IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A1080/2001

In the matter between:

SERGIO GUISEPPE DI GIULIO
Appellant

and

FIRST NATIONAL BANK OF SOUTH AFRICA LIMITED Respondent

JUDGMENT: 19 JUNE 2002

VAN ZYL J:

INTRODUCTION

[1] The respondent, as plaintiff, issued summons against the appellant, as first defendant, for payment of the amount of R310 312,87, together with interest and costs. The cause of action was a written suretyship in terms of which the appellant bound himself as surety and co-principal debtor in favour of the respondent for the due payment by the debtor, Soundprops 1094 Investments (Pty) Ltd ("Soundprops"), of all amounts owing, from time to time, to the respondent.

[2] The appellant admitted signing the deed of suretyship, but denied that he was bound by it. In this regard he raised various defences in his amended plea. At the commencement of the trial he reduced them to what in essence constitutes only one defence, namely that the respondent had honoured cheques in breach of its agreement with Soundprops, thereby acting to the prejudice of

the appellant as surety and discharging or releasing him from his obligations in terms of the suretyship. In this regard it was alleged that the respondent would, in terms of the said agreement, from time to time advance money on overdraft to Soundprops up to a certain limit. In the course of doing so it would honour cheques and withdrawals in accordance with the instructions of “the officials of Soundprops” and with their written authorisation. In breach of written authorisations issued from time to time, the respondent advanced Soundprops the aforesaid sum of R310 312,87 on overdraft, without the consent or knowledge of the appellant.

[3] When the matter came on trial in the court *a quo*, the learned magistrate ruled that, inasmuch as the respondent had made out a *prima facie* case on the pleadings, the appellant should commence with his case. The appellant called only one witness, Mrs J F Erasmus, the resources manager (“bestuurder hulpbronne”) at the Mossel Bay branch of the respondent, to testify on his behalf. In addition he handed up numerous exhibits, including two lists of “signing officers” marked “B” and “C”, two sets of cheques marked “D1” to “D111” and “E1” to “E 68” respectively, and a number of bank statements marked “F1” tot “F23”. On conclusion of the evidence the respondent admitted that all these exhibits related to the relevant account of Soundprops. The appellant thereupon closed his case. The respondent subsequently closed its case without leading evidence.

[4] The court *a quo* gave judgment in favour of the respondent in the amount claimed, together with interest *a tempore morae* and costs. In her reasons for judgment in terms of rule 51(1) of the rules of the magistrate’s court, the learned magistrate rejected the appellant’s

defence on the basis that he had failed to prove any breach by the respondent of its obligations in terms of the principal contract. In any event he had been unable to demonstrate any prejudice suffered by him a surety as a result of the respondent's alleged conduct. The respondent, on the other hand, was held to have proved its case against the appellant on a balance of probabilities, except for the contractual interest claimed by it. That is why only interest *a tempore morae* was awarded.

[5] The present appeal is directed against the whole judgment and order of the court *a quo*, including the order relating to interest and costs.

THE RELEVANT DOCUMENTATION AND EVIDENCE

[6] The agreement of suretyship between the appellant and the respondent, dated 19 November 1997, is not in dispute and provides that the appellant binds himself as surety and co-principal debtor, jointly and severally, with Soundprops for the payment of all monies owed by it to the respondent, "from whatsoever cause and howsoever arising". This includes liability for interest and costs on the scale as between attorney and own client.

[7] The testimony of Mrs Erasmus was of a limited nature, despite her being confronted, during her evidence in chief, with a large number of the aforesaid exhibits. The difficulty was that she clearly did not have any personal knowledge of the Soundprops account nor of the exhibits, all of which dated back to the period June 1997 to February 1998, long before she commenced her employment at the respondent's Mossel Bay branch on 16 August 1999.

[8] The appellant attempted, through Mrs Erasmus, to prove that the respondent had been in breach of its obligations to Soundprops by honouring cheques ostensibly not signed by the required number of persons appearing in the lists of “signing officers” (exhibits "B" and "C"). She was unable to render any assistance in this regard but explained that lists of this nature were not always adhered to in that clients would, from time to time, request a manager of the respondent to honour cheques not bearing the requisite signatures. She had no knowledge of any arrangements made with regard to cheques submitted as exhibits in the present matter, but emphasised that the respondent would be extremely wary of annoying clients by regularly referring cheques back to them.

[9] Of some significance is the fact that all the cheques presented as exhibits appear to have borne a bank stamp. According to Mrs Erasmus this indicated that the cheques had been duly presented and paid out, and that the amounts appearing from the cheques had been debited to the account of Soundprops. It also meant that Soundprops had received value for the amount of each cheque and could hence not have suffered any damage as a result of the payment thereof. In this regard, she testified, there was no indication that any cheque payment honoured by the respondent had ever been queried, be it with reference to signatures appearing on a cheque or for any other reason.

MAIN SUBMISSIONS ON BEHALF OF THE APPELLANT

[10] Mr van der Merwe, for the appellant, submitted that the respondent had failed to

discharge the *onus* of proving that Soundprops in fact owed it the amount claimed. In this regard he suggested that the respondent should have presented evidence on the composition or calculation of such amount and on the fact that it was due and payable. The court *a quo* had erred, he argued, in finding that a *prima facie* case had been made out by the respondent and that the appellant had the duty to begin.

[11] The gist of Mr van der Merwe's argument was that the respondent had acted in breach of its mandate as set forth in the list of "signing officers" dated 26 May 1997 (exhibit "B") by honouring some 110 cheques not bearing the required signatures. It was hence not entitled to debit the account of Soundprops with the amounts appearing from such cheques and totaling R229 872,78. From this it followed that the appellant could not be held liable for such amounts or for the accumulated interest thereon. If the said interest should in fact be credited to the Soundprops account, the amount of the respondent's claim would be extinguished. The respondent had chosen not to tender any evidence in rebuttal relating to authorised payments and had hence not proved what amount, if any, was in fact due and payable by Soundprops and, accordingly, by the appellant.

[12] Mr van der Merwe submitted further that, as a result of the aforesaid unauthorised payments debited to the Soundprops account, the respondent had acted irregularly and in conflict with the interests of the appellant as surety. This constituted prejudice arising from the respondent's "breach of contract towards Soundprops", which had the effect that the appellant's position and obligations as surety were increased or aggravated. The appellant was hence entitled to his discharge as a surety.

MAIN SUBMISSIONS ON BEHALF OF THE RESPONDENT

[13] Mr du Toit, for the respondent, submitted that the respondent had indeed proved a *prima facie* case against the appellant and that the learned magistrate had quite correctly ruled that the appellant should begin with his case. It was for the appellant then to prove that the respondent had breached its contract with the appellant, or had acted without authority in honouring cheques subsequently debited to the account of Soundprops. In this the appellant had failed, inasmuch as the appellant had not been able to prove that the cheques in question had been signed by unauthorised persons, despite the existence of the lists of "signing officers". In any event, even if the lists were decisive, it had not been proved that they were applicable at any particular stage.

[14] In this regard Mr du Toit submitted that, inasmuch as the appellant had admitted the amount of the loan and his liability in terms of the suretyship, the appellant was, at least, saddled with an *onus* to rebut this *prima facie* evidence substantiating the respondent's claim. Every cheque honoured by the respondent constituted proof of its compliance with a mandate given by Soundprops to the respondent to make payment in terms of the cheque. The lists of "signing officers" did not affect the validity of the mandate. If the respondent should ignore, or deviate from, the requirements contained in the list, it did so at its own risk and with the full realisation that the signature or signatures on the cheque in question might turn out to be unauthorised. If no objection, however, should be raised to the honouring of a cheque that has not complied with the signing authority contained in the list, the respondent would be perfectly entitled to debit the amount of the cheque to the account of Soundprops.

[15] On this basis Mr du Toit argued that it was not sufficient for the appellant simply to demonstrate that the signature or signatures on the cheques did not comply with the relevant list (whichever that may be). He should have tendered evidence that the person or persons signing the individual cheques had not been authorised to do so. In this regard he himself had chosen not to testify, despite the fact that much of the evidence required to establish the appellant's defence must have been within his personal knowledge. This justified a negative inference against him. The evidence of Mrs Erasmus did not assist him at all. On the contrary, she had exposed the possibility that there could have been an arrangement between Soundprops and the respondent to accept signatures not consonant with the requirements set forth in the applicable list or lists. Of some significance, Mr du Toit pointed out, was the fact that a number of cheques constituted payments for services rendered by the Municipality and Telkom. It was most unlikely that such cheques would not have been authorised.

[16] Another problem, raised as an alternative argument by Mr du Toit, related to the fact that the first list (exhibit "B") had been cancelled on an unspecified date, so that it was not clear which list, if any, was applicable at the relevant stage. No evidence was tendered to elucidate this *lacuna* in the appellant's case.

THE RELEVANT LAW

The Relationship between a Bank and its Client

[17] The relationship between a bank and its client has exercised the minds of lawyers over a

long period of time. In the well known case of *London Joint Stock Bank, Limited v Macmillan and Arthur* [1918] AC 777 (HL), Lord Finlay LC said the following in his speech (at 789):

The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque.

That the underlying agreement between bank and client is one of mandate, has been unequivocally accepted in South African law, as appears from the *dictum* of Grosskopf J in *Volkskas Bpk v Johnson* 1979 (4) SA 775 (C) at 777H-778A:

Die verhouding tussen bankier en kliënt behels dat die bankier sy kliënt se opdrag om te betaal, soos uitgedruk in 'n tjek, moet uitvoer. Indien hy dit doen is hy geregtig om die kliënt se rekening te debiteer met die bedrag van die tjek.

[18] In his leading judgment on banking law, as reported in *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C), Selikowitz J, with reference to South African and foreign legal authorities, stated thus (at 530G-H):

The law treats the relationship between banker and customer as a contractual one. The reciprocal rights and duties included in the contract are to a great extent based upon custom and usage. Although historically the original objective of a depositor was to ensure the safekeeping of his money, over time jurists have considered characterising and explaining the basic relationship as one of *depositum*, *mutuum* or agency. All of these approaches have on analysis proved to be inadequate. It is now accepted that the basic, albeit not sole, relationship between banker and customer of a current account is one of debtor and creditor.

In regard to the use of cheques for purposes of instructing a bank to make payments to the bearers thereof, the learned judge added (at 531F-H):

When an instrument such as a cheque is used, the customer, acting as principal, instructs the bank, his agent, to perform a specific act, which is usually the payment of a sum of money to the bearer, the payee or his order. As between the bank and its customer a payment by cheque is governed primarily by the law of agency. Thus even in basic normal and everyday banking activity the relationship described as one between debtor and creditor includes aspects – often described as 'superadded obligations' – which are regulated by the law of agency.

[19] This case has recently been cited with approval in *Liebenberg v Absa Bank Limited t/a Volkskas Bank* [1998] 1 All SA 303 (C) at 308-309 and in *Absa Bank Bpk v Janse Van Rensburg* 2002 (3) SA 701 (SCA) at 709A-B. I am in respectful agreement with the proposition that the relationship between bank and client is contractual, the client being the creditor and the bank the debtor. In the context of agency, however, where the client is the principal and the bank the agent, it must be borne in mind that agency and mandate are not exact equivalents. The contract of mandate is a consensual contract that has its origin in Roman law (*mandatum*), whereas agency is a term that "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". These are the introductory words of Professor J C de Wet in his discussion of agency and representation in *The Law of South Africa* vol 1 (1st reissue, 1993) par 100. In some cases agency may constitute nothing more than an act of representation, while in others it may take the form of a contract of mandate, where the agent is in fact a mandatary and the principal is a mandator. See *Totalisator Agency Board, OFS v Livanos* 1987 (3) SA 283 (W) at 290J-292E and the discussion of mandate and *negotiorum gestio* in *The Law of South Africa* vol17 (1st reissue, 1999) par 1-2.

[20] To avoid this kind of confusion it is, I believe, essential to determine the true nature of the agreement between the bank and its client. Inasmuch as the client instructs the bank to render

certain banking services when required, and the bank agrees to carry out such instructions, their *consensus* must needs emanate from a contract of mandate, in terms of which the client is the mandator and the bank the mandatary. It is quite correct that the rights and obligations arising from this form of mandate may be of a complex nature, but its essence remains the same. I do not believe that the complexity of the mandate justifies its classication as a contract *sui generis*, however tempting this nomenclature may be. See *G S George Consultants and Investments (Pty) Ltd v Datasys (Pty) Ltd* 1988 (3) SA 726 (W) at 735-736 and *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 (1) SA 205 (N) at 213-214.

[21] Particularly enlightening in this regard is the pragmatism and sound common sense appearing from the following passage in *Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law* (3rd ed by F R Malan and J T Pretorius, 1997) par 203 (at p 334):

> [I]n essence the contract between bank and customer obliges the bank to render certain services, the so-called services de caisse, to the customer on his instructions and for this reason it can be classified as a contract of mandatum. The bank and customer relationship is based on a comprehensive mandate in terms of which the customer lends money to the bank on current account, the bank undertakes to repay it on demand by honouring cheques drawn on it and to perform certain other services for the customer, such as the collection of cheques and other instruments, and the keeping and accounting of his current account. The fact that the customer lends money to the bank, or the bank, in the case of an overdraft, to the customer does not determine the nature of the contract between them: these loans facilitate the execution of the comprehensive mandate between the parties. Within this comprehensive mandate the individual cheques drawn by the customer are "dependent" orders, because their consequences are in many respects governed by the terms of this embracing relationship. The body of rules governing the bank and customer relationship can be called the "internal" law of cheques.

I have no hesitation in respectfully associating myself with this approach.

Unauthorized Signatures

[22] Who and under what circumstances a person may be authorised to sign a cheque on behalf of the client must necessarily be contained in the contract of mandate underlying the relationship between the client and the bank. If, as in the present case, a list of persons with such signing powers is furnished to the bank, it in fact becomes part of the mandate. Should a cheque then not bear an authorised signature or signatures, as the requirement may be, the bank would be acting in breach of the terms of the mandate if it should honour such cheque and debit the client's account with the amount thereof.

[23] In *Kunneke v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1997 (3) SA 300 (T) it was common cause (305E) that the bank had a written mandate to pay cheques only when signed by the plaintiff and one Kruger. The bank proceeded to honour cheques not bearing the requisite signatures. This prompted Stafford J to say (at 307B):

Die verhouding tussen die BK en die verweerder is 'n kontraktuele verhouding. Dit is geykte reg. Die verweerder kon slegs wanneer hy tjeks in ooreenstemming met sy mandaat uitbetaal het, die BK se rekening dienooreenkomstig debiteer. *In casu* het die verweerder strydig met sy mandaat opgetree en was hy ook gevolglik nie geregtig om die BK se rekening met die eisbedrag te debiteer nie.

[24] A deviation from the list of authorised signatories does not necessarily mean that payment of the cheque is invalidated. In *London Intercontinental Trust Ltd v Barclays Bank Ltd* [1980] 1 Lloyd's Law Reports 241 (QB)(Com Ct), the defendant bank was instructed to honour only those cheques signed by two authorised signatories. In conflict with this instruction, however, the bank honoured two cheques bearing only one authorised signature and debited the account of the plaintiff with the amount of the cheques. The plaintiff thereupon claimed that,

inasmuch as payment of the cheques had been without authority and in breach of the mandate to the bank, the bank had not been entitled to debit the plaintiff's account as it had done. On consideration of the relevant evidence and documents, Slynn J held that the cheques in question had in fact been deposited with the authority and approval of the plaintiff's board and that one Ross had had actual authority to arrange for the transfer of the amounts indicated on the cheques. In this regard the learned judge stated (at 249):

In the light of Mr. Ross's actual authority to direct the transfer of these moneys I hold that the bank was entitled to act on the cheques drawn on his single signature. Those cheques are not invalidated by the fact that the bank had a mandate requiring two signatures. The bank as a result of its failure to observe the discrepancy took a risk in honouring the cheque that Mr. Ross was not in fact authorized. In the case of both these cheques I hold that he was so authorized.

[25] This *dictum* was cited with approval by Stafford J in *Kunneke v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1997 (3) SA 300 (T) at 311B. It likewise met with the approval of Davis J at typed page 6 of his unreported judgment, delivered on 10 February 2000, in *The Standard Bank of South Africa Limited v Langraphix (Pty) Limited and Colin Nadasen Naidoo* (Case No 15802/97). I must respectfully concur with my learned brethren in doing so. The parties to a contract of mandate are free to amend or deviate from its authorisation requirements relating to the signing of cheques, provided such amendment or deviation is consensual. This may be done formally, in writing, orally, by word of mouth, or tacitly, by conduct in the form of acts or omissions. If there should be no such *consensus*, they may, with equal validity, subsequently ratify any deviation from the terms of the mandate. In any event the bank may, at its own risk, honour ostensibly unauthorised cheques in the expectation that their payment will be approved or ratified. This may, in essence, constitute a breach of the mandate, but it will not

per se invalidate the payment of the cheques.

The Onus of Proof in Suretyship Agreements

[26] In any claim against a surety the plaintiff must, at the outset, prove the existence of a valid contract of suretyship. He must then prove that the source of indebtedness (*causa debiti*) in terms of such agreement is one in respect of which the defendant undertook to be liable. Finally he must prove that the said indebtedness is due and payable. See the useful discussion of these requirements, with reference to relevant authorities, in *Amler's Precedents of Pleadings* (5th ed by LTC Harms, 1998) 381-382.

[27] If the defendant should place the amount of the claim, relating to its composition or calculation, in issue, the necessary evidence to substantiate such amount must be presented by the plaintiff. See *Moreriane v Trans-Oranje Finansierings- en Ontwikkelingskorporasie Bpk* 1965 (1) SA 767 (T) at 769G; *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 383A.

[28] It is trite that, if the surety should admit liability in terms of the suretyship agreement, the plaintiff would not be required to lead evidence in this regard. If the amount of the claim should likewise be admitted, no evidence of its composition or calculation would be required. If the surety should, however, deny liability on the basis that the principal debt was not due, the principal would have to prove that it was. See the *Senekal* case (par 27 above) at 383A-F. On the other hand, if the surety should raise a "special" defence such as illegality, fraud, lack of contractual capacity or lack of authority, he would be required to present evidence in support thereof. This is because the facts underlying such defence are regarded as falling beyond the ambit of the plaintiff's cause of action. See C W H Schmidt and H Rademeyer *Bewysreg* (4th ed 2000) 38-39 and the authorities cited there.

[29] Once the party bearing the *onus* of proof has made out a *prima facie* case, his opponent is burdened with an *onus* of rebuttal. Should he fail to discharge this *onus* of rebuttal, *prima facie* evidence would be regarded as sufficient evidence for purposes of discharging the main *onus* of proof. See *Senekal v Trust Bank of Africa Ltd* (par 27 above) 382H-383A; Schmidt and Rademeyer (par 28 above) 65. Even more so would this be the case if he has personal knowledge of facts or information relevant to the discharge of such *onus*, but fails or refuses to testify. Under such circumstances an adverse inference may be drawn against him. See *Galante v Dickinson* 1950 (2) SA 460 (A) at 465; *New Zealand Construction (Pty) Ltd v Carpet Craft* 1976 (1) SA 345 (N) at 349G-H; *Hasselbacher Papier Import and Export (Body Corporate) and*

Another v MV Stavroula 1987 (1) SA 75 (C) at 79F-80C; *Lazarus v Gorfinkel* 1988 (4) SA 123 (C) at 134B-135C.

The Defence of Prejudice Justifying Release of a Surety

[30] Over a long period of time a rule has evolved that, in general terms, a surety may be fully or partially released from his obligations in terms of the suretyship agreement if he should be prejudiced by an act of, or omission by, the creditor. This rule has, however, been qualified in later legal development. A classical rendition of the rule is attributed by J W Wessels, *The Law of Contract in South Africa* (2nd ed by A A Roberts, 1937) par 4341, to Joseph Story *Equity Jurisprudence* (13th ed 1886) section 325:

Where the person guaranteed does any act injurious to the surety or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged.

Wessels par 4346 points out that this rule, with its origin in equity, appears to have been stated in the English case of *Watts v Shuttleworth* (1861) 7 H & N 235 [at 247-248; also in 157 ER 1171 (Ex Ch) at 1176].

[31] In South African legal context Colman J cited the rule with approval in *Minister of Community Development v S A Mutual Fire & General Insurance Co Ltd* 1978 (1) SA 1020 (W) at 1024A. With reference to its equitable origin, however, the learned judge emphasised that it was "clearly not intended to mean that the proposition enunciated related to some system of law other than our own".

[32] The issue of prejudice justifying discharge from suretyship obligations was dealt with in some detail by Van der Westhuizen AJ in *Fry and Another v First National Bank of South Africa Ltd* 1996 (4) SA 924 (C) at 927G-931J. It was common cause in that case that the respondent bank had advanced additional funds on overdraft to the principal debtor, in breach of its mandate which required that such transactions were to be approved by three of the principal debtor's directors. With reference to the rule enunciated above, the learned judge considered (at 928F) "whether the rule as stated is founded on a principle of our law or whether it must be regarded as the 'exercise of a broad equitable power'".

[33] In considering this issue the learned judge referred to a number of authorities, including *Bank of India v Trans Continental Commodity Merchants and Patel* [1983] 2 Lloyd's Reports 298 (CA) at 301-302. In that case Lord Goff of Chieveley held "that merely irregular conduct on the part of the creditor, even if prejudicial to the interests of the surety, does not discharge the surety". After careful consideration of the legal basis of the rule, as qualified, in South African legal context, Van der Westhuizen AJ concluded (at 931F-G) that it was not "founded on the exercise of some broad equitable discretionary power". In this regard the learned judge observed (at 931G-I):

Although the principles underlying the rule are founded on principles of equity, they have become firmly embedded and have been established for a very long time as part of our law… There can be no doubt that from ancient times to the present public policy and well-established business morals require creditors to act *bona fide* in their dealings with sureties and that these considerations contributed to the growth of the rules of law that I have referred to.

Applying these considerations to the facts of the case before him, Van der Westhuizen AJ held (at 935H-I) that the conduct of the bank was not only irregular, but in fact "wholly unacceptable and reckless and was to his knowledge to the prejudice of the appellants".

[34] In the *Kunneke* case (par 25 above) at 314B-C, Stafford J referred to the payment of cheques by the bank, in breach of its mandate, as irregular and prejudicial to the interests of the surety. Although the learned judge did not give further consideration to the meaning and ambit of prejudice in this context, he suggested (at 314C) that the bank's conduct had not been conducive to doing "justice between man and man".

[35] In *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA) at 1123J-1124A (par 14), Olivier JA cautioned against broadening the concept of the "prejudice principle" to include any conduct of the creditor, in his dealings with the principal debtor, which may prejudice the surety. The learned judge rejected the suggestion that "such a wide and unqualified principle" may exist in our law and proposed (at 1124I-1125A - par 19) that it should have specific parameters:

As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer.

This qualification of the rule relating to prejudicial conduct which may release a surety was followed and endorsed by Griesel J in *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C) at 116G-117C.

[36] The issue of prejudice justifying release from a suretyship was considered in a recent decision of Davis J in this court, namely *Spur Steak Ranch Ltd v Mentz* 2000 (3) SA 755 (C). Although not propounding a broadening of the concept of prejudice in this context, the learned judge supported a flexible approach to the obligations arising from the principal ("initial") contract by taking cognisance of certain annexures apparently supplementing such contract. With reference to the *Fry* matter (par 32 above) Davis J observed (at 764B):

The description of the rule, that is prejudicial conduct on the part of the creditor, must be distinguished from the scope of the rule. The nature of the enquiry to determine the prejudicial conduct and how that enquiry should be conducted depends upon an investigation of the very purpose of the rule.

After considering various passages from the *Bank of India* case (par 33 above), Davis J cited par 4295 of Wessels *Law of Contract* (par 30 above) to the effect that "the creditor may improve the position of the surety but he may not render his liability more burdensome". The creditor and debtor may hence not prejudice the surety by amending the terms of the principal contract without his consent. To determine whether or not there has been such prejudice, however, the court deciding the matter is required to have regard to any such purported amendments. In this regard Davis J stated (at 765D-E):

Accordingly, when defendant submits that it had a legitimate defence in law of prejudicial conduct, it requires the Court which decides this matter to look at prejudicial conduct in a broader context than simply in terms of the initial contract strictly defined. If this is so, it must strengthen the conclusion that there is no basis by which a more comprehensive examination of prejudicial conduct should be precluded.

This prompted the learned judge to conclude (at 765H-I):

Accordingly, defendant has raised a defence grounded in the law of suretyship which was initially sourced in equity but which has now become a rule of law, namely that plaintiff in such a case should not engage in conduct prejudicial to the surety which makes its obligations more burdensome.

[37] When the authorities cited above are considered it is clear that the rule relating to release of a surety as a result of prejudicial conduct by the creditor is rooted in equity. What might initially have been a product of English equitable jurisprudence, however, has been received by, and become firmly entrenched in, South African law. This has not, I venture to say, been a particularly difficult process, since equity is a fundamental value underlying much of the Roman-European civil tradition that constitutes a substantial part of our South African common law.

[38] Significantly, as appears from the citations from the *Fry* and *Kunneke* cases (par 33 and 34 above), equity goes hand in hand with what I regard as its natural concomitants, namely justice, reasonableness, good faith (*bona fides*) and good morals (*boni mores*) or public policy. These values occur with consistent frequency in private law in general, and in the law of contract in particular. The concept of prejudice, in the context of a surety's release from contractual obligations in terms of an agreement of suretyship, is in fact an excellent example of how these values work in unison to achieve a fair and just result.

[39] The qualification of the general rule as enunciated in the *Absa* case (par 35 above) does not, in my respectful view, create any limitation to the applicability of the said values. On the contrary, it serves to illuminate the practical matrix or context within which the rule must apply. The prejudice in question will, in general, emanate from a breach of either the principal agreement or the agreement of suretyship. Such breach cannot, however, be viewed in isolation, but must be assessed within the broader context of the relevant facts and circumstances as a whole. This may include, as Davis J pointed out in the *Spur Steak Ranch* case (par 36 above), a consideration of additional documentation or evidence relating to the allegedly breached agreement, and should not be restricted to the strict parameters of the initial agreement.

[40] I respectfully associate myself with the view expressed by Davis J in the said case, namely that an increase in the contractual burden of the surety will, generally speaking, be prejudicial to the surety (par 36 above). It may, however, be appropriate to add a rider that the increase in the surety's burden should be substantial, unreasonable or undue. A trivial increase may indeed elicit an invitation to raise the maxim *de minimis non curat lex*.

[41] On the basis of these considerations I would then suggest that the prejudice required for a successful defence of prejudicial conduct justifying release from a suretyship agreement, may be described in the following terms. With reference to all the relevant facts and circumstances, and with due regard to considerations of justice, fairness, reasonableness, good faith and public policy, the alleged prejudice must constitute real and substantial prejudice which has the effect of unduly increasing the contractual burden of the surety.

CONSIDERATION OF THE FACTS IN THE PRESENT MATTER

[42] It is clear from the legal principles set forth above that the appellant was burdened with the *onus* of proving that the respondent had, in conflict with its obligations in terms of the mandate subsisting between it and Soundprops, honoured cheques without authority. The appellant came nowhere near discharging this *onus* inasmuch as it failed even to prove the terms of the mandate. There was no evidence as to who the authorised signatories were and it was never proved that the lists of "signing officials" (exhibits "A" and "B") had ever been incorporated in the mandate. And even if they were, there is no indication that the board of Soundprops objected to the payment of cheques not signed strictly in accordance with the lists. On the contrary, the fact that no single cheque thus paid out was ever queried, indicates that the board in fact authorised, or approved, the payment thereof.

[43] It is inexplicable why the appellant called only Mrs Erasmus to testify on his behalf. She clearly had no personal knowledge of the provisions of the mandate relating to authorised signatories, and was quite unable to assist the appellant in discharging his *onus*. On the contrary, she tendered information in support of the respondent's case, namely that none of the cheques had been queried and that it was not unusual for a principal debtor such as Soundprops to approve the payment of ostensibly unauthorised cheques. In this regard there was no explanation as to why the appellant himself, or any director or official on behalf of Soundprops, was ever called to testify on relevant matters falling peculiarly within their personal knowledge. I believe that it would, under such circumstances, be justified to draw an adverse inference against the appellant for failing to testify or to place other evidence before the court in support of his case.

[44] The reason why no cheques were ever queried may be attributable to the fact that they were, for the most part, issued in payment of moneys owing on ordinary, run of the mill transactions. This is confirmed by the fact that a number of the cheques were payable to the Great Brak Municipality (or simply "Municipality"), Telkom, Waltons and Pick 'n Pay. It was never suggested that any of the cheques related to suspect or extraordinary transactions. The only reasonable inference which, to my mind, may be drawn from this, is that the board or other authorised officials of Soundprops had approved, expressly or tacitly, every single payment. It follows that the appellant failed to discharge his *onus* of proving that any of the said cheques was unauthorised, or that the respondent had wrongly debited the Soundprops account with the

amounts of such cheques.

[45] Even if the appellant had discharged his *onus* of proving that the cheques had been unauthorised and paid out in breach of the provisions of the mandate subsisting between Soundprops and the respondent, this does not mean, as pointed out above (par 24-25) that the payments were *per se* invalidated. The respondent might have been at risk in honouring the cheques, but its reasonable expectation, that Soundprops would approve the payments, was clearly met.

[46] In any event the appellant did not tender any evidence relating to the prejudice he allegedly suffered. At best for him the payments might have been irregular. That did not, however, constitute real and substantial prejudice that had the effect of making his obligations as surety more burdensome. With reference to the extremely limited facts and circumstances placed by him before the court *a quo*, and bearing in mind the considerations of justice, fairness, reasonableness, good faith and public policy, the appellant was unable to prove that he suffered even the slightest prejudice.

CONCLUSION

[47] It follows that there is no basis for interfering with the findings of the court *a quo*. Accordingly the appeal must be dismissed with costs.

D H VAN ZYL

Judge of the High Court of South Africa

I agree. It is so ordered.

J M HLOPHE
Judge-President of the High Court of South Africa