REPORTABLE

Case number: 105/2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

ABSA BANK LIMITED t/a VOLKSKAS BANK **APPELLANT**

and

JAN HENDRIK NEL PAGE **FIRST RESPONDENT**

HENDRIK VAN NIEKERK NO **SECOND RESPONDENT**

CORAM: **NIENABER, NAVSA, MTHIYANE JJA, CONRADIE and NUGENT AJJA**

DATE OF HEARING: **18 SEPTEMBER 2001**

DELIVERY DATE: **28 SEPTEMBER 2001**

Summary: Interpretation of court order – limited suretyship - discharge of surety by payment by principal debtor – only where liability of principal debtor and surety co-extensive.

JUDGMENT

CONRADIE AJA:

[1] The appellant is a commercial bank. It is a creditor of Derryk Page, a farmer in the Adelaide district of the Eastern Cape. He was the first defendant in a trial before Whitehead AJ in which the appellant sued him to recover money which he had borrowed on a current account overdraft. His son, who was the second defendant, stood surety for his father's liability up to an amount of R190 000. I shall refer to the *dramatis personae* as the creditor, the principal debtor and the surety.

[2] The only part of the relief granted in the trial against the principal debtor and the surety which is relevant at present is that formulated in paragraph 2 of the order:

> 'Judgment is granted in favour of the plaintiff in the sum of R597 056,57 together with interest thereon at the rate of 19,5% per annum from 24 January 1998 to the date of payment, in respect of which sum the first defendant and the second defendant shall be jointly and severally liable for payment of the first R190 000.00 together with the

said interest thereon, the one paying the other to be absolved, and the first defendant shall be solely liable for the balance together with the said interest thereon.'

[3] The creditor promptly caused a garnishee order to be issued against the principal debtor's attorney who held R300 000 in his trust account on his client's behalf. The attorney's reaction to the service of the garnishee order was to pay over to the acting sheriff of Adelaide an amount of R219 741, 51. This was the capital of R190 000 together with interest up to the date of payment. In a letter to the acting sheriff (who is the second respondent) he stated that the payment was 'in full settlement of the amount due by the First and Second Judgment Debtors on a joint and several basis.' In subsequent correspondence he made it clear that the money had been paid in discharge of that portion of the debt for which, according to his interpretation of the judgment, the two defendants were jointly and severally liable.

[4] The creditor did not accept that the payment on behalf of the principal

debtor had discharged the surety's liability. It accordingly issued a writ against the latter. The attachment of a truck forming part of the surety's transport business impelled him to bring an urgent application to set aside the writ. This in turn prompted the creditor to bring an application of its own for a declaratory order establishing the meaning of the order made by Whitehead AJ.

[5] The two applications came before Leach J. The decision in the court *a quo* is reported as *Page v Absa Bank Ltd t/a Volkskas Bank and Another* 2000 (2) SA 661 (E). The creditor's application was dismissed with costs on the attorney and client scale. The court held that it had been frivolous to bring a separate application since the meaning of the order would in any event be a central issue in the interdict proceedings. The surety's contention that the order of Whitehead AJ meant that the principal debtor's payment absolved him (the surety) from liability to the creditor was upheld. The writ

was set aside. The creditor's contention that Whitehead AJ did no more than give effect to the suretyship , as interpreted in the light of the common law, failed. The creditor's application for leave to appeal also failed, but an application to the Chief Justice for leave to appeal against the whole of the judgment of the court *a quo* dated 10 September 1999 in respect of the main application was successful.

[6] The approach which Leach J adopted to test the order for ambiguities or errors was to compare it with what he conceived the common law position to be. Since it seemed to him that the order expressed the common law he concluded that it meant what it said. He relied on what he called 'the well established principle' that a payment by a debtor ought to be appropriated to the most onerous portion of his debt. In the case of a debt partly secured by a suretyship, this would be that part of it for which both debtor and surety are liable. The learned judge held that –

> ‘In terms of the common law, and without specific appropriation to any particular portion of the judgment debt, the payment of the principal debtor, Derryk Page, of the amount equal to the indebtedness of the surety, immediately discharged that portion of the debt for which the latter was liable as surety to the creditor…’

[7] One should approach the interpretive difficulty in the order on the footing that the expression “the first R190 000,00 together with interest thereon” in the context is ambiguous. The manner in which ambiguities in an order of court are to be dealt with is explained in *Firestone South Africa (Pty) Ltd v Gentiruco A.G.* 1977 (4) SA 298 (A) at 304 D – H). The order and the court’s reasons for giving it must be read as a whole; if uncertainty on the meaning of the order still persists, extrinsic circumstances leading up to the court’s judgment may be investigated in order to clarify it.

[8] The trial before Whitehead AJ was not about the surety’s liability. It revolved around the principal debtor’s indebtedness. The judgment concerning the liability of the surety is understandably brief. It does little

more than quote the part of the suretyship imposing liability on the surety. In essence, the document binds the surety as co-principal debtor to the payment of whatever sums may be owing by the principal debtor to the creditor from time to time. The limitation on the surety's liability is recorded in the form of a proviso:

> '…met dien verstande, nietemin, dat die totale bedrag verhaalbaar van my ingevolge hiervan nie altesaam die bedrag van R19000.00… tesame met sodanige verdere som vir rente en koste wat reeds opgeloop het of mag oploop tot die datum van betaling van die hoofsom, te bowe sal gaan nie.'

[9] The learned judge confined himself to this crisp comment on the terms of the suretyship:

> 'The liability of the second defendant (the surety) is, therefore, limited to the sum of R190 000.00 together with interest thereon and costs.'

[10] At the conclusion of his judgment he found the surety liable to the principal debtor 'in accordance with the terms of the Deed of Suretyship'.

There is no discussion in the judgment of the soundness or otherwise of dividing the principal debt into two parts, one of which is secured and the other not. If there had been such a (highly unusual) provision in the deed of suretyship, the learned judge could hardly have failed to mention it. It has not been suggested before us that there was. I proceed on the footing that there was not. I further proceed on the footing that the judgment of Whitehead AJ was intended not to novate but to reinforce the suretyship obligation (*Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 944F – G) and that the surety at whom the order was directed would have understood it in this sense. I furthermore do not believe that one should assume that the learned judge misunderstood the terms of the suretyship.

[11] The ambiguity in the expression "the first R190 000 together with interest thereon" is latent. Leach J put the focus on compliance with the order. He assumed that the expression referred to the first R190 000 (and

interest) paid or to be paid by either of the debtors. It does not necessarily refer to that. On the face of it, it may with equal justification be taken to refer to the principal debtor's *indebtedness*. In fact, having regard to the terms of the suretyship, and the tenor of the judgment, this is its probable meaning. Whitehead AJ must be understood as having declared the extent of the two debtors' joint and several liability (ie the obligation to pay R190 000 of the debt). He did not purport to deal with the legal consequences produced by the payment by either debtor of his obligations. Read in this way, the order means that the surety was adjudged liable only for an amount up to R190 000 (and interest) of that owing by the principal debtor; the amount by which the creditor permitted the principal debtor's indebtedness to exceed the 'first' R190000 was not the surety's concern. Indeed, the order takes the trouble to spell out that the remainder of the debt (over and above the limit of R190 000) is the responsibility of the principal debtor alone.

Interpreted in this way, the order makes linguistic sense. It also gives effect to the provisions of the suretyship (quoted by Whitehead AJ without comment) that make the surety accountable for 'terugbetaling op aanvraag van enige som of somme geld wat die skuldenaar/s nou, of van tyd tot tyd hierna,aan die Bank…om welke rede ook al verskuldig mag wees.'

[12] The suretyship envisages security for *all* debts of the principal debtor to the creditor. No question of any common law allocation arises. The parties' intention that every single one of the principal debtor's debts be secured, is incompatible with an intention on their part that any particular portion of any particular debt should remain unsecured. If one were to suppose that the order held the surety liable only for so long as it took the principal debtor to pay off R190 000 on his indebtedness, it would, contrary to what Leach J thought, not accord with the common law. An unlimited suretyship covers the whole debt. A limited suretyship is no different. It

does not cover only a portion of the debt. A limited surety who performs obligation must be taken to pay a (fixed) contribution towards the whole debt. His payment means that the creditor receives a 'dividend' of fewer than one hundred cents in the Rand on the *whole* debt. He does not receive payment in full of some part of the debt. Since a surety's liability is accessory, and a surety's debt cannot be greater than that of the principal debtor, payment by a principal debtor of an indebtness which is co-extensive with the surety's liability will discharge both him and the surety. Before that, a principal debtor's payment discharges only his own debt.

[13] The contrary conclusion of Leach J is based on a misreading of *dicta* in *Northern Cape Co-Operative Livestock Agency Ltd v John Roderick & Co. Ltd* 1965 (2) SA 64 (O) at 73D – H and *Zietsman v Allied Building Society* 1989 (3) SA 166 (O) at 178C – D). These cases dealt with distinct secured and unsecured debts.

[14] In his judgment refusing the application for leave to appeal Leach J found further support for his view of the law in the majority judgment of this Court in *Pfeiffer v First National Bank of SA Ltd* 1998 (3) SA 1018 (SCA). But the point on which the Court *a quo* sought to rely for authority was expressly left open in the majority judgment. The judgment of the majority is based on the rule that payments by a debtor are, in the absence of agreement to the contrary, to be credited first to interest and then to capital. In regard to the rule that, failing agreement, payments are to be appropriated to a secured debt in preference to an unsecured one, Harms JA says the following (at 1032G – H):

> 'The other appropriation rule that, conceivably, can be invoked is that a secured debt should be paid before an unsecured debt. This rule as found in textbooks is formulated on the assumption that there is more than one debt, the one secured and the others not. The obvious reason for the rule is that good faith requires that the creditor and the debtor should as far as possible ease the burden of the surety. Whether there is reason in principle, logic or fairness why this rule should not also

apply, depending upon the terms of the deed of suretyship, if a debt is partially secured does not arise on the facts of this case.'

Pfeiffer's case is thus no authority for the proposition that the common law countenances an appropriation of a debtor's payment to a surety's debt where the liabilities of the two are not co-extensive.

[15] The appeal succeeds with costs against the first respondent.

The order of the court *a quo* is set aside and replaced with an order reading:

'The application is dismissed with costs'.

J H CONRADIE
ACTING JUDGE OF APPEAL

NIENABER JA)Concur
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CONRADIE AJA:

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