



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **A268/2018**

In the matter between:

**SHAMAN FILLING STATION CC t/a
TOTAL ORANGESIG**

First Appellant

CAROL BALINDIWE MOTAKE

Second Appellant

and

**GARAGESURE CONSULTANTS AND
ACCEPTANCES (PTY) LTD**

Respondent

CORAM: NAIDOO, ADJP *et* DAFFUE, J *et* REINDERS, J

HEARD ON: 24 MAY 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 30 MAY 2019

I INTRODUCTION

- [1] This appeal lies against a judgment by a single judge of this Division (“the trial court”) granting orders in favour of the plaintiff against two defendants, the one paying the other to be absolved, in the sum of R500 000.00 together with interest on this amount and costs of suit.¹
- [2] On 26 October 2018 the trial court granted leave to appeal to the unsuccessful defendants, costs of the application for leave to appeal to be costs in the appeal.²

II THE PARTIES

- [3] First and second appellants, the unsuccessful defendants in the trial court, are Shaman Filling Station CC, t/a Total Oranjesig and Carol Balindiwe Motake respectively. They were represented before us by Adv S Grobler, who also appeared in the trial court, duly instructed by Honey Attorneys. It is perhaps appropriate to mention at this stage that the particulars of claim and documents relied upon by plaintiff were drafted rather poorly. This is highlighted by the allegation in the particulars of claim that the first defendant is a company which is clearly not the case if its registration number and the relevant documents are considered.³ The first appellant is a close corporation. More will be said in this regard later.
- [4] Respondent, the successful plaintiff in the trial court, is Garagesure Consultants and Acceptances (Pty) Ltd, represented in the appeal as well as in the trial court by Adv D de Kock, instructed by Webbers Attorneys.

¹ Order on p 120 and judgment on pp 121 -129 of the record.

² Record p135.

³ Par 2 of particulars of claim: p 5 of record, read with pp 20, 21, 23, 25, 26 31 and 36.

- [5] In order to avoid confusion the parties will be referred to as cited in this court.

III THE RELIEF CLAIMED

- [6] Respondent described itself as “at all relevant times hereto acting as duly authorised agent of COMPASS INSURANCE COMPANY LIMITED which is an insurance company”⁴ This is in line with the documentation relied upon.⁵
- [7] In order to claim the amount of R500 000.00 plus interest and costs, respondent averred that (1) it issued a fuel guarantee for this amount to Total SA (Pty) Ltd (“Total”) in respect of purchases to be made by first appellant from Total and (2) the second appellant bound herself as surety and co-principal debtor with first appellant “for all its obligations under the agreement.”⁶
- [8] The fuel guarantee is not attached to the particulars of claim. POC3 relied upon is a letter and not the actual guarantee.⁷ However, it is accepted that appellants admitted that a fuel guarantee was issued. The terms thereof remain a mystery and were not dealt with at all in the evidence.
- [9] The Suretyship Agreement, POC4, is inelegantly worded to say the least. It will be dealt with in more detail later herein.
- [10] It is respondent’s case on the pleadings that first appellant owed Total in excess of R2m and that it had to pay the amount of R500 000.00 to Total on demand in order to give effect to its obligations in terms of the fuel guarantee.

⁴ Par 1 of particulars of claim, p 5.

⁵ Introductory paragraph of Fuel Insurance Policy, POC1, p 10 and Suretyship Agreement, POC4 on p 21.

⁶ Paras 8 and 10 of particulars of claim, p 7, read with the Suretyship Agreement, POC4 on pp 21 – 24.

⁷ P 20.

IV THE TRIAL COURT'S JUDGMENT

- [11] The trial court held, as testified to by the only witness who testified at the trial, Mr Mitchell, the managing director of respondent, that respondent "was mandated by Compass Insurance to do certain things" and "in the event of success in this litigation, money will be paid to the bank account of Compass Insurance to which they have rights."⁸
- [12] It also held that according to the "uncontested evidence Total SA delivered fuel products to the defendants in the amount of R2 193 176.36," stating that the debtor's account and certificate of balance were part of the record.⁹
- [13] The trial court dealt with the appellants' submission that respondent did not have the necessary *locus standi in iudicio* to institute the action.¹⁰ It held that the Surety Agreement was not disputed and that "(t)he parties to the Surety Agreement are clearly identified with rights and duties vis-a-vis each other. As a result there can be no talk of lack of *locus standi* and this argument cannot be upheld."¹¹
- [14] It was proved that Total demanded R500 000.00 from respondent which this entity paid to Total in terms of the fuel guarantee. Therefore, the trial court had little difficulty in granting judgment as prayed for.

V THE GROUNDS OF APPEAL

- [15] The appellants formulated several grounds of appeal, but it is only necessary to mention the following which Mr Grobler advanced in his heads of argument and in oral argument before us, to wit:
- (1) The trial court erred in finding that respondent had *locus standi* to sue on behalf of its principal, Compass Insurance;

⁸ Par 13 of the judgment on p 125.

⁹ Par 20 on p 127.

¹⁰ Paras 22 – 25 of the judgment, pp 127 & 128.

¹¹ Par 25.

- (2) the trial court erred in finding that respondent had made out a case to the effect that the Surety Agreement provided for a right of recourse against appellants.

VI EVALUATION OF THE JUDGMENT AND THE PARTIES' SUBMISSIONS

- [16] The first question to be asked is whether respondent was enforcing a legal right and had sufficient interest in the relief claimed. A sufficient interest is in itself not enough; the claim must be based on a legally enforceable right.¹² We are not concerned with a right to address social injustice and s 38 of the Constitution is not applicable. Therefore it is relevant to ascertain whether respondent's rights have been adversely affected by the alleged wrong.¹³
- [17] Several exceptions are applicable to the general rule.¹⁴ I considered all these, but could not find any authority to support respondent's version that it was entitled to sue as agent. I enquired from Ms De Kock if she could assist, but she could not.
- [18] As a general rule an agent has no *locus standi* to sue or be sued in his/her own name on behalf of the principal. Obviously, when an agent has acquired contractual rights in his/her own name, the agent may sue to claim what is due.¹⁵ Three documents, to wit the particulars of claim, Fuel Insurance Policy and the Suretyship Agreement, stipulate that Garagesure is the agent of Compass Insurance. It needs to be pointed out that both agreements refer

¹² Cilliers et al, Herbststein & Van Winsen: The Civil Practice of the High Court of South Africa, 5th ed pp 147 & 185.

¹³ Ibid p 186 & authorities quoted.

¹⁴ Ibid pp 147 & 148; 190 – 204.

¹⁵ Continental Illinois Bank v Greek Seamen's Pension Fund 189 (2) SA 515 (D & CLD) at pp 538H – 542C and Springfield Omnibus Service Durban CC v Peter Maskell Auction CC [2006] 4 All SA 483 (N) paras 8 - 15.

to the contracting party as Compass Insurance, which is conveniently referred to throughout the documents as Garagesure. In my view this does not change the identity of the real contracting party, to wit Compass Insurance. No agency agreement has been pleaded or tendered in evidence and the terms of such agreement, if it exists, are unknown.

- [19] One company may not claim in its own name for and on behalf of another company, even if they are sister companies within the same group. The Constitutional Court dealt with an analogous issue in *Areva*.¹⁶
- [20] Respondent and Compass Insurance are no doubt separate legal entities if the pleadings and the evidence are evaluated. Mr Mitchell testified during examination in chief that “we act on the mandate of Compass Insurance and recoveries form part of that mandate any monies recovered we pay into their bank account which is held by Compass Insurance but we have user rights.”¹⁷ (emphasis added). This reminds me of the position of a firm of attorneys instructed to collect a client’s debtor’s book. Surely, the firm of attorneys cannot sue the debtors in their own name, unless the claims have been ceded to it.
- [21] The R500 000.00 was paid from Compass Insurance’s bank account and in the event of respondent’s claim being successful, the amount to be collected has to be paid into the same account.¹⁸ The necessary consequence of the evidence – both in chief and during cross-examination – is that Compass Insurance was the owner of the money that was used to pay Total in

¹⁶ *Areva NP Inc in France v Eskom Holdings (SOC) Ltd and another* 2017 (6) SA 621 (CC) at paras 29 – 34 & 37 – 39.

¹⁷ Record, p 92 lines 10 -14.

¹⁸ As confirmed during cross-examination: record, p 93.

accordance with the fuel guarantee and that Compass Insurance expected to receive the amount of R500 000.00 so paid out together with interest in the event of a successful claim against appellants. It is apparent from the evidence that Garagesure did not even act as a conduit pipe in respect of funds paid out or received. Compass Insurance's bank account was used at all times.

[22] I am of the view that respondent lacked *locus standi* to sue for an amount allegedly due to Compass Insurance and this conclusion should be the end of the matter. However, in the event that this might be an incorrect conclusion, I shall briefly deal with the second ground of appeal mentioned above.

[23] I tried to understand what the parties intended to achieve with the Suretyship Agreement, but had great difficulty in interpreting the contract. I accept that suretyships were required, but whether a valid and enforceable agreement was entered into is a different matter. In an oft-quoted judgment Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Endumeni Municipality*¹⁹:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material

¹⁹ Natal Joint Municipal and Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18. See also Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at par 10 -12.

known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

Thus, the matter must be approached holistically and context and language must be considered together with neither predominating over the other. Lewis, JA stated the approach as follows in *Mahmood Investments*:²⁰

“It is settled law that the contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract It is also clear that the position must be given a commercially sensible meaning ...”

[24] In *Novartis* Lewis, JA repeated her views in the following words²¹:
 “[28]..... A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.” (emphasis added)

[25] I repeat what Lewis, JA said in *Novartis supra*. In order to establish what the parties intended, all the facts – the context – must be examined in order to determine what the parties intended. In the words of Wallis, JA in *Endumeni supra*, a “sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

²⁰ BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd [2010] 2 All SA 295 (SCA) at para 11.

²¹ Novartis v Maphil [2015] ZASCA 111 (3 September 2015) at para 28.

- [26] The Fuel Insurance Policy provides for subrogation in clause 22 thereof which reads as follows: “On the payment of a claim in terms of this Policy, the Fuel Company shall transfer to Garagesure all rights relating to the claim so that Garagesure is subrogated to such rights.”²² Respondent’s counsel made it clear at the start of the proceedings in the trial court that no reliance was placed on subrogation. However, Mr Mitchell was confronted about this in cross-examination and it became evident that he had difficulty understanding the basis of respondent’s claim.²³ He had to admit that respondent did not rely on a cession of the claim from Total to it as the agreement anticipated – whether that is required in the case of subrogation is not to be considered for purposes hereof – and then indicated that the claim is actually based on the Suretyship Agreement. It is in this agreement that appellants bound themselves according to the witness and therefore respondent solely relied on this agreement for its claim against appellants.²⁴
- [27] After much deliberation during cross-examination Mr Mitchell eventually had to concede that the Surety Agreement does not stipulate that in the event of Garagesure (or Compass Insurance) having to make payment to Total, it would be entitled to claim the amount so paid from appellants.²⁵
- [28] In order to establish whether Mr Mitchell’s concession was fairly made, I considered the judgment of the trial court carefully in conjunction with the authorities quoted above pertaining to

²² POC1 at p 14.

²³ Record, pp 95 – 99.

²⁴ Record, p 103 lines 15 -18.

²⁵ Record, pp 104 – 107 and **p 17 lines 1&2 in particular.**

interpretation of documents as well as the principles applicable to performance guarantees.

[29] I referred to paragraphs [22] and [23] of the trial court's judgment above. I repeat that the trial court found that clauses 3.1 and 3.3 were the relevant parts of the Suretyship Agreement and it then also referred to clause 4.2 thereof which stipulates that the agreement "extends to any damages or other compensation to which Garagesure may be entitled, arising out of the guarantee." The respondent did not claim for damages or compensation of some sort. It sought to be reimbursed for the amount paid to Total in terms of its Fuel Guarantee. In clause 3.1 second appellant bound herself as surety for the punctual performance by first appellant of its obligations in connection with the "Guarantee". I presume the guarantee mentioned in this clause is a reference to the "fuel insurance guarantee policy" mentioned in clause 2.1. There is no such thing as a "fuel insurance guarantee policy" although the parties apparently referred to the Fuel Insurance Policy issued by Compass Insurance to Total, POC1. Apparently, Compass Insurance (or Garagesure for the argument) issued a fuel guarantee which has not been placed before the trial court. The issuing of the guarantee was admitted, but its terms and conditions remain mysterious.

[30] Performance guarantees are often encountered in economic life. Insurance companies and banks are generally responsible for issuing these guarantees to employers or owners relating to, for example, construction contracts. In the event of non-compliance by the contractor of its obligations towards the employer or owner, the insurance company is called upon to settle what it undertook

to pay in such event. The guarantor generally has an independent, autonomous contract with the employer/owner as beneficiary, but it may also be no more than an accessory obligation.²⁶

- [31] The parties hereto probably had in mind the signing of a counter indemnity as was the case in *Lombard Insurance*.²⁷ In such case the guarantor who indemnifies the employer/owner (or in this case the supplier) arranges for a counter indemnity agreement to be entered into with the contractor or in this case the fuel dealership in terms whereof the guarantor is to be indemnified upon paying on demand by the beneficiary. If suretyships are also required from others on behalf of the principal debtor, these are then obtained as was the case in *Lombard Insurance*. In the present matter respondent, who was probably responsible for drafting of the agreement, apparently sought to merge the counter indemnity and Suretyship Agreement into one document, causing serious confusion in the process. I agree with Mr Grobler that in terms of the “guarantee contract” the insurer, Compass Insurance (or for the argument Garagesure), had to retain a right to claim from its insured what it might be called upon to pay Total. It accepted payment of monthly premiums from first appellant in exchange for the indemnity provided, but if it also had in mind to be fully reimbursed by first appellant, that should have been agreed to in clear terms. The same argument applies to the terms of the Suretyship Agreement which does not contain a clause, based on an objective interpretation of the agreement and considering the language used and the context, entitling

²⁶ *Compass Insurance v Hospitality Hotel Developments* 2012 (2) SA 537 (SCA) at pp 540 – 542B.

²⁷ *Lombard Insurance Company Ltd v Schoeman* [2018] 1 All SA 554 (GJ) at para 10 and further.

Compass Insurance (or Garagesure) to sue appellants for amounts paid out to Total. Second appellant bound herself as surety for the performance of first respondent in connection with the “Guarantee.”

VII CONCLUSION

[32] In summary, respondent had no *locus standi* to issue summons on behalf of Compass Insurance, a totally different legal entity. Even if I am wrong in this regard, the second point discussed above should be adjudicated in favour of appellants. The trial court erred in granting judgment in favour of respondent. The appeal must succeed. Costs should follow the event.

VII ORDERS

[33] Consequently the following orders are made:

- (1) The appeal is upheld with costs.
- (2) The orders of the trial court are set aside and substituted with the following:
“The plaintiff’s claim is dismissed with costs.”

J P DAFFUE, J

I concur

S NAIDOO, ADJP

I concur

C REINDERS, J

On behalf of Appellants : Adv S Grobler
Instructed by : Honey Attorneys
BLOEMFONTEIN

On behalf of Respondent : Adv D de Kock
Instructed by : Webbers Attorneys
BLOEMFONTEIN