent mentioned and no further. To find that interruption of prescription against one surety constitutes not only interruption of prescription against the principal debtor but even

against the other sureties, constitutes a substantial deviation of the common law principles on the topic.'

I cannot fault this reasoning.

[24] In all the circumstances the appeal has to fail. The following order is made:

The appeal is dismissed with costs.

_____

T M Makgoka

Judge of Appeal

APPEARANCES

For Appellant:	JF Steyn
	Instructed by:
	Gerings Attorneys, Johannesburg
	Rossouws Attorneys, Bloemfontein
For Respondent:	HP Van Nieuwenhuizen
	Instructed by:
	Wikus du Toit Attorneys, Mbombela
	Couzyn Hertzog & Horak Attorneys, Pretoria
	Symington de Kok Attorneys, Bloemfontein