IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A241/2004

In the appeal between:

CALTEX OIL SOUTH AFRICA (PTY) LTD Appellant

and

JOHANNES STEPHANUS OLIVIER Respondent

CORAM: HANCKE *et* EBRAHIM JJ

HEARD ON: 22 AUGUST 2005

JUDGMENT BY: HANCKE J

DELIVERED ON: 25 AUGUST 2005

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[1] The appellant instituted action against the respondent in the magistrates' court for payment of the amount of R60 352,76 for goods sold and delivered to Delta Pipe Construction (Pty) Ltd. The appellant's cause of action is based on a written suretyship agreement which the respondent signed in favour

of the appellant as surety and co-principal debtor for Delta Pipe Construction (Pty) Ltd.

[2] The parties prepared a stated case from which it is undisputed that the respondent signed the personal suretyship in favour of the appellant. It is also common cause that the respondent proposed a written compromise which was made an order of court on 5 December 2001 by the Transvaal Provincial Division of the High Court. Clause 4.6 of the said compromise states as follows:

> "Upon sanctioning of the compromise, all suretyships signed by any director or previous director, employee or previous employee of the company in favour of any creditor of the company will be deemed to be cancelled."

[3] The appellant, being of one of the concurrent creditors, was owed an amount of R125 907,30 by Delta Pipe Construction (Pty) Ltd. Appellant did not vote in favour of the compromise at the meeting of creditors held. The appellant received notice in terms of the section 311 order on 18 December 2002 from Tutor Trust (Pty) Ltd being the receiver appointed

in terms of the said section. The appellant then completed a claim form and submitted it to Tutor Trust on 3 January 2003 for a claim in the amount of R60 352,76 with the *proviso* and modification that the appellant does not accept clause 4.6 of the compromise.

[4] The respondent's defence is that a compromise in terms of section 311 of the Companies Act 61 of 1973 ("the Act"), which was sanctioned by a court order, stipulates that all suretyships signed by the respondent, as a director of Delta Pipe Construction (Pty) Ltd in favour of any creditor of Delta Pipe Construction (Pty) Ltd, would be deemed to be cancelled. The respondent therefore relies on the cancellation of the suretyship through the sanctioned compromise and contends that the appellant could not found an action on the thus cancelled suretyship.

[5] Eventually, after the magistrate was requested by the attorneys of both parties to give a judgment on the stated case, the magistrate dismissed the plaintiff's claim "on the

grounds that this court has no jurisdiction to entertain the matter".

[6] The issue in this appeal is whether the respondent is liable in terms of the written suretyship signed by him. This question involves an interpretation of section 311, in particular section 311(3) of the Act.

[7] Section 311 reads as follows:

> "311 Compromise and arrangement between company, its members and creditors –
>
> (1) ....
>
> (2) If the compromise or arrangement is agreed to by–
>
> a) the majority number representing three-fourths in value of the creditors or class of creditors; or
>
> b) a majority representing three-fourths of the votes exercisable by the members or class of members, (as the case may by) present and voting either in person or by proxy at the meeting, such compromise or arrangement

> shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members (as the case may be) and also on the company or on the liquidator if the company is being wound up or on the judicial manager if the company is subject to a judicial management order.
>
> (3) No such compromise or arrangement shall affect the liability of any person who is a surety for the company."

[8] Mr. Leeuwner, counsel for the respondent, submitted that as the compromise was in all respects lawfully sanctioned by the court, the appellant was bound by it even if it did not agree to the terms of the compromise. In this regard he relied on authority stating that

> "………. the purpose of the section is to create machinery to bind a dissenting recalcitrant minority to the agreement between the company and the majority…….."

EX PARTE KAPLAN AND OTHERS NNO: in re ROBIN

CONSOLIDATED INDUSTRIES LTD 1987 (3) SA 413 (W) at 419 B – C; **MORRIS NO v AIROMATIC (PTY) LTD t/a BARLOWS AIRCONDITIONING CO** 1990 (4) SA 376 (A) at 397; and also **EX PARTE LOMATI LANDGOED BEHERENDE (EDMS) BEPERK; EX PARTE LOMATI LANDGOED (EDMS) BPK** 1985 (2) SA 517 (W) at 521.

[9] It is however important to note that the authorities referred to above concern the interpretation of section 311(2) and not section 311(3) of the Act. As far as the latter sub-section is concerned it was pertinently discussed in **EX PARTE VOYSEY BOND PROPERTY INVESTMENTS LTD** 1978 (2) SA 134 (D) where Leon J stated the following at 138 A – B:

> "But the section does not either expressly or by necessary implication prevent parties from contractually altering the position which the statute would otherwise bring about." (My underlining)

[10] **Henochsberg on the Companies Act** by Meskin (Volume

1) in his commentary to section 311(3) states the following at page 632:

> "It is respectfully considered that the effect of Section 311(3) read with Section 311(2) is that, whatever their nature, the terms of the scheme cannot in any way affect the surety's liability to any creditor; the legislature does not intend that a term which would affect such liability is to be binding only on a creditor who voted in favour of the scheme. A surety for the company remains liable to the company's creditor notwithstanding that the creditor's claim against the company is subject to the novation resulting from the sanctioned compromise."

I agree with the aforesaid quote.

[11] This is in accordance with English Law where the following passage in Halsbury's **Laws of England** (Second Edition Volume V – Hailsham Edition) paragraph 1366 at page 797 is quoted with approval in **<u>RE GARNER MOTORS LTD</u>** [1937] 1 All ER 671 Ch. D at 675C.

> "A scheme need not expressly reserve the rights of any creditors

against sureties for debts of the company, as such rights are unaffected by a scheme."

[12] In **INCORPORATED GENERAL INSURANCES LTD v CEMENT DISTRIBUTORS (SOUTH AFRICA) (PTY) LTD** 1990 (1) SA 132 (A) Botha JA stated the following at page 136 H to 137 A:

"No doubt the effect of Section 311 (3) is that

'a scheme need not expressly reserve the rights of any creditors against sureties for debts against the company as such rights are unaffected by the scheme' ....

.... but it is a far cry from that to hold that a creditor who has voted against the acceptance of an offer of arrangement is bound to abide by a clause in it providing for the termination of his right to proceed against a surety, for, *ex hypothesi*, he has in fact not contracted out of the protection afforded to him in terms of Section 311(3)."

[13] It follows therefore that a party cannot invoke the provisions of section 311(2) in a proposed offer of compromise to bind the creditor of a surety of the company who does not consent

to be bound, especially in view of the clear wording of section 311(3) of the Act.

[14] It is important to note that the appellant in the present matter did not vote in favour of the compromise nor did it accept all the conditions thereof when it submitted its claim with the *proviso* and/or modification that clause 4.6 of the compromise should be deleted in respect of the appellant. The appellant's rights as against third parties, like the respondent in this matter, who signed a personal suretyship in favour of the appellant, cannot be affected in view of the wording of section 311(3) of the Act. It can only be affected by agreement between the parties whose rights are at stake.

[15] Accordingly it is clear that the appellant never waived its protection afforded to it in terms of section 311(3) of the Act either expressly, tacitly or by implication and therefore clause 4.6 of the compromise can never be enforced against the appellant. The respondent should therefore be held liable to the appellant in terms of the personal suretyship he signed.

In the result the appeal is upheld with costs and the order of the court *a quo* is replaced with the following order:

> "The defendant is liable to the plaintiff in terms of the written deed of suretyship and the defendant is ordered to pay the plaintiff the amount of R60 352,76 together with costs."

S.P.B. HANCKE, J

I agree.

S. EBRAHIM, J

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