THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 588/10

In the matter between:

D J VAN RHEEDE VAN OUDTSHOORN Appellant

and

INVESTEC BANK LIMITED Respondent

Neutral citation: *Van Oudtshoorn v Investec Bank Ltd* (588/10) [2011] ZASCA 205 (25 November 2011)

Coram: **LEWIS, MAYA, MHLANTLA, SERITI** and **WALLIS JJA**.

Heard: 8 **November 2011**

Delivered: 25 **November 2011**

Summary: Interpretation of power of attorney and partnership agreement – authority of managing partner to conclude instalment sale agreement – need for rectification of that agreement – authority of agent of undisclosed partner to execute deed of suretyship in respect of partnership obligations – scope of that authority.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bosielo J sitting as court of first instance):

1 The appeal is upheld to the extent that the order of the trial court is amended by the deletion of paragraph 1 thereof and the deletion of the words 'on an attorney and client scale' in paragraph 4 thereof.

2 The appeal is otherwise dismissed, with costs.

JUDGMENT

WALLIS JA (LEWIS, MAYA, MHLANTLA and SERITI JJA concurring)

[1] The incidence of income tax and the desire it generates among some taxpayers to minimise their tax liability has led over the years to tax advisers developing and marketing various schemes directed at minimising the tax liability of the participants. As the legislation under which income tax is imposed has become more complex, the scope for developing such schemes has expanded. A common feature of these is that they exploit allowances, such as depreciation or investment allowances, afforded to the taxpayer under the relevant legislation, to generate substantial losses, largely on paper rather than in terms of actual expenditure, that the participants can then set off against their taxable income from other sources.

[2] This case arises from one such scheme[1] that sought to take advantage of the generous allowances that the Income Tax Act 58 of 1962 then afforded in respect of the depreciation of aircraft. The scheme was structured around a commanditarian partnership, in which the investors would be the undisclosed partners. The partnership would acquire an aircraft with finance provided by the respondent, Investec Bank Ltd (Investec), and charter it to generate the income necessary to meet the financing costs due to Investec. Unfortunately the income generated from the chartering operations was less than anticipated. This led Investec to demand payment of what was due to it under the financing arrangements in respect of the aircraft. Payment was not forthcoming and the scheme collapsed. Investec sued the participants in the scheme on various grounds.[2] In the case of Mr van Oudtshoorn, the appellant, the claim was based on a deed of suretyship signed on his behalf and binding him as surety for the purchaser's liability under the instalment sale agreement described below in paragraph 13.

[3] Mr van Oudtshoorn disputed any liability to Investec because he contended that he had not authorised the conclusion of the agreements required to give effect to the scheme. Whilst he accepted that he agreed to participate in the scheme, he said that the agreements actually concluded were not those that he agreed to and were concluded without authority. Investec disputed this and contended that in any event he had by his conduct, particularly in claiming and receiving the tax benefits of participation in the scheme, ratified the agreements or waived his right to

[1] No doubt mindful of the provisions of s 103 of the Income Tax Act, the developers of the scheme preferred to refer to it as a project. The description of it as a scheme is more accurate and its use does not carry any pejorative overtones.

[2] The original action cited 28 defendants but all bar the present appellant settled with Investec during the course of the trial.

object to them or was estopped from doing so. Bosielo J, in the trial court, upheld the contention that he ratified the agreements concluded on his behalf and on behalf of the partnership. He entered judgment against Mr van Oudtshoorn in an agreed amount and ordered him to pay interest and the costs of the trial on the attorney and client scale. This appeal is with his leave.

The agreements

[4] In order to appreciate the basis for Mr van Oudtshoorn's defence it is necessary to have regard to the background to his participation in the scheme and the different agreements that were put in place in order to give effect to the scheme. Ms Claire Dillon, of the firm of Robin Beale & Associates Ltd ('RBA'), a firm of tax advisers, assembled the scheme. In conception it had the following elements. A commanditarian partnership would be created to limit the potential exposure of the individual participants. The partners would be Cormorant Aviation (Pty) Ltd ('Cormorant'), a special purpose vehicle created and controlled by RBA, as the disclosed and managing partner and the individual participants, who would be the undisclosed partners, each contributing a defined share to which their liability was limited. The partnership would acquire an aircraft with financial assistance from Investec. A management agreement would be concluded with the company from which the aircraft was acquired, which would operate the aircraft on charter and maintain it on behalf of the partnership. The scheme would endure for four years during which the participants would be able to claim in each year a depreciation allowance of 25 per cent of the cost of the aircraft. The aircraft would then be sold at a price expressed in US dollars and, as it was anticipated that the Rand would depreciate against the dollar, RBA predicted that the sale would generate a capital gain and proceeds sufficient to discharge the

debt to Investec. In each tax year it was anticipated that, with the benefit of the allowances for depreciation, the partnership would show a loss that would be allocated to the partners and set off against their taxable income from other sources. It is unnecessary to spell out the potential tax and investment advantages that would accrue to the participants.

[5] Ms Dillon had set up similar schemes in the past. She was aware of a group of potential participants based in Pietersburg.[3] In February 1995 they were looking for a way to reduce their potential tax liabilities in the 1995 tax year. There was accordingly a measure of urgency about setting up an aircraft scheme to meet their needs before the end of the tax year. A problem arose when the company she was dealing with in regard to the acquisition of a suitable aircraft withdrew shortly before the end of February. She then approached Mr Ken Roseveare, a businessman involved in the aircraft industry, with whom she had set up similar schemes in the past, to find out if his company had a suitable aircraft. It did, but it was a considerably bigger aircraft than the one she had been considering and the price was almost double that of the other aircraft. The participants she had identified were not proposing to invest sufficient to pay more than about half this higher price. To overcome the problem she persuaded Mr Roseveare to sell an interest in the plane to a partnership including the existing group of participants, on the basis that she would then find a further group to acquire the balance. It seems that at the time she had some inkling that other people in the Pietersburg area were interested in participating in such a scheme.

[6] Ms Dillon proceeded to set up an *en commandite* partnership called the Kite No 1 Partnership. The structure of the partnership was largely as

[3] Now Polokwane.

described above. Cormorant was the managing partner and the individual participants were undisclosed partners with their liability limited in varying amounts. In addition, and because the partnership otherwise only had the resources to purchase an approximate half share in the aircraft, Mr Roseveare's company, Aerospace Express (Pty) Ltd (Aerospace Express), and a related company, also became partners. Simultaneously with the signing of the partnership agreement the Kite No 1 partnership entered into an agreement with Aerospace Express for the acquisition of a 50.4 per cent interest in the aircraft, a Hawker Siddeley. As the partnership was to acquire the ownership of the aircraft as a whole Aerospace Express contributed its residual interest as its contribution to the partnership.[4] The price for the 50.4 per cent interest was payable by the end of April 1995. Finally, an agreement to operate and maintain the aircraft was concluded with Aerospace Express.

[7] Procuring the signatures of all the participants posed logistical problems. These were addressed by RBA procuring a power of attorney from each of the participants authorising it to enter into the agreements on their behalf. In the result the partnership agreement was signed on behalf of each of the participants in terms of these powers of attorney.

[8] Once the Kite No 1 Partnership was established, Ms Dillon set about finding potential participants who would take part in a scheme in respect of the balance of the interest in the aircraft. Two people were identified, a Dr van Zyl, who had participated in an earlier scheme, and Mr van Oudtshoorn. The latter was an attorney, specialising in third party litigation, who had practised as a partner in a well-known firm for many years. He had been headhunted by the Multilateral Motor Vehicle Fund –

[4] This was not spelled out in the partnership agreement or the agreement of purchase and sale in respect of the aircraft, but was explained by Ms Dillon in her evidence.

the predecessor to the Road Accident Fund – and was employed by them in a senior capacity. In February 1995 he turned 55 and some retirement annuities in which he had invested matured. He sought advice from his accountant, Mr Kruger, and a tax adviser, Mr Boonzaaier, concerning the investment of the funds that would accrue from this. They recommended that he should invest in an aircraft and Mr Kruger advised that an amount of R1.625 million should be invested. This amount could have come from Mr van Oudtshoorn's own resources, but he was advised that it was preferable that the funds be borrowed in order to secure the maximum advantage from the investment. On 13 March 1995 he decided to accept this advice and told his advisers to go ahead with the investment.[5]

[9] Pursuant to this, RBA concluded three agreements on 14 March 1995. The first was a partnership agreement establishing the Kite No 2 Partnership as a commanditarian partnership, with Cormorant as the managing and disclosed partner, and Aerospace Express and its associated company, Mr van Oudtshoorn and Dr van Zyl as the undisclosed partners. Ms Dillon executed the deed of partnership on behalf of Mr van Oudtshoorn. There were two other agreements. In terms of the first the partnership acquired from Aerospace Express a 34.6 per cent interest in the Hawker Siddeley plane.[6] In terms of the second Aerospace Express would operate and manage the aircraft on terms identical to the corresponding agreement concluded for the Kite No 1 Partnership. As with that partnership payment for the interest in the plane to be acquired by the partnership was to be effected by the end of April 1995.

[5] Ms Dillon said in her evidence that she met with Mr van Oudtshoorn on 13 March 1995 when he gave her the go ahead for his participation in the scheme, but he denied this. It is unnecessary to resolve this issue as on any footing the instruction to go ahead was given on 13 March 1995.

[6] This left Aerospace Express with a 14.98 per cent interest in the aircraft held via its interest in the two partnerships.

[10] Both of the agreements for the acquisition of the respective interests of the two partnerships in the aircraft provided that Aerospace Express would transfer it to Cormorant and that ownership and risk in the aircraft would pass to Cormorant. Under the two operating agreements the aircraft was to remain in the physical possession of Aerospace Express. Accordingly the passing of ownership to Cormorant could only take effect by means of constructive delivery in the form of constitutum possessorium: the seller's existing possession of the thing sold (the *merx*) was converted into detention so that possession in the legal sense was held by the purchaser.[7] In view of the express provisions of the two purchase agreements there is no reason to doubt that ownership of the aircraft passed to Cormorant in terms of these provisions. The precise date on which that occurred is immaterial.

[11] On 14 March 1995 Mr van Oudtshoorn met with Ms Dillon and executed a power of attorney in favour of RBA. The terms of that power of attorney are central to his arguments about RBA's lack of authority to conclude agreements. It appointed any director of RBA as his agent:

'...for the purposes of signing and executing for me on my behalf and in my name place and stead just as fully and effectively as I could do if acting personally therein, the following documents:

> An agreement with third persons in terms of which I will be a partner with such third persons for the purpose of acquiring a B Ae HS748 2B Aircraft ('the aircraft') pursuant to appointing an agent to establish and conduct the business of chartering the aircraft.

which is herein referred to as 'the partnership agreement', and my attorney is hereby authorised and empowered to sign and execute the partnership agreement on such terms and conditions as my attorney may think fit and further to make such variations,

[7] *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66 at 73.

modifications or alterations thereto in such manner as my attorney may think fit, or just as fully effectively as I could do if acting myself.

Furthermore, *I hereby nominate, constitute and appoint my attorney to be my lawful attorney and agent for the purpose of managing and transacting all of my business, property and affairs*, both present and future, anywhere, and *which arises from or is attributable to the partnership agreement or any matter or thing in connection with the partnership agreement (hereinafter referred to as 'my business')*.

And my attorney shall have full and unrestricted power and authority to represent and act for me and in my name and for my account and benefit *in relation to the partnership agreement or my business, and all matters and things affecting the partnership agreement or my business, without any limitation*, to all intents and purposes as I might or could do if personally present and acting therein.' (Emphasis added.)

[12] The power of attorney continued with a provision dealing with the power to conclude a management agreement in respect of the conduct and management of the business of chartering the aircraft and went on as follows:

'And further, and without limiting the generality of, and as part of the aforegoing my attorney shall have full and unrestricted power and authority to represent and act for me for the purposes of concluding or entering into or signing for me and on my behalf and in my name, place and stead the following agreement:

> An agreement of loan with Investec Bank Limited ('the financial institution') in terms of which, inter alia, I shall borrow from the financial institution a sum equal to my capital contribution to the partnership as specified in the partnership agreement, subject to normal banking requirements, including the requirement to pay interest and any other usual bank charges, and subject to the provision of any additional security which the bank may require including any deeds of suretyship, guarantees, surety bonds, notarial bonds and the like;

which is herein referred to as 'the loan' and my attorney is hereby authorised and empowered to sign and to execute the loan agreement referred to above and any other agreement, undertaking, deed, bond or document required from time to time by the financial institution in relation to, or necessary to give effect to, or relating to, or

incidental to the loan on such terms and conditions as my attorney may think fit, and, further, to make such variations, modifications or alterations thereto in such manner as my attorney may think fit, all just as fully effectively as I could do if acting personally myself.

AND GENERALLY my attorney shall have full and unrestricted power and authority to do execute and suffer any such act, deed, matter or thing whatsoever, as my attorney may deem necessary or expedient in or about my concerns pertaining to the partnership agreement and my business and the loan. AND I HEREBY GIVE AND GRANT to my attorney power to appoint a substitute or substitutes, and at his pleasure to displace or remove and appoint another or others. And I hereby ratify and agree to ratify whatsoever shall be done or suffered by virtue of these presents.'

[13] It had always been the intention of RBA to secure finance from Investec to enable the partnerships to pay what was due to Aerospace Express under the purchase agreements. In other aircraft schemes, undertaken with the assistance of other financial institutions, it had borrowed the money and provided security in the form of a notarial bond over the plane. However, Investec preferred the security that ownership of the aircraft would give it, so in this instance the financing was provided by way of an instalment sale agreement concluded on 21 and 24 April 1995. The mechanics of this transaction were the following. Aerospace Express provided an invoice in respect of the sale by it of the aircraft to Investec. The price of R5 million was the total of the amounts owing under the two purchase agreements, plus the value of its own residual interest in the aircraft which was transferred to Cormorant as its capital contribution to the two partnerships. Then Investec sold the aircraft in terms of an instalment sale agreement to Cormorant Aviation (Pty) Limited 'acting in its capacity as agent for The Kite Partnership'. The price was R5 485 000 together with interest at a rate of 17.5 per cent per annum compounded and payable monthly from 21 April 1995.

[14] In addition to the security that ownership of the aircraft provided, Investec wanted further security in the form of limited deeds of suretyship from the investors in the two partnerships. Ms Dillon executed these on behalf of the investors, including Mr van Oudtshoorn, acting in terms of the powers of attorney provided by them to RBA. That is the basis upon which Investec claimed that Mr van Oudtshoorn had bound himself to it as surety for his share of the indebtedness under the instalment sale agreement. I will return in due course to the terms of the deed of suretyship executed on his behalf.

The defences

[15] Mr van Oudtshoorn originally contended that he was not a partner in the Kite No 2 Partnership, but this was based on the technicality that the partnership deed was signed before the power of attorney. At the outset of his cross-examination he accepted that he had been a partner in the partnership and this issue became academic. His principal contentions were that the method adopted to finance the acquisition of the aircraft was not what he had agreed to and that the execution of the deed of suretyship on his behalf was unauthorised. He said that the power of attorney expressly contemplated that the finance would come from a personal loan granted to him by Investec and that he never agreed to RBA concluding the instalment sale agreement or executing the deed of suretyship on his behalf. Whilst the power of attorney referred to the possibility of Investec requiring security for any loan granted to him, including deeds of suretyship, he made the point that this could not have included a deed of suretyship by him personally as one cannot stand surety for oneself.[8]

[8] *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 475E-I; *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 (3) SA 107 (SCA) para 9.

[16] Apart from the primary objection that the instalment sale agreement was, at least as far as he was concerned, an impermissible way of procuring finance to pay for the acquisition of the aircraft, certain other objections, largely of a technical nature, were raised on his behalf. Thus the description of the purchaser under the instalment sale agreement as Cormorant 'acting in its capacity as agent for The Kite Partnership' was attacked as showing that contrary to the basis of the partnerships, they and not Cormorant were the purchasers under the instalment sale agreement. This was said to lead to confusion on the grounds that there was no such entity as The Kite Partnership and led to Investec seeking rectification of the agreement and the suretyship, to insert the words 'No 1 and No 2' after 'Kite' in the description of the purchaser and the principal debtor. It was also claimed that disclosure of the identity of the 'undisclosed' partners was a breach of a fundamental principle underlying a partnership *en commandite*. This was said to lead to the partners being personally liable to Investec under the instalment sales agreement. It was also contended that as ownership in the aircraft had passed to the partnerships in terms of the two sale agreements it was impossible for Aerospace Express to sell it to Investec and pass ownership as contemplated by the instalment sale agreement. All of these points were directed at the validity of that agreement.

Validity of the instalment sale agreement

[17] In advancing these arguments concerning the validity of the instalment sales agreement, counsel was faced with a conundrum. His client had claimed and received the benefit of the deduction from his taxable income of the losses incurred by him in consequence of his participation in The Kite No 2 Partnership. Those losses had been incurred because the partnership had purchased an interest in the aircraft by means of the instalment sale agreement and thereby became entitled to claim the depreciation allowance on the acquisition of an aircraft as well as the trading losses incurred by the partnership, which would have included interest payable to Investec. If that agreement was invalid the status of these claims was, at its lowest, put in doubt. Faced with those considerations counsel accepted that RBA had indeed had authority in terms of the deed of partnership to conclude the agreement and his other contentions regarding its validity became muted. The various challenges to its validity were in any event without merit and these issues can accordingly be disposed of relatively simply.

[18] As regards the authority to finance the acquisition of the aircraft by way of an instalment sale agreement, Cormorant's authority to do this flowed from the terms of the partnership agreements. The material part of clause 5.2 provided that:

'… the managing partner shall be responsible for the day to day management of the partnership business and the financial management of the partnership. The managing partner shall have the authority to act and bind the partnership in respect of all matters or affairs which concern the partnership business without reference to the other partners, and in exercising its powers the managing partner shall not be required to have regard to the interests of any particular partner, but shall exercise its authority with regard to the general interests of the partnership as a whole and of the partnership business.'

The two partnerships had incurred a liability to Aerospace Express of a little over R4 million. Cormorant was obliged under this clause to arrange finance to enable these payments to be made. There is nothing unusual in securing finance by way of an instalment sale agreement any more than by way of a bank overdraft or a financial lease. The reason for doing so was explained in evidence as being that it was the cheapest form of finance available. There can be no doubt that Cormorant was authorised to conclude this agreement and the challenge to its authority was misconceived.

[19] The first of the technical objections arose from the fact that the agreement identified the purchaser as 'Cormorant Aviation (Pty) Ltd acting in its capacity as agent for The Kite Partnership'. The suggestion was that the agreement was accordingly not one between Investec and Cormorant, but one between Investec and an entity that did not exist. This prompted the prayer for rectification to insert the words '1 and 2' after 'Kite'. The case was then conducted on the confusing basis that such an amendment was necessary in respect of both the instalment sale agreement and the deed of suretyship, where the principal debtor was similarly described. Thereafter a considerable amount of time in the trial was devoted to evidence in chief and cross-examination concerning particularly Ms Dillon's understanding, but also that of others, of the legal effect of the different agreements. This was further protracted by the fact that it was often based on a misconception of both the law and the meaning of the documents. It was also unfair, because it was directed at a witness who had never been admitted to practice in South Africa and who had severed her connection with this country and this business some eleven years prior to her giving evidence.

[20] The correct position was that Cormorant, as the managing partner, was appointed under the partnership agreements to represent the partnerships in all business dealings. All the business of the partnerships was to be carried on in its name. No other party could represent the partnerships in any way. In accordance with this the instalment sale agreement reflected Cormorant as the purchaser of the aircraft and added unnecessarily by way of clarification that it was acting as agent for The Kite Partnership. As Investec was at all times party to the scheme no doubt it inserted the reference to The Kite Partnership for easy identification of the transaction in its records. That, as the unchallenged evidence showed, was the shorthand used by both Cormorant and Investec to refer to both partnerships and the use of the expression here clearly encompassed both. It was accordingly unnecessary to rectify the instalment sale agreement in that regard as, in the event of dispute, evidence could have been led to show that the expression was used in this sense.[9] The deed of suretyship fell to be similarly construed and for the same reason did not need to be rectified.

[21] The confusion arose because the parties misconstrued the import of the statement that Cormorant was acting 'in its capacity as agent' for the partnership. They thought that this meant that it was thereby binding the partnership contrary to the express provisions in the two deeds of partnership that all business should be conducted in its name. That ignored the salutary warning penned by Professor J C de Wet in his contribution on agency in *Lawsa*[10] that:

> 'The expression "agency" is used in such a wide variety of meanings that it cannot be regarded as a term of art denoting a specific branch of law.'

[9] *Hill v Faiga* 1964 (4) SA 594 (W) at 596H-597A.
[10] 1 *Lawsa* 2 ed para 175 where the statement in the original edition is repeated.

Over a century ago Lord Herschell sounded a similar warning when he said:

> 'No word is more commonly and constantly abused than the word "agent". A person may be spoken of as an "agent" and no doubt in the popular sense may properly be said to be an "agent", although when it is attempted to suggest that he is an agent under such circumstances as create legal obligations attaching to agency, that use of the word is only misleading.'[11]

In this case there was no reason to believe that the addition of the phrase 'acting in its capacity as agent' was intended by either Investec or Cormorant to convey anything beyond the fact that Cormorant was 'acting in the interest of another'[12] as it undoubtedly was. The construction of the instalment sale agreement as one between Investec and the partnerships, as opposed to one between Investec and Cormorant, was simply incorrect and occasioned a great deal of wasted time, energy and costs.

[22] The alternative point that Cormorant had acted beyond its authority by disclosing the existence of the *en commandite* partnership and its members to Investec, is also without merit. It flows from a misconception of the legal effect of such disclosure. Whilst it is so that in general the foundation for a partnership *en commandite* is that the existence of the partnership and the identity of the partners, save the disclosed or managing partner, should not be disclosed, the mere fact of disclosure does not serve to render the partnership or the individual partners, as opposed to the disclosed or managing partner, liable on contracts concluded with that partner. Such disclosure may be forced upon the managing partner in the course of performing its functions. Thus a request for finance addressed to a financial institution is unlikely to be

[11] *Kennedy v De Trafford* [1897] AC 180 at 188.
[12] Professor David M Walker, *The Oxford Companion to Law* sv 'agency', at 40.

successful when made in the name of a shelf company, without disclosure of the financial worth and commitments of those standing behind it. That is what happened here. Such disclosure does not infringe upon the reason for anonymity, namely that third parties should not be induced to deal with the managing partner in reliance on the credit of the other members of the partnership as members of the partnership.[13] In the result the mere fact of disclosure does not serve to render either the partnership or the undisclosed partners liable on the contracts concluded by the managing or disclosed partner.[14]

[23] The other technical point is of even less merit. It is based on the proposition that Aerospace Express had transferred ownership in the aircraft to Cormorant and therefore that it was unable to sell the aircraft to Investec and Investec was unable to take delivery of the aircraft. Quite where this was thought to lead is unclear. However it is unnecessary to consider that question because the underlying premises are incorrect. It is trite that a person can sell something that they do not own. Many forms of commodity trading or trading on stock exchanges would be impossible were this not so. All that the seller is required to do in order to transfer ownership, which is usually an obligation under the agreement of sale, is to procure that the owner of the *merx* delivers it by some form of delivery recognised by our law to the purchaser.

[24] In this case Aerospace Express sold the aircraft to Investec. As the basis of the sale was that Investec would acquire ownership of the aircraft, Aerospace Express was obliged to cause Cormorant to deliver the aircraft to Investec in a manner recognised by law as sufficient to transfer

[13] Van der Keessel *Theses Selectae* (Lorenz translation) para 704; *Mmabatho Food Corporation (Pty) Ltd v Fourie en 'n ander* 1985 (1) SA 318 (T) at 322G-I.
[14] *Hall v Millin & Hutson* 1915 SR 78; *R v Siegel & Frenkel* 1943 SR 13 at 15.

ownership. To the knowledge of all concerned the aircraft was never to leave the physical possession of Aerospace Express, so that all that was required was an act on the part of Cormorant, accepted by Investec and Aerospace Express, that conveyed unequivocally that the aircraft was now being held on behalf of Investec as owner. One need look no further in that regard than the execution and implementation of the instalment sale agreement itself. Not only was the price for the aircraft paid by Investec to Aerospace Express, but that was done in terms of an agreement with Cormorant which recorded that Investec had purchased the aircraft at Cormorant's request and would be and remain the owner until it received payment in full of what was due to it. There was a clear intention by all three parties that Investec would become owner of the aircraft, and this is reflected in their subsequent behaviour, because, when the scheme collapsed, Investec sold the aircraft to Aerospace Express. That intention was sufficient to transfer ownership to Investec by attornment.[15]

[25] For those reasons, the instalment sale agreement was validly concluded and binding on Cormorant. The remaining question is whether the deed of suretyship executed by Ms Dillon on behalf of Mr van Oudtshoorn is binding upon him. It is to that question that I now turn.

The validity of the suretyship

[26] Various issues arise under this head. The first, pursued at the trial and in the heads of argument, arose from the terms of the power of attorney and concerned Ms Dillon's authority to execute the deed on behalf of Mr van Oudtshoorn. The second was whether, assuming she had such authority, the deed she signed fell within the scope of that authority

[15] *Lawsa* Vol 27 para 373.

given the limited capital contribution of Mr van Oudtshoorn to the partnership. The third arose from a request by the court addressed to the parties before the hearing to deal with the implications of s 6 of the General Law Amendment Act 50 of 1956, which provides that a deed of suretyship is valid only if reduced to writing and signed by or on behalf of the parties. Flowing from this and the fact that Ms Dillon did not qualify her signature when she signed the deed it was contended that there was non-compliance with the statutory requirements for validity.

[27] The focus of the argument in the court below, and in the heads, on the scope of Ms Dillon's authority in terms of the power of attorney was on that part of it in which she was authorised to conclude an agreement of loan on behalf of Mr van Oudtshoorn. The argument was that, as all that the power of attorney did was authorise her to borrow money on his behalf and one cannot stand surety for oneself, the reference in that part to a suretyship did not extend to the suretyship she executed, purportedly on his behalf.

[28] That argument is correct as far as it goes, but it falls short when consideration is given to the terms of the power of attorney as a whole. They vested in RBA the power to conclude the partnership agreement and to manage and transact Mr van Oudtshoorn's business arising from or attributable to the partnership agreement or any matter or thing in connection with that agreement. They went on to give RBA 'full and unrestricted power and authority to represent and act for me and in my name … without any limitation' in relation to the partnership and his involvement therein. Bearing in mind that the partnership would need to raise finance to purchase the aircraft and that Cormorant had the power to do so by means other than loans from or obtained by the partners, such a

power was ample to allow the attorney to provide, in the name of the partner, security by way of a deed of suretyship for the indebtedness of Cormorant. That is reinforced by reference to the fact that the same power of attorney authorised RBA to borrow money on behalf of Mr van Oudtshoorn. To authorise RBA to do that, whilst objecting to it providing security for the finance obtained by other less expensive means to acquire the aircraft, smacks of straining at a gnat whilst swallowing a camel. After all, suretyship is an accessory obligation,[16] so that it could not be more onerous for Mr van Oudtshoorn than a loan would have been and it might well have been less onerous, if the scheme had been successful financially. Accordingly Ms Dillon was authorised to execute the deed of suretyship on behalf of Mr van Oudtshoorn.

[29] The next issue is whether in executing the deed of suretyship Ms Dillon exceeded her authority. It will be recalled that Mr van Oudtshoorn committed himself to a capital contribution to the partnership of R1.625 million. The deed of suretyship is for a limited amount in that it provides that the capital amount recoverable thereunder is limited to R2 031 000, plus further sums for interest, charges and costs as may become due and payable by Cormorant. It was argued that the effect of this was to bind him to pay an amount in excess of the maximum amount that he could be called upon to contribute to the partnership; that this exceeded the authority conferred by the power of attorney; and accordingly that the suretyship having been given in excess of that authority was unenforceable.[17]

[30] At first blush the argument is attractive but on closer examination I think it incorrect, because it starts with Mr van Oudtshoorn's maximum

[16] *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 622I-623G.
[17] *Du Preez v Laird* 1927 AD 21 at 28.

capital contribution to the partnership and ignores the fact that the obligation under the deed of suretyship is one owed to Investec. Once it is recognised that there is nothing to prevent an undisclosed partner in an *en commandite* partnership from accepting liability under a deed of suretyship to the financier of the partnership's business activities, the amount of that liability is not necessarily confined to the amount of that partner's maximum liability under the deed of partnership. The true question is then whether the power of attorney restricted Ms Dillon's authority to furnishing a deed of suretyship limited to the amount of the capital contribution.

[31] If one starts by looking at the power of attorney in respect of the possible loan from Investec it makes it clear that whilst the capital amount of any loan is limited to the capital contribution to the partnership, namely, R1.625 million, the actual financial commitment is considerably greater. This is because it authorises the borrowing of the full amount of R1.625 million 'subject to normal banking requirements including the requirement to pay interest and any other usual bank charges'. According to the evidence interest rates at the time on bank loans were around 20 per cent. Accordingly a loan of this amount over the four years that the partnership would endure, with interest payable annually, would involve a total commitment of nearly R2.9 million in all depending on how interest was calculated and how frequently payments would be made. That suggests that the limitation now contended for is not justified.

[32] A second feature is that the power of attorney authorised the furnishing of 'any additional security which the bank may require' for any loan, including surety bonds or notarial bonds. Obviously any such

security would have to cover not only the capital amount of the loan but the entire indebtedness however arising. As the purpose of security is to cover the financial institution in the event of default it will necessarily be for more than the total amount of the indebtedness. Whilst it is true that Mr van Oudtshoorn could not have furnished a suretyship for a loan to himself, he could have provided security in some other form such as by a pledge, a cession of a life insurance policy or the proceeds of the retirement annuities that triggered his involvement in this scheme, or a bond of some sort over movable or immovable property. Bearing in mind the factors mentioned above it cannot be said that the power of attorney limited the authority to furnish security to R1.625 million.

[33] The third and decisive point is that all this was to be in accordance with 'normal banking requirements'. Mr McLeod, from Investec, testified without challenge that it was Investec's practice at the time and that of a number of other banks, when accepting limited suretyships from a number of individuals in respect of a global debt, to require that each suretyship be for the individual's share of the debt plus 25 per cent. That is how the amount of R2.031 million was determined. Accordingly this suretyship was provided in accordance with normal banking requirements at that time.

[34] Taking these factors together the authority given to RBA under the power of attorney to execute a suretyship on behalf of Mr van Oudtshoorn was not restricted to one for R1.625 million. Whilst I accept that the amount of the capital contribution to the partnership was relevant to determine the scope of the authority, the other factors show that the power extended to the execution of a suretyship on the terms that Investec

demanded and received. As it happens the agreed amount for which judgment was entered was less than R1.625 million.

[35] The final point arises from the terms of the suretyship itself. It commences by saying:

> 'I/We, the undersigned,
>
> Diederik Johan Van Rheede Van Oudtshoorn ID No: 4002255038004
>
> do hereby bind myself/ourselves unto and in your favour as surety … for and co-principal debtor/s jointly and severally with
>
> Cormorant Aviation (Pty) Ltd acting in its capacity as agent for The Kite Partnership …'

The deed then contains the conditions of the suretyship and towards the end contains a clause that commences:

> 'I/We hereby certify by my/our signature appended below that when this Suretyship was signed by me/us …'

Lastly the deed records that it was 'done and signed' by Mr van Oudtshoorn, giving his address, at Johannesburg on 21 April 1995. The problem is that Mr van Oudtshoorn's signature appears nowhere on the deed, which is signed on each page by Ms Dillon, without any qualification.

[36] It was submitted (although not raised in either the pleadings or the heads of argument) that this rendered the suretyship non-compliant with the statutory requirements for the validity of a deed of suretyship. Whilst the deed purported to have been signed by the surety, another person had signed it, without any indication that the signatory was doing so on behalf of the surety. It was contended that such an indication was essential to the validity of the deed of suretyship. The position in this case is no different, so the argument ran, from that where two people executed suretyships at the same time and by mistake each signed the deed intended for the

other's signature. It was argued that as, on the face of it, neither deed would comply with the statute, both would be formally invalid. If that were indeed so and they were formally invalid this could not be remedied by way of rectification.[18]

[37] The only issue in the present case is whether the deed of suretyship is formally valid. If it is then the omission by Ms Dillon to state that she was signing on behalf of Mr van Oudtshoorn could be dealt with either by way of evidence that she was in fact authorised or by way of rectification, it matters not which. I turn then to the issue of formal validity. It was said in *Fowles*[19] that whilst care must be taken not to defeat the intention of the statute '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'. To that end one examines the deed – for formal validity depends on its terms alone – and if the document is reasonably capable of an interpretation consistent with validity it should be held to be formally valid.[20] If there is ambiguity, and it is capable of being given a meaning consistent with validity, preference must be given to that meaning that renders it valid.[21]

[38] Adopting that approach in this case, a fair reading of the document would result in the reader saying that it reflected two possible situations. The one would be that Ms Dillon had signed it in error for some or other reason and the other is that she was signing on behalf of Mr van Oudtshoorn. Those are the only possible explanations for her having signed the deed. If it mattered, I would be inclined to say that the latter is

[18]*Magwaza v Heenan* 1979 (2) SA 1019 (A) at 1029A-C read with 1026A-D; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) paras 9 and 10.
[19] Para 11.
[20]*Fowles* para 18.
[21]*Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 (3) SA 107 (SCA) para 11.

the more probable because people do not usually sign formal documents of this type by mistake, which is something different from signing a document that contains a mistake. However it is unnecessary to go that far. Once the deed is capable of both constructions, one of which renders it formally valid and the other of which renders it invalid, it is the former construction that we must adopt. That being so this deed must be construed as having been signed by Ms Dillon on behalf of Mr van Oudtshoorn, as indeed it in fact was. The contention that it does not comply with the statute falls to be rejected.

[39] That serves to dispose of the merits of the appeal in favour of Investec. It renders it unnecessary to consider the contentions based on estoppel, waiver and ratification. I am concerned that the pursuit of these contentions appears to have substantially protracted the trial and, at least in regard to the estoppel and waiver, appear to have had little prospect of success on legal grounds.[22] However the attempt to rely on ratification, if necessary, has some support in English authority under the Statute of Frauds.[23] As all three were said to depend on the same facts it is impossible at this stage to determine whether and to what extent the pursuit of the other two arguments caused the proceedings to take longer than they would otherwise have done and both parties are at fault in that regard. There was lengthy evidence in chief and cross-examination of witnesses on legal issues, frequently based on a flawed understanding of the law by all concerned. The cross-examination on behalf of both parties was directed in virtually every instance at seeking to expose the witness as dishonest, when flawed recollection; exhaustion in the light of the

[22] *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 411H-412C; *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) at 26G-I and the authorities collected in *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D) at 476B-478B.
[23] *Maclean v Dunn and Watkins* 4 Bing 722 at 727; 130 ER 947 at 949.

length of the proceedings;[24] errors in documents, combined with misguided attempts to explain them in the light of misconceptions of the law; and an endeavour to present themselves in the best possible light were more probable explanations. Such cross-examination has been the subject of previous adverse comment by this court.[25]

[40] There is one further matter flowing from the decision by Bosielo J to award costs against Mr van Oudtshoorn on a punitive scale. He did so because he regarded the approach to the defence to have been unduly obstructive; because he found his behaviour in claiming the deduction of losses from his participation in the scheme from taxable income in the determination of his tax liability, whilst contending that the contracts underpinning the scheme were invalid, 'morally reprehensible'; and because in some respects he regarded Mr van Oudtshoorn's evidence as dishonest. All of this he characterised as 'a serious abuse of the court process' flowing from a trial in which, so he said, 'he knew that he had no *bona fide* defence.'

[41] With respect that last finding is inconsistent with the subsequent grant of leave to appeal to this court. It may be that the defences were technical, as is often the case in situations such as this, but that is not of itself a reason to grant a punitive costs order. The record shows that Mr van Oudtshoorn was concerned from an early stage with the scheme's apparent failure to live up to its promise and the impact this might have on his retirement. He relied extensively in entering into the scheme on financial advisers and when problems arose he relied on legal advisers he

[24] The trial took some 22 days of evidence and argument during which Ms Dillon gave evidence and was cross-examined for 7 days and Mr van Oudtshoorn for 6. In the case of Ms Dillon she had travelled from the USA for the trial and was under pressure to return, which would have added to her tiredness and stress.

[25] *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) paras 26 and 37.

regarded as experts. Many of the points taken were legal points manifestly taken on legal advice from others. Litigants, even those who are legally qualified, are entitled to rely on the legal advice that they receive. When faced with a claim of the magnitude of the present one I think that Kekewich J was correct in saying in *Blank v Footman Pretty & Co*[26] that 'the defendant is entitled to put his back against the wall and to fight from any available point of advantage'.[27] I appreciate that those remarks related to a defendant who was successful on some and not other defences, but in principle it cannot matter that all the defences advanced fail. Something more is required before a punitive costs order is made.

[42] In the result the following order is made:

(a) The appeal is upheld to the extent that the order of the trial court is amended by the deletion of paragraph 1 thereof and the deletion of the words 'on an attorney and client scale' in paragraph 4 thereof.

(b) The appeal is otherwise dismissed with costs.

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M J D WALLIS

JUDGE OF APPEAL

[26] *Blank v Footman Pretty & Co* (1888) 39 Ch D 678 at 685.

[27] Cited in *Nel v Nel* 1943 AD 280 at 288.

Appearances

For appellant:	N G D Maritz SC
	Instructed by:
	Gildenhuys Lessing Malatji, Pretoria
	Honey Attorneys, Bloemfontein
For respondent:	Lucas J van Tonder
	Instructed by:
	Glyn Marais Inc, Johannesburg
	Lovius-Block, Bloemfontein.