



**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: **592/2019**

In the matter between:

CHARL DANIEL WILKE N.O.

1st Applicant

THERESA WILKE N.O.

2nd Applicant

T ROOS INDEPENDENT TRUSTEE (EDMS) BPK

3rd Applicant

(Registration no: 2017/119408/07)

and

GRIEKWALAND WES KORPORATIEF LTD

Respondent

CORAM: DAFFUE, J

HEARD ON: 13 JUNE 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 20 JUNE 2019

I INTRODUCTION

- [1] The trustees of a trust seek cancellation of a surety bond they have passed in favour of a creditor during 2003, sixteen years ago. The crisp point to be decided is whether the creditor may be compelled to relinquish its contractually acquired right to hold on to its security. The trustees aver that the claim against the principal debtors for whom they stood security was finally dismissed and became “done and dusted”; therefore the creditor may not have the proverbial second bite at the cherry as the creditor seeks to achieve. If this sounds a bit confusing, the relevant facts will provide more clarity. Legal principles such as election, *res iudicata*, issue estoppel, the effects of deregistration of a company and the subsequent reinstatement of its registration shall be addressed.

II THE PARTIES

- [2] The three trustees of the Wilke Boerdery Trust, IT 1304/1995 (“the Trust”), cited as the applicants are Mr Charel Daniël and Mrs Theresa Wilke and an independent trustee. I shall herein later refer to them as the applicants and to Mr Wilke as “Wilke.” Adv S Grobler appeared for the Trust in this application and also for Wilke and Karob Boerdery (Pty) Ltd (“Karob”) in case no 4573/2009 herein later referred to as “the 2009 action.”
- [3] Griekwaland Wes Korporatief Ltd (“GWK”) is the respondent in this application, it having instituted the 2009 action against Wilke and Karob. Adv KW Lüderitz SC, assisted by Adv P Lourens, appeared for GWK.

III THE RELIEF CLAIMED

- [4] The Trust seeks an order in terms whereof GWK be ordered to take the required steps to cause the cancellation of Surety Bond B6027/2003 registered over the Trust's immovable properties, Portion 3 (of 1) of the farm Mayville 236, district Jacobsdal and perseel 190 Riet River Settlement East, district Jacobsdal and that GWK be ordered to pay the costs of the application on an attorney and client scale.
- [5] It should be placed on record for convenience of the reader hereof that the *raison d'être* for the relief claimed is the Trust's reliance on the judgment of Kruger, J in the 2009 action which was not only upheld by the full bench of this division, but the Supreme Court of Appeal ultimately dismissed GWK's petition for leave to appeal. Kruger, J dismissed GWK's action, relying on an acknowledgment of debt ("AoD"), in which it claimed an amount of nearly R13m from Wilke and Karob. More will be said about the judgment later. Wilke, deposing to the founding affidavit in support of the Trust's application, avers in paragraph 9.1 thereof that "GWK has exhausted all legal remedies at its disposal to claim money it alleged Karob and I owed it."

IV FACTUAL MATRIX

- [5] In order to make sense of the defences raised by GWK, it needs to be pointed out that numerous aspects mentioned herein are either common cause, or can be accepted as correct based on the *Plascon Evans* principles. Wilke, Karob (that is Karob Boerdery (Pty) Ltd, previously known as CD Wilke Boerdery (Pty) Ltd) and Henque 4335 CC ("Henque") entered into various credit

agreements with GWK. No doubt, Wilke and his group of entities found themselves in a financial predicament to such an extent that they could not serve the various credit agreements.

- [6] During March 2005 Wilke, Karob and Henque applied to GWK to have the debts owing by them to be consolidated into one single account in the name of Wilke (later Karob). GWK approved the request on the express condition that all the securities granted by Wilke, the Trust and Henque would remain in place in securitisation of the amounts to be assumed by Wilke (later Karob). These sureties agreed to such conditions. The debt was consolidated and instalments were rescheduled. On 26 January 2006 Wilke signed the AoD on behalf of Karob and also bound himself in his personal capacity as surety and co-principal debtor in favour of GWK. It was admitted that Karob owed R12 787 871.82 at the time, the arrears being R4 831 871.05. Settlement of the arrears in instalments was agreed upon and an acceleration clause provided that in the event of default, the full outstanding amount would become due and payable at once. Henque's portion of the debt assumed by Karob pursuant to the debt consolidation amounted to R4 226 302.45.
- [7] The only relevance of the debt consolidation is to ascertain which debts are the subject matters of such consolidation. As mentioned, the Trust's liability relates to the debt stipulated in the Surety Bond more fully dealt with later. In terms thereof the Trust bound itself as surety for the indebtedness of Wilke and Henque, jointly and severally, towards GWK in the amount of R5m. The AoD is not a novation of the original debts and/or underlying credit agreements and GWK expressly retained the right to sue the

respective debtors based on the original and underlying credit agreements. The Trust was not a party to the AoD.

- [8] When the debtor failed to comply with its undertakings in terms of the AoD, GWK instituted a provisional sentence summons – the 2009 action – against Karob and Wilke (as surety). Provisional sentence was granted for a certain amount. The matter went on trial whereupon Kruger, J dismissed the action.
- [9] Kruger, J found in paragraphs [21] and [22] of his judgment, after evidence was led in the trial and upon interpretation of the AoD, that the parties intended to deal with the arrears only. Therefore the learned judge held: “Na betaling of nie-betaling van die agterstalliges was eiser geregtig om die volle uitstaande bedrae, met verwysing na die onderliggende kontrakte waarna in klousule 11 en in die eiser se aanmaningsbrief van 7 Maart 2007 verwys word, te vorder.” The court therefore accepted that insofar as the AoD dealt in essence with payment of the arrears, GWK would be fully entitled to proceed against the debtors based on the original and underlying credit agreements to claim what was due in terms thereof.
- [10] The full bench dismissed GWK’s appeal, but remarked that absolution from the instance would probably be the correct order. On 10 January 2017 GWK’s petition to the Supreme Court of Appeal for special leave to appeal was dismissed with costs.
- [11] Mr Grobler argued that insofar as legal issues are to be adjudicated, the Trust cannot be penalised for not dealing fully with the facts raised by GWK. I do not agree. GWK put the relevant factual matrix before the court which it is bound to accept based on the *Plascon Evans* principles, unless it is so far-fetched and untenable and/or false that it could be rejected on the papers. None of GWK’s allegations fall in any of these categories. The

application shall be adjudicated on the facts stated by GWK together with the admitted version of the Trust.

V THE SURETY BOND

- [12] The Surety Bond B 6027/2003 was registered by the Trust in favour of GWK as suretyship for the debts of Wilke and Henque in the total amount of R5m in respect of “gelde geleen en voorgeskiet en/of produksiekrediet verleen en/of goedere verkoop en gelever uit hoofde van ’n skriftelike leningsooreenkoms.” I emphasise that the suretyship relates to a specific credit agreement. It is not the customary suretyship where the surety binds him/her for all amounts due by the principal debtor as well as amounts that may fall due in future. It is also emphasised that the Surety Bond expressly stipulates that the trustees bound the Trust as surety and co-principal debtor.
- [13] I, being well aware of the limited nature of the Trust’s suretyship as contained in the Surety Bond and its claim for cancellation of the Surety Bond, requested Mr Grobler at the onset to explain whether the Trust would seek to rely on the fact that the particular debt might not have been included in the consolidated debt. My concern was, notwithstanding the averments in *inter alia* paragraphs 17, 18, 19, 24.9 and 29 of the answering affidavit, it did not appear clearly from this affidavit that the debt arising from the particular credit agreement also formed part of the consolidated debt. It is apparent that Henque’s debt in excess of R4m, as assumed by Karob, formed part of the total debt of nearly R13m for which the provisional sentence summons was issued. Mr Grobler in no uncertain terms submitted that it was not his client’s case that the debt secured by the Surety Bond was not part and parcel of the consolidated debt. Mr Grobler’s submission is in line

with the pleaded version of the Trust. Consequently, it is not necessary to deal with this issue any further for purposes of adjudication of this application.

VI THE DEFENCES

[14] GWK's defences to the Trust's application can be summarised as follows:

- (1) The Trust was not a party to the 2009 action;
- (2) GWK relied exclusively on the AoD to sustain its cause of action (and clearly not on the numerous underlying credit agreements);
- (3) the balance of the Henque debt in the amount of R4 226 302.45 for which the Trust stood surety as will become clear later, form part of the AoD debt;
- (4) the AoD is not a novation of GWK's original claim against Karob and GWK would be entitled to institute action either in terms of the AoD, or the original cause of action;
- (5) the outcome of the 2009 action is not finally dispositive of GWK's rights to claim payment from Wilke and the Trust (as well as Karob, once its registration as a company has been reinstated) in terms of the principal or underlying credit agreements;
- (6) the claims against Wilke and the Trust (based on special notarial bonds in respect of Wilke) and the Surety Bond (in respect of the Trust) attract a thirty year prescription period¹;

¹ Section 11(a)(i) of the Prescription Act, 68 of 1969 and *Factaprops v the Land Bank* (353/2016) [2017] ZASCA 45 (30 March 2017) at paras [20] – [22].

- (7) GWK's claims against Wilke and the Trust "are alive today as they were from inception."

VII ELECTION, *RES IUDICATA*, ISSUE ESTOPPEL AND THE "ONCE AND FOR ALL RULE"

- [15] Mr Grobler made submissions in an effort to convince the court that GWK would be non-suited in a claim against the Trust based on any one or all of the above principles. He based his arguments predominantly on the so-called extended *res iudicata*. Therefore, so he argued, the Surety Bond should not be allowed to remain registered against the Trust's immovable properties as GWK's security has lapsed. Consequently, the application should be granted.
- [16] The first issue that requires attention is the submission that GWK has elected to issue summons based on the AoD and the submission that it cannot now, after being unsuccessful, revert to the underlying credit agreements and issue fresh summonses based on these agreements. The AoD stipulates, loosely translated, that in the event of default in complying with the AoD, the creditor would be entitled in its exclusive discretion to institute litigation in terms of the AoD or the original cause of debt. It reads as follows in Afrikaans: "... sal die skuldeiser geregtig wees om in sy uitsluitlike diskresie geregtelike stappe in te stel kragtens die skuldbewys of die oorspronklike skuldoorsaak." The doctrine of election is well-known, but I am afraid that Mr Grobler failed to convince me that it applies *in casu*. Mr Grobler submitted that GWK issued summons against Wilke and Karob, not for arrears only, but for the entire alleged

indebtedness; however it failed in three courts. I indicated above on what basis Kruger, J held against GWK.

- [17] Mr Grobler's reliance on *Montesse*² is misplaced. There is no sign that GWK in pursuing action based on the AoD abandoned its other remedies. Clearly, this is not an issue where GWK had a choice between two inconsistent remedies and unequivocally committed itself to one. An example that comes to mind is a party claiming cancellation of the contract and damages, instead of enforcement of the contract. GWK's election to claim payment based on the AoD is surely not a remedy inconsistent with claims for payment of indebtedness based on various underlying credit agreements. GWK's election to rely on the AoD is understood. It probably believed that it would not be necessary to rely on several credit agreements and to prove numerous sales in respect of each of them which would have been time consuming and an onerous task. Mr Grobler conceded that neither Karob, nor Wilke "could have complained had GWK chosen to sue on strength of the original 40 odd credit agreements." He also conceded, on a proposition put to him by the court, that in the event of unsuccessful action having been instituted by GWK on the AoD, for example in that Wilke did not have authority to enter into the AoD or it being found to be null and void based on fraud or misrepresentation, GWK would be entitled to still rely on the underlying agreements to claim payment.
- [18] The next issue is the reliance on *res iudicata*. Mr Grobler argued that GWK's claim was dismissed. It was not a matter of absolution from the instance in which case the *exceptio rei iudicatae* could not be raised successfully. Even accepting that Karob might and

² *Montesse Township and Investment Corporation (Pty) Ltd & another v Gouws NO & another* 1965 (4) SA 373 (A) at 380H – 381A.

would be reinstated with retrospective effect, I am of the view that GWK's claims against Wilke and Karob have not been finally adjudicated. The Supreme Court of Appeal recently considered the defences of *res iudicata* and issue estoppel.³ The principles pertaining to *res iudicata* are trite. The dispute must have been finally adjudicated in proceedings between (1) the same parties for (2) the same relief on the (3) same ground or same cause of action. Neither the Trust, nor Henque was a party to the proceedings in the 2009 action, obviously no cause of action was pleaded against them and no relief was sought from them. Therefore, *cadit quaestio*.

- [19] Issue estoppel is a consequence of a relaxation of the common law defence of *res iudicata*. At least the same parties must have been involved and the same issue must have arisen earlier for successful reliance on issue estoppel.⁴ Again, it is repeated that neither the Trust, nor Henque was cited as a party in the 2009 action. Also, the AoD as acknowledgement of debt was capable of sustaining an independent cause of action and in particular independent from the principal and underlying credit agreements.
- [20] Mr Grobler submitted, relying on *Janse van Rensburg*⁵, "it amounts to an abuse if the same subject matter is advanced in a second or subsequent case under a different cause of action when the initial chosen cause of action and claim had failed." He based his submission on what he called an extension of the issue estoppel principle. He failed to refer the court to any specific paragraph of the judgment in his heads of

³ *Transalloys v Mineral-Loy* (781/2016) 2017 ZASCA 95 (15 June 2017) at para [10]. See also majority judgment in *National Sorghum Breweries (Pty) Ltd v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at paras [2] – [5].

⁴ *Smith v Porritt & others* 2008 (6) SA 303 (SCA) para [10], referred to with approval in *Transalloys* (previous footnote).

⁵ *Janse van Rensburg NO & others v Steenkamp & another; Janse van Rensburg & others v Myburgh & others* [2009] 1 All SA 539 (SCA) at para [23].

argument and could also not inform me during his oral address on what passages or *dicta* he relied. I allowed him an opportunity to point out the relevant paragraphs relied upon in reply. Eventually he merely referred the court to paragraph [23] in which the court quoted with approval the *dictum* of Olivier, JA in *National Sorghum Breweries*⁶. *Janse van Rensburg* does not support the Trust's case at all. The SCA considered the principles of *res iudicata* and issue estoppel⁷ as well as the claim instituted by the liquidators. It is not necessary to deal with the applicable facts and the law in that matter, save to mention that the liquidators' appeal succeeded in terms whereof it was declared that they were entitled to institute a claim in terms of s 29 of the Insolvency Act, 24 of 1936, notwithstanding an earlier judgment of the SCA under case number 522/2003 in terms whereof they unsuccessfully relied on s 30 of the same Act.⁸ Heher, JA, writing for a unanimous court, stated that the respondents could not be successful⁹ "because a plea of *res iudicata* (whether in its classical or extended form) cannot succeed unless it nullifies the legal force of the cause of action (put otherwise, it cannot be raised successfully if it leaves the plaintiff with a viable cause of action)."

[21] The "once and for all rule" prevents a party to embark on piecemeal litigation. All claims flowing from the same cause of action, or put differently, all claims which are wholly dependable on the same cause of action, must be claimed once and for all in one action. This is trite.¹⁰ There is no basis upon which GWK's intended action against the Trust can be successfully objected on the basis of the "once and for all rule." In this regard Heher, JA

⁶ Ibid.

⁷ From para [19] and further.

⁸ Notice of motion quoted in para [6] and the orders in para [38].

⁹ At para [26].

¹⁰ See also the discussion in *National Sorghum Breweries* op cit at paras [6] – [10].

dealt with a similar defence in *Janse van Rensburg*¹¹ and having found that the respective sections of the Insolvency Act do not create the same cause of action, even in the extended sense, the learned judge of appeal held that the “once and for all rule” could not be applied.

- [22] In conclusion on the four issues raised and dealt with above, no valid submissions have been raised to assist the Trust in its endeavour to have the Surety Bond cancelled.

VIII KAROB’S DEREGISTRATION

- [23] Karob was deregistered on 16 July 2010. This was after institution of the 2009 action, but long before the matter was heard and the judgment by Kruger, J which was delivered on 13 August 2015. Karob has yet to be reinstated as a company in terms of s 82(4) of the Companies Act.¹²
- [24] The existence of a company terminates upon deregistration and it “brings an end to its corporate personality ‘in the same way that a natural person ceases to exist at death.’”¹³ This *dictum*, as Brand, JA held later in the judgment¹⁴ is not entirely correct. Brand, JA continued in paragraph [15] of *Newlands Surgical Clinic* to state that all actions purportedly taken on behalf of the deregistered company after deregistration were void and of no consequence. This included the arbitration proceedings, associated court proceedings and the orders granted against the deregistered company. The reinstatement of Karob as a company in terms of s 82(4) with

¹¹ At para [27].

¹² 71 of 2008.

¹³ *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) at para [15], quoting with approval from *Miller & others v Nafcoc Investment Holding Co Ltd & others* 2010 (6) SA 390 (SCA) at para [11].

¹⁴ *Ibid* at para [26]. Unlike a natural person who has passed away, a deregistered company may carry on with business activities after deregistration to the detriment of third parties.

retrospective effect from date of deregistration, which may include the retrospective validation of all corporate activities, may well be ordered in future on application by an interested person.¹⁵ This aspect does not have to be considered for purposes of the adjudication of this application.

- [25] I agree with Mr Lüderitz that, as a consequence of Karob's deregistration, the proceedings before Kruger, J, his dismissal of GWK's claim and the outcome of the subsequent appeal are null and void as against Karob. He also argued that these judgments do not divest GWK of its claims against Karob, either premised on the AoD or the underlying credit agreements. In my view it is not necessary to adjudicate the application having to rely on nullity and voidness of the aforesaid proceedings and orders. It is still possible for Karob's registration to be reinstated with retrospective effect. Having said this, deregistration or "death" of Karob does not prevent GWK as creditor to proceed with action against the Trust as surety.¹⁶ It is not the law that a surety is released from liability to the creditor when the principal debtor ceases to exist. Mr Grobler conceded this. The inescapable conclusion is that the accessory liability of the Trust as surety pursuant to the Surety Bond remains. I agree with Mr Lüderitz that GWK cannot be compelled to relinquish contractually acquired rights against its will, given the material factual matrix.

IX CONCLUSIONS

- [26] In conclusion, I am satisfied that the Trust remains bound as surety towards GWK. Whether or not Karob's registration as a

¹⁵ Newlands Surgical Clinic op cit at paras [30] & [31].

¹⁶ Traub v Barclays National Bank; Kalk v Barclays National Bank 1983 (3) SA 619 (A) at pp 633/4.

company will be restored is immaterial to the liability of the Trust as surety. In any event, it bound itself as surety for Wilke and Henque's indebtedness towards GWK as is apparent from the Surety Bond. GWK has certainly not exhausted all its remedies to claim money owing to it by Wilke, Karob, Henque and the Trust.

- [27] Finally, I considered an appropriate costs order. The general rule is that costs follow the event. Prior to the launch of the application GWK threatened the Trust with a punitive costs order if it dared taking steps as anticipated. Mr Lüderitz submitted, relying on *Lamprecht*,¹⁷ a punitive costs order should be granted insofar as the Trust acted in a reprehensible manner, well-knowing before institution of the present application what were GWK's defences. I do not agree. GWK could have issued action against the Trust several years ago. Notwithstanding its losses in three different courts, it failed to act positively against the Trust, merely relying on the prescription period of thirty years. In my view the Trust cannot be blamed for resolving to launch the present application in the hope to obtain finality in respect of GWK's security. Eventually Mr Lüderitz asked for costs to include the costs of two counsel. I am satisfied that the nature of the legal principles involved and the importance of the outcome of the case to the parties, especially GWK, justify the fees of two counsel.

X ORDER

- [28] Consequently the following order is made:

The application is dismissed with costs, such costs to include the costs consequent upon the employment of senior and junior counsel.

¹⁷ *Lamprecht v Klipeiland (Pty) Ltd* (753/2013) [2014] ZASCA 125 (19 September 2014) at para [19].

J P DAFFUE, J

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