

Case no 555/88

E du P

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA

Appellant

LIMITED

and

ARTHUR MANFRED KRUGER

First Respondent

JACOB JUSTUS DE VILLIERS

Second Respondent

Coram: JOUBERT, STEYN, F H GROSSKOPF, JJA PREISS et

KRIEGLER AJJA.

Heard:

Delivered:

7 March 1991

28 March 1991.

J U D G M E N T

F H GROSSKOPF JA:

The appellant, plaintiff in the Court a quo, claimed payment of the sum of R163 653,66 (which amount was later reduced) plus interest from the first and second respondents as sureties for the indebtedness of a company called Pro-Max International (Pty) Limited ("Pro-Max").

The appellant's action was based on a written deed of suretyship ("the deed of suretyship") signed on 4 November 1980 at Johannesburg by the first and second respondents and Andries Petrus Jacobus van der Merwe ("Van der Merwe") as sureties and co-principal debtors for the indebtedness of "the debtor" to the appellant. The appellant alleged that "the debtor" was Pro-Max.

The deed of suretyship was completed on a standard printed form used by the appellant. The first part reads as follows:

"In consideration of The Standard Bank of South

Africa Limited (hereinafter called 'the Bank') allowing Andries Petrus Jacobus van der Merwe, Arthur Manfred Kruger, Jacob Justus de Villiers acting as Trustees for a Company about to be registered in the Republic of Venda (hereinafter called 'the Debtor') or any third party whose present or future indebtedness to the Bank has been or will be guaranteed by the Debtor, such banking facilities as the Bank may in its sole discretion deem fit (either by way of the continuation of any existing facilities and/or providing new or further facilities), subject to the conditions hereinafter mentioned, we the undersigned Andries Petrus Jacobus van der Merwe, Arthur Manfred Kruger, Jacob Justus De Villiers do hereby jointly and severally guarantee and bind ourselves as sureties and co-principal debtors for the repayment on demand of all sums of money which the debtor may now or from time to time hereafter owe or be indebted in to the Bank, its successors or assigns

The first and second respondents admitted that they had signed the deed of suretyship in favour of the appellant, but denied that it was possible to identify Pro-Max as "the debtor" therein. It was contended in limine on behalf of the first and second respondents in the Court a quo that the deed of suretyship was unambiguous and that ex facie the document itself it was clear that "the debtor" was not Pro-Max, but

Van der Merwe, the first respondent, and the second respondent, acting as trustees for a company about to be registered in the Republic of Venda.

The Court a quo dismissed this preliminary point and allowed the appellant to adduce extrinsic evidence of an identificatory nature in order to show that the principal debtor was indeed Pro-Max. (See Sapirstein and Others v Anglo African Shipping Co (SA) Ltd. 1978(4) SA 1(A) at 12 B-E). Having considered the admissible evidence the Court a quo came to the following conclusion regarding the identity of "the debtor" in the deed of suretyship:

"In the matrix of the surrounding circumstances as appears from the admissible evidence, I am of the view that plaintiff has failed to establish that the principal debtor envisaged in the deed of suretyship is Pro-Max International (Pty) Ltd and the probabilities on such evidence would appear to indicate that the principal debtor was the trustees in their capacity as trustees for a company to be registered in Venda."

In the result the Court a quo granted absolution

from the instance on the appellant's claim. Leave to appeal to this Court was subsequently granted by the Court a quo.

There is an application for condonation by the appellant which must be considered before dealing with the merits of the appeal. The appellant seeks condonation for the late lodging of a corrected record of appeal. Its application was opposed by the first and second respondents; both filed answering affidavits. The first respondent even contended that the appeal had lapsed. Counsel appearing for the first and second respondents later indicated in their heads of argument that both respondents abided the decision of this Court, as far as condonation was concerned, but the first respondent still sought an order for costs.

In order to deal with the question of costs in the condonation application I shall have to refer to the salient features set out in lengthy papers filed on behalf of the parties.

The appellant from the outset experienced problems

in preparing the appeal record. The problems began when seven cassettes containing the record of the evidence given in the Court a quo, could not be traced in the registrar's office in Johannesburg. All efforts to locate the missing cassettes were unsuccessful; it later became apparent that the appellant would not be in a position to lodge the appeal record within the time limits prescribed by the Rules of this Court. At first the respondents refused to agree to any extension of time for the lodging of the record. The appellant was obliged to prepare its first petition for condonation. Shortly before that petition was filed the respondents consented to an extension of two months. This meant that the appeal record had to be lodged by not later than 25 March 1989. Some time during February 1989 an articled clerk in the employ of the appellant's attorney conducted a search in the Court archives and found the cassettes.

In the beginning of March 1989 the first respondent

informed the appellant's attorney that he required four copies of the appeal record, whereas the appellant's attorney had made provision for only two copies. The additional two copies could only be supplied by May 1989. According to the appellant's attorney it was agreed that these copies would be forwarded to the first respondent as soon as they were ready. On 28 March 1989 the first respondent addressed a letter to the appellant's attorney in which he "confirmed" that the further two copies of the record had to be delivered before 15 April 1989. The appellant's attorney denied that he had ever agreed to deliver the further two copies of the record by that date, and this gave rise to a dispute.

The additional two copies of the record were not delivered by 15 April 1989, and the first respondent then took the point that the appellant had failed to comply with the provisions of Rule 5(4) of the Rules of this Court. The first respondent further maintained that the record was defective in a number of respects and that the appellant had

therefore not lodged a proper record in compliance with the provisions of Rule 5(4). The appellant's attorney acknowledged that the record was defective in some respects and enquired whether the first respondent would be willing to agree to an amended record being lodged. The first respondent refused to give his consent and replied as follows:

"As far as we are concerned, the record submitted by the appellant is hopelessly defective and cannot be patched up. We furthermore take the view that no case has been made out for condonation and the consents sought by you are refused."

The appellant then lodged a corrected record of appeal and filed his petition for condonation. The first respondent opposed the relief sought by the appellant and raised a number of highly technical points in his answering affidavit. The first respondent further made a gratuitous attack on the appellant's attorney, suggesting dishonesty, incompetence and improper conduct on his part. Counsel for the first respondent conceded during argument that there was no justification for these intemperate allegations.

The second respondent filed a short answering affidavit in which he associated himself with the first respondent's objections to the defective record.

The petition for condonation does not specifically deal with the appellant's prospects of success on appeal, but it is mentioned in the petition that leave to appeal had been granted by the Court a quo. It is, of course, necessary to persuade this Court that there are reasonable prospects of success on appeal, inasmuch as the indulgence of this Court is now being sought. The fact that the learned trial Judge was of the opinion that there is a reasonable prospect of success on appeal is, nevertheless, a factor which in my view, ought to carry weight. In the peculiar circumstances of this case the absence of a formal assertion initially of a reasonable prospect of success does not preclude the granting of condonation.

In my judgment condonation for the late lodging of the revised and corrected record of appeal ought to be granted. The delay was occasioned by the temporary loss of the cassettes. Appellant's attorney did everything in his power to find them. He also timeously and adequately informed the respondents' attorneys of his difficulty and sought their co-operation. Once the cassettes had been found he proceeded with due expedition to cause the record to be prepared. The defects in the record, which was then prepared in some haste, were not ascribable to the fault of appellant's attorney. He promptly caused an adequately corrected record to be prepared and applied for condonation.

The appellant must, however, bear the costs of the petition for condonation on an unopposed basis. The appellant must, in addition, bear the wasted costs occasioned

by the lodging of the original incomplete record of appeal.

The first respondent refused to give his consent to the proposed rectification of the appeal record and the late lodging of such corrected record. There is no allegation that the first respondent would have been prejudiced had he given the required consent. In my view there was no justification for his refusal. (See: AA Mutual Insurance Association Ltd v Van Jaarsveld and Another 1974(4) SA 729(A), at 731 B-E, where it was held that a respondent who unreasonably refuses to agree to an extension of time under Rule 5(4)(c) runs the risk of being ordered to pay, not merely the costs of any opposition, but the costs of the entire application). The first respondent, in addition, made an intemperate and unjustified attack on the integrity of the appellant's attorney. In my judgment these considerations justify an order in terms whereof the first respondent should pay the costs occasioned by his opposition to the condonation application.

The second respondent also opposed the application for condonation, but he was never asked to agree to the late lodging of the corrected record. The second respondent further refrained from making disparaging comments about the appellant's attorney. In my judgment the second respondent should be ordered to pay his own costs in respect of the condonation application.

I now propose to deal with the merits of the appeal. It is common cause that on 4 November 1980 the first and second respondents and Van der Merwe opened a bank account ("the bank account") at the Odendaalsrus branch of the appellant. The bank account was recorded in the books of the appellant under the name "Andries Petrus Jacobus van der Merwe, Arthur Manfred Kruger, Jacob Justus de Villiers, acting as trustees for a company still to be registered in Venda". On the same day the first and second respondents and Van der Merwe, acting as aforesaid, and the appellant agreed that the appellant would allow them overdraft

facilities of R225 000 on the bank account until April 1981 ("the overdraft agreement"). In view of the overdraft agreement the first and second respondents and Van der Merwe were required to sign the deed of suretyship. Thereafter a number of cheques were drawn on the bank account, causing it to become substantially overdrawn.

Pro-Max was incorporated at a much later date, namely, on 14 August 1981. It was subsequently registered on 26 August 1981 as an external company in the Republic of Venda. The first and second respondents had no interest in Pro-Max and Van der Merwe became the sole director and shareholder of the company.

It was the appellant's case throughout that Pro-Max was "the debtor" referred to in the deed of suretyship, and that the first and second respondents therefore bound themselves to the appellant as sureties and co-principal debtors for the indebtedness of Pro-Max. This contention was disputed by both respondents and there has been much debate

about the identity of "the debtor" referred to in the deed of suretyship, as also the admissibility of extrinsic evidence to establish the identity of such debtor. It is unnecessary, in my opinion, to decide these issues. Even if the appellant were to succeed in proving by means of admissible evidence that Pro-Max was indeed "the debtor" referred to in the deed of suretyship, the appellant must, in addition, still prove that Pro-Max, after incorporation, effectively became the appellant's debtor. In my judgment the appellant has failed to establish this latter requirement. The evidence in fact leads to the conclusion that Pro-Max never even considered this requirement.

Mr Levin, who appeared for the appellant, submitted that Pro-Max became the appellant's debtor by accepting liability for the overdraft. According to this argument, the overdraft agreement was indeed to operate as a contract for the benefit of a third person, or stipulatio alteri, under the common law, and once Pro-Max had been incorporated, it

adopted the benefit stipulated for in its favour and undertook the consequent obligations. (See generally on the requirement of adoption: McCulloch v Fernwood Estate Ltd. 1920 AD 204 at 206 and 215; Ex parte Elands Properties (Pty) Ltd 1945 TPD 37 at 39; Bagradi v Cavendish Transport Co (Pty) Ltd 1957(1) SA 663(D) at 667H - 668A; Avondson Trust (Pty) Ltd v Wouda 1975(2) SA 444(T) at 445 H and 447 H).

This was certainly not the appellant's case on the pleadings. I do not agree that the overdraft agreement was intended to be a contract for the benefit of a third party. At the time of its incorporation Pro-Max could, in any event, have derived no benefit from adopting the rights and obligations which had allegedly been stipulated for in its favour. In the circumstances the overdraft agreement could hardly be regarded as a contract "for the benefit" of a third person. It is therefore highly unlikely that Pro-Max would have accepted any liability to repay a debt incurred by other persons for their own purposes.

Assuming however, without deciding, that the overdraft agreement was intended to operate as a contract for the benefit of Pro-Max as a third person, it still had to be established that Pro-Max, after incorporation, effectively adopted the benefits stipulated for in its favour. Without such adoption Pro-Max could never have become the appellant's debtor.

There is no evidence that Pro-Max, or for that matter Van der Merwe as its sole shareholder and director, ever acknowledged the existence of any contract concluded for the benefit of Pro-Max, or that they ever contemplated the adoption of any benefit stipulated for in favour of Pro-Max. There was certainly no resolution whereby Pro-Max expressly adopted such benefits. The minute book of Pro-Max shows that only two meetings were ever held. The one was a meeting of subscribers to the memorandum held on 25 August 1981, and the other was a director's meeting held on 20 October 1981. Van der Merwe was the only person shown to have been present at

both these meetings. According to the minutes it was "agreed" at the first meeting "to open a bank account with the Standard Bank of South Africa Limited". This resolution is inconsistent with any conclusion that Pro-Max accepted liability for the repayment of the overdraft to this bank.

The evidence of Van der Merwe indicates that he never appreciated that some kind of acceptance or adoption by Pro-Max was necessary. It appears from his evidence that he was under the mistaken belief that Pro-Max, upon incorporation, automatically became liable for the repayment of the debit balance on the bank account. It was submitted on behalf of the appellant that Van der Merwe's letter of 28 September 1981 to the manager of the Odendaalsrus branch of the appellant amounted to an acceptance by conduct. There is nothing in the body of the letter to support this contention. The heading of the letter referred to Pro-Max as the company which was supposed to have been registered, but in my view this oblique reference to the incorporation of Pro-Max cannot

assist the appellant. Van der Merwe's conduct could, in any event, not have resulted in any acceptance, inasmuch as the need for acceptance had never even entered his mind.

It was suggested that the subsequent payment on 25 May 1983 of a sum of R200,000 into the bank account showed that Pro-Max had accepted liability for the repayment of the overdraft. In my view this payment cannot be regarded as an acceptance by Pro-Max, for the simple reason that there is no evidence to show that the payment was made by, or on behalf of, Pro-Max. It is common cause that Pro-Max never commenced business. Furthermore it had no assets or funds of its own to make such a substantial payment. The deposit slip shows that Van der Merwe's attorneys paid the money into the bank account. This payment was made from monies which Van der Merwe had received from the government of Venda in settlement of a Court case.

There is no evidence that Pro-Max ever accepted any benefit under the alleged stipulatio alteri, and it has not

been established that Pro-Max became indebted to the appellant on any other basis. The judgment by default which was granted on 25 May 1984 by the Witwatersrand Local Division in favour of the appellant against Pro-Max and Van der Merwe was obtained on the incorrect factual allegation that Pro-Max had "accepted and adopted the said loan and advance". That judgment is, in any event, not binding on the first and second respondents since they were not parties to that action.

It has been the appellant's case throughout that the first and second respondents bound themselves as sureties and co-principal debtors for the indebtedness of Pro-Max as principal debtor. Accordingly the appellant must stand or fall on this sole issue. For the reasons set out above, Pro-Max never became indebted to the appellant. In the result the sureties cannot be held liable and the appeal must be dismissed with costs.

There is one further aspect which should be

considered because it has a bearing on the question of costs in the Court a quo. It was alleged in paragraph 4 of the appellant's particulars of claim that during the period November 1980 to August 1981 the appellant lent and advanced monies to the first and second respondent and Van der Merwe, acting as trustees for a company to be registered in the Republic of Venda, that the said company was registered as pro-Max and that Pro-Max "accepted and adopted the said loan and advances as aforementioned." The first respondent requested further particulars with regard to the alleged acceptance and adoption of the said loan by Pro-Max, but the appellant refused to supply these particulars. The first respondent then brought an application to compel the appellant to furnish such particulars, alternatively, to strike out the latter portion of paragraph 4.2 of the particulars of claim, and more especially the words quoted above. Counsel appearing for the appellant in that application submitted that those words were irrelevant to

establish the appellant's cause of action, and intimated that he had no objection to those words being struck out. The Court ordered accordingly. In my judgment, and for the reasons already set out, the deletion of those words is fatal to the appellant's cause of action. It made the particulars of claim excipiable. This was, in my view, correctly conceded by Mr Burger, who appeared for the second respondent in this Court. In my opinion both respondents should have taken an exception at that stage. Their failure to do so resulted in the incurring of the wasted costs of the subsequent action in the Court a quo. In my judgment the first and second respondents became entitled only to their costs as on exception in the Court a quo.

In the result the following order is made:

- 1.1 Condonation for the late lodging of the revised and corrected record of appeal is granted.
- 1.2 The appellant is ordered to pay the costs of the petition for condonation on the basis of an

unopposed application, as well as the wasted costs in respect of the original incomplete record of appeal lodged by it.

1.3 The first respondent is ordered to pay the costs occasioned by his opposition to the condonation application.

1.4 The second respondent is ordered to pay his own costs in respect of the condonation application.

1.5 Costs will include the costs of two counsel employed by each of the parties.

2. The appeal is dismissed with costs, which are to include the costs occasioned by the employment of two counsel by each of the respondents.

3. The order of the Court a quo is deleted and substituted by the following order:

"3.1 The plaintiff's claim is dismissed.

3.2 The plaintiff is ordered to pay defendants' costs as on exception only.

- 3.3 The defendants are ordered jointly and severally to pay the plaintiff one day's cost of the trial. (This being a special order made by the Court a quo).
- 3.4 Costs will include the costs of two counsel employed by each of the parties.
- 3.5 The attention of the taxing master is drawn to the fact that junior counsel for the second defendant was not in attendance at court for one whole day, and that first defendant is an attorney and acted on his own behalf. (This being an observation made by the Court a quo)."

F H GROSSKOPF JA

JOUBERT	JA	
STEYN	JA	
PREISS	AJA	Concur
KRIEGLER	AJA	