



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 117/2016**
DATE HEARD: **15 MAY 2017**
DATE DELIVERED: **26 MAY 2017**

In the matter between:

ROPE CONSTRUCTION CO (PTY) LTD

Appellant

- v -

BLAZECOR 116 CC
LANGE, IZAK JACOBUS JEREMIAS

1st Respondent
2nd Respondent

Coram: Mamosebo J et Ndlovane AJ

JUDGMENT

NDLOKOVANE AJ

- [1.] This is an appeal against the decision of the learned Magistrate Ms Tsotsa handed down on 7 September 2016 to disallow an amendment to the particulars of claim during the course of a trial. The Magistrate dismissed the claim of the appellant with costs. The appeal is only proceeding against the 2nd respondent and accordingly postponed against the 1st respondent which has been placed under business rescue.
- [2.] During the proceedings of the appeal, there was no appearance on behalf of the respondents, even though there was proper service on them which they received

on 7 December 2016 at 09:48, nor did they file heads of argument and/or practice notes in terms of the Uniform Rules of this Court.

- [3.] The appellant, Rope Construction Co (Pty) Ltd ("*Rope*") in the Court *a quo*, sued the 1st respondent, Blazecor 116 CC ("*Blazecor*") and the 2nd respondent, Izak Jacobus Jeremias Lange ("*Lange*") for the payment of the sum of R304 900.00 plus interest at the rate of 2% per month *a tempore morae* to date of final payment and costs of suit on the scale of attorney and client. This claim is denied by the respondents.

BASIS OF THE APPELLANT'S CLAIM

- [4.] Rope's claim against Blazecor in the Court *a quo* was based on the following salient features:

4.1 On 20 February 2012, Blazecor, represented by Lange, executed a written application for credit facilities in favour of Rope. The credit application form was annexed to Rope's particulars of claim as annexure "B".

4.2 The credit application was accepted by Rope and Blazecor agreed to be bound by the terms and conditions expressed therein.

4.3 Pursuant to the conclusion of the agreement as set out in annexure "B" and during the period in question, Rope supplied Blazecor with the goods in terms of the agreement, at Blazecor's special instance and request.

- [5.] Rope further contends that by signing annexure "B", Lange agreed to bind himself as surety and co-principal debtor *in solidum* in favour of Rope for the due performance by Blazecor and waived the benefits of all legal exceptions. Therefore, Lange is liable together with Blazecor for payment.

RESPONDENT'S AMENDED PLEA

- [6.] Blazecor denies entering into a credit application at all with Rope, furthermore it contends that the credit application is not legible and for that reason denies the allegations. Blazecor also denies that goods were sold by Rope to it. Not only did it not receive such goods, it also denies any compliance with s129 of the **National Credit Act**, 34 of 2005 (*"the NCA"*) by Rope. Consequently denies any suretyship executed by Lange.

ISSUES FOR DETERMINATION

- [7.1] Whether the Court *a quo* misdirected itself by rejecting the proposed amendment by Rope in support of its closing arguments;
- [7.2] The suretyship embodied in annexure "B";
- [7.3] The uncontested evidence in legal proceedings.

AMENDMENT OF PLEADINGS DURING TRIAL

- [8.] Section 111 of the **Magistrate's Court Act 32 of 1944** (*"the MCA"*) deals with amendments which a party desires to make in his own pleadings.
- [9.] Application for amendments in terms of this section have been entertained by our Courts and allowed even after both sides have closed their cases and in certain cases even after the conclusion of arguments (see in this regard *Levy v Rose*, 1903 20 SC 189). See also **KASPER V ANDRE KEMP BOERDERY CC, 2012 (3) SA 20 (WCC)**.
- [10.] It is common cause that Rope, after closing its case just before addresses, moved for an amendment of paragraph 6 of its particulars of claim to read:

*"Pursuant to the conclusion of annexure "B" the Plaintiff,
resultant from orders placed upon it by the 1st Defendant,*

supplied 1st Defendant with goods. The balance due and owing to the Plaintiff by the 1st Defendant in respect thereof is the sum of R304 900.00”.

- [11.] Rope alleged that the purpose of the amendment was to bring the pleadings in line with the uncontested evidence, namely the sum aforesaid claimed is a “*balance due*” by Blazecor to Rope of its only witness, Mr Craig Ramsay, its financial director.
- [12.] Mr Ramsay testified that Blazecor made payment totalling the sum of R360 000.00, leaving a balance due of R304 000.00 to Rope, and prior to the institution of this action, Lange had never raised any dispute as to the amount claimed. Blazecor was afforded the opportunity to object to the amendment, and in fact in submission of its heads of arguments it dealt with the grounds for its objection extensively. Paragraph 7.12 reads:

“Defendants will be severely and materially prejudiced should the amendment be effected on this basis as it will constitute a totally new cause of action to which defendant were never afforded an opportunity to plead or answer. If the amendment is allowed, it would resuscitate a claim which might have become prescribed at this stage due to the fact that summons was served more than 3 (three) years after 1st Defendant applied or credit securities”.

- [13.] It is clear from the record that the notice for amendment was filed as a separate document accompanying the written submissions at the Court *a quo*. Blazecor was afforded the opportunity to deal with it which indeed it dealt with as part of its written submissions as aforesaid.
- [14.] I agree with Rope that bringing an amendment at this stage couldn’t have prejudiced Blazecor in any manner that couldn’t be compensated by an order of costs. The amendment therefore ought to have been allowed, particularly

considering the fact that the evidence was only elicited through cross-examination by the respondents' legal representative. There was no rebuttal evidence to reject this notion, Rope has objected to it being raised at that stage of the proceedings. The objection was overruled.

- [15.] Rope had no option other than to bring the amendment so as to bring the uncontroverted evidence in line with its pleadings [See **SARFU & OTHERS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS, 2000 (1) SA 1 (CC)** at 61 to 64].

CERTIFICATE CLAUSE IN THE DEED OF SURETYSHIP EMBODIED IN ANNEXURE "B"

- [16.] S133(2) of the **Companies' Act**¹ reads that:

"During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the Court and in accordance with any terms the Court considers just and equitable in the circumstance".

- [17.] The above section is a special provision dealing specifically with the enforcement of claims against the company based on guarantee and suretyships, and stipulates that in such cases the claims against the company may be enforced only with the leave of the Court.

- [18.] At the hearing of this application, Mr Iouliau on behalf of the appellant, referred the Court to two Court cases in this regard, one being **INVESTEC BANK V BRUYNS, 2012 (5) SA 430 (WCC)** and also **BUSINESS PARTNERS LTD V S & OTHERS, 2016 (4) SA 390 (WCC)**.

¹ 71 of 2008

- [19.] In dealing with the issue relating to the certificate of balance, Mr Ioulouliou further referred the Court to the case of **SENEKAL V TRUST BANK OF AFRICA LTD, 1978 (3) SA 375 (A)** in which the then Appellate Division held:

“The appellant could only at his own peril refrain from giving or leading evidence to counter the prima facie proof of the indebtedness afforded by the certificate.”

The Court further held that:

“When all the evidence, including the certificate, was in, the Court has to decide whether the party upon whom the onus rested had discharged it on a proper balance of probabilities”.

- [20.] As regards to the certificate of balance, Mr Ramsay testified about it, and same was handed up at Court by agreement, and marked as annexure “B”. This certificate clause is denied by Blazecor in its plea although it never challenged it.
- [21.] During the hearing of the appeal the Court raised the slight difference between the two certificates, one which was unsigned and formed part of the pleadings and the signed one which was handed up at Court *a quo* during the hearing. Despite that, the Court agreed that these differences remain immaterial to the issues for determination.
- [22.] In careful consideration of Blazecor’s denial in its pleadings as aforesaid. The Court fails to understand why Blazecor then signed the acknowledgement of debt?
- [23.] The inference that the Court can draw under these circumstances is nothing other than a debtor who would order goods and not pay for it and upon demand for payment would go an extra mile to put bare denials like what Blazecor did at these proceedings.

[24.] Having regard to the foregoing considerations, I am of the view that the appeal ought to succeed. In consequence, the following order is appropriate:

1. THE APPEAL IS UPHELD.
2. THE ORDER OF THE COURT *A QUO* IS SET ASIDE AND IS SUBSTITUTED WITH THE FOLLOWING:

**“THE SECOND RESPONDENT TO PAY THE APPELLANT
AN AMOUNT OF R304 900.00, WITH INTEREST AT THE
RATE OF 2 % PER ANNUM *A TEMPORE MORAE* FROM
THE DATE OF SERVICE OF THE SUMMONS, TO DATE
OF FINAL PAYMENT.”**

3. THE SECOND RESPONDENT IS ORDERED TO PAY THE COSTS OF SUIT,
INCLUDING COSTS OF THE COUNSEL.

**NDLOKOVANE N
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE HIGH COURT, KIMBERLEY**

I concur.

**MAMOSEBO M
JUDGE OF THE HIGH COURT
NORTHERN CAPE HIGH COURT, KIMBERLEY**

For Appellant:	ADV. IOULIANOU (MaCartney Attorneys c/o Duncan & Rothman Inc.)
For the Respondent/s:	NO APPEARANCE