THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 1327/2019

In the matter between:

CHARL DANIEL WILKE NO	**FIRST APPELLANT**
THERESA WILKE NO	**SECOND APPELLANT**
T ROOS INDEPENDENT TRUSTEE (EDMS) BPK	**THIRD APPELLANT**

and

GRIEKWALAND WES KORPORATIEF LTD	**RESPONDENT**

Neutral citation: *Wilke NO & Others v Griekwaland Wes Korporatief Ltd* (1327/2019) [2020] ZASCA 182 (23 December 2020)

Coram: NAVSA, MOCUMIE, SCHIPPERS and DLODLO JJA and LEDWABA AJA

Heard: 11 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the website of the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 December 2020.

Summary: Civil procedure – action by creditor based on acknowledgement of debt which related only to arrears – judgment in favour of debtor on basis that amount of indebtedness not established – subsequent claim by debtor and surety for cancellation of surety bond – given as security for debt – creditor claiming

entitlement to security on basis of underlying original causes of debt – acknowledgment of debt reserving creditor's rights in relation to original causes or finance agreements – whether creditor precluded by *res judicata* or issue estoppel – not same relief on same ground —– appeal dismissed.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Daffue J sitting as court of first instance):

The appeal is dismissed with costs including costs consequent upon the employment of two counsel.

JUDGMENT

Dlodlo JA (Navsa, Mocumie and Schippers JJA and Ledwaba AJA concurring):

[1] The appellants are the trustees of Wilke Boerdery Trust (the Trust). In February 2019 they launched an application in the Free State Division of the High Court, Bloemfontein (the high court), for an order directing the respondent, Griekwaland Wes Korporatief Bpk (GWK), to cancel a surety bond registered in its favour in 2003, over two farms in Jacobsdal in the Free State Province (the surety bond). The surety bond was registered by Mr Charl Daniel Wilke (Wilke), and Henque 4335 CC (Henque) as security for goods sold and delivered, production credit granted and monies lent and advanced by GWK to them in the amounts of R 4 million (Wilke) and R 1 million (Henque), in respect of their farming operations. The Trust had bound itself to GWK as surety and co-principal debtor in a total amount of R 5 million, for the due fulfilment of the obligations by the principal debtors, Wilke and Henque. The high court (Daffue J) dismissed the application with costs and held that the Trust remained bound as surety to GWK under the surety bond. The appeal is with its leave.

[2] Since August 2004, GWK extended credit to Henque and Karob Boerdery (Pty) Ltd (Karob), formerly known as CD Wilke Boerderye, pursuant to numerous credit agreements (the principal agreements). In March 2005, Wilke applied to

GWK together with Henque and Karob to have the debts owing to GWK consolidated in a single account in the name of Karob. GWK approved the request on the express condition that notwithstanding the consolidation of the subject debts, all securities granted by Wilke and Henque would remain in place in securitisation of the liability to be assumed by Karob. It is common cause that Wilke, Henque and Karob were amenable to such request and condition being imposed.

[3] With effect from March 2005, the debt owed to GWK by Wilke and Henque at the time were consolidated with the debt of Karob, which assumed liability for those debts to GWK. Payments thereof by Karob to GWK remained secured by special notarial bonds registered in favour of GWK by Wilke in 2000 and Henque in 2003, to secure their indebtedness to GWK, 'pursuant to any cause whatsoever'. Thereafter, only Karob contracted with GWK.

[4] In breach of numerous credit agreements and the debt consolidation, Karob failed to make payment to GWK. As at January 2006 it was in arrears in an amount of R4 831 873.05, and its total contractual indebtedness to GWK was R12, 787, 871.82. These amounts were recorded in an acknowledgement of debt (AOD) which Wilke executed on behalf of Karob on 26 January 2006. In terms of the AOD, Karob undertook to pay the arrears of R4 831 873.05 to GWK as follows: equal monthly instalments of R300, 000.00 from January to December 2006, and a payment of R1, 500, 000.00 on or before 31 August 2006 from the proceeds of Karob's summer crop harvest. Wilke bound himself as surety and co-principal debtor for the due and punctual performance of Karob's obligations under the AOD. An appendix to the AOD recorded the manner of calculation of the aggregate amount alleged to be outstanding, with reference to 21 underlying credit agreements that were extant at the time of the signing thereof.

[5] The AOD did not novate GWK's prior principal claim against Karob. Clause 11.1 reads (my translation):

'The parties record that this acknowledgement of debt is not a novation of the creditor's original claim against the debtor, that it does not constitute a waiver of any of the rights of the creditor, including its right, without notice, upon the original failure to comply with the terms and conditions of this acknowledgement of debt, in its sole discretion to institute legal proceedings in terms of the acknowledgement of debt or the original cause of action.'[1]

The AOD also contained an acceleration clause:

'If the debtor fails to make any payment in terms of this acknowledgement of debt on the payment date, the creditor, in its sole discretion, shall be entitled to:

. . .

recover the full balance of the principal debt and finance costs outstanding on the date of the breach or failure, without it being necessary for the creditor to inform the debtor of this.'[2]

[6] Karob however breached its payment obligations under the principal agreements, the debt consolidation and the AOD. By 10 April 2007 it was in arrears in the sum R5 025 458.37. Consequently, in a letter of demand dated 10 April 2007, GWK invoked the acceleration clause in the AOD and claimed payment from Karob in the sum of R11 655 499.84 before 24 April 2007. Of this amount, R4 226 302.45 constituted the debt owed to GWK by Henque, which Karob had assumed in terms of the debt consolidation. Thereafter, Karob made payments

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[1] Clause 11.1 of the AOD reads:
'Die partye plaas op rekord dat hierdie skuldbewys nie 'n novasie van die skuldeiser se oorspronklike eis teen die skuldenaar is nie, dat dit nie afstandoening van enige van die regte van die skuldeiser insluitende sy reg om sonder kennisgewing met die oorspronklike versuim om die bepaling en voorwaardes van hierdie skuldbewys na te kom sal die skuldeiser geregtig wees om in sy uitsluitlike diskresie geregtelike stappe in te stel kragtens die skuldbewys of die oorspronklike skuldoorsaak'.

[2] Clause 5 of the AOD reads:
'5. Indien die skuldenaar nalaat om enige betaling ingevolge hierdie skuldbewys op betaaldatum te maak, sal die skuldeiser, in sy uitsluitlike diskresie, geregtig wees om:

5.1.1 . . .

5.1.2 die volle saldo van die hoofskuld en finansieringskoste uitstaande op die datum van verbreking of versuim te verhaal sonder dat dit nodig is dat die skuldeiser die skuldernaar hieromtrent in kennis stel;'

and credits were passed on its outstanding indebtedness, so that by 1 July 2009 it owed GWK an amount of R 7 001 793.90.

[7] On 11 September 2009 GWK issued a provisional sentence summons in the high court against Karob and Wilke for payment of the sum of R 7 001 793.90, based entirely on the AOD. On 19 September 2009 the court granted judgment against Karob and Wilke, jointly and severally, in an amount of R1 917 165.80, together with interest. The order provided, inter alia (my translation):

'2. This order is without prejudice to any rights which the plaintiff might have to recover further amounts in terms of the present acknowledgement of debt in these proceedings and in accordance with paragraph 3 hereof.

3. Regarding the remainder of the plaintiff's claim in terms of the acknowledgement of debt, it is ordered that the provisional sentence summons shall remain as a simple summons, it is deemed that an appearance by the defendants has been entered and that the proceedings will take place in accordance with the rules of Court.'[3]

[8] On 5 July 2010 GWK delivered its declaration in respect of the action. Where appropriate, I refer to this claim as 'the 2009 action'. Karob was finally deregistered on 16 July 2010 for want of filing its annual returns. On 8 September 2010, Wilke and Karob (despite the deregistered status of Karob), delivered their plea. Further payments were received by GWK in the amount of R3 million and R435, 690.77 on September 2010 and 21 April 2011, respectively. The matter proceeded to trial. On 13 August 2015, the high court (Kruger J) handed down judgment and dismissed GWK's action, essentially on the basis that GWK had failed to prove the arrear amounts owed in terms of the AOD.

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[3] The order read:

2. Hierdie bevel is sonder benadeling van enige regte wat die Eiser mag hê om verdere bedrae ingevolge die onderhawige skuldbewys te verhaal in hierdie verrigtinge en wel ooreenkomstig paragraaf 3 hiervan.

3. Wat betref die restant van die Eiser se vordering ingevolge skuldbewys word beveel dat die voorlopige vonnis dagvaarding bly staan as enkelvoudige dagvaarding dat geag word dat verskyning deur die Verweerders aangeteken is en dat die verrigtinge verder ooreenkomstig die hoofreëls geskied.'

[9] Kruger J's findings were as follows. The form and content of the AOD established that it dealt only with payment of the arrears. The AOD did not refer to payment in instalments ('afbetalingspaaiemente') for the full principal debt and did not contain an interest rate and was therefore unusual. It referred to the different interest rates in the various (underlying) contracts. Failure to pay in terms of the AOD meant that GWK was entitled to claim the full outstanding amounts owed to it in terms of the underlying contracts referred to in clause 11 of the AOD. (1/96/22). Ultimately, GWK failed to establish the applicable rate of interest and the amount owed by the Trust in terms of the AOD.

[10] GWK was granted leave to appeal to a full court of the high court. The full court (Moloi and Reinders JJ and Zietsman AJ) held that GWK had decided to institute legal proceedings in terms of the AOD and not the original causes of action or accounts referred to in annexure A to the AOD. Had it instituted action in terms of the latter causes of action, the full court found, there could have been no doubt about what interest could be charged, on what account from what date, and whether or not interest could be capitalised. The full court however, concluded that Kruger J was correct to hold that the amount of indebtedness in terms of the AOD had not been established. The full court noted that although Kruger J had dismissed GWK's claim with costs, the proper order ought to have been one of absolution from the instance. It did not consider that to be a sufficient basis to interfere with the order made by Kruger J. Subsequently, this Court refused an application by GWK for special leave to appeal against the judgment of the full court.

[11] In his judgment, Daffue J emphasised that the AOD was not a novation of the original debts or underlying credit agreements and that GWK had expressly retained the right to sue the respective debtors on the original and underlying credit agreements. Daffue J had regard to the finding of Kruger J that the parties to the AOD intended to deal only with the arrears.

[12] Daffue J held that there was no indication that GWK, in pursuing an action based on the AOD, abandoned its other remedies. Dealing with res judicata and issue estoppel, the judge noted that neither the Trust nor Henque had been cited as a party in the 2009 action and that the same relief on the same ground had not been finally adjudicated by Kruger J. The court found that GWK was not asserting the same subject matter as a basis for holding onto its security, under the guise of a different cause of action.

[13] The deregistration of Karob meant that the proceedings before Kruger J and his dismissal of GWK's claim and the outcome of the appeal are null and void as against Karob. Daffue J, on the authority of *Traub v Barclays National Bank; Kalk v Barclays National Bank* 1983 (3) SA 619 (A) held that the deregistration of Karob however, did not prevent GWK, as creditor, from proceeding with an action against the Trust, on the underlying credit agreements. As is evident from the surety bond, the Trust remains bound as surety to GWK in respect of Wilke and Henque's indebtedness to it, regardless of whether Karob's registration as a company will be restored.

[14] Counsel for the Trust argued that the high court was incorrect to hold that GWK could proceed against the debtors based on the original and underlying credit agreements. GWK could sue for the total debt based either on the AOD, or the underlying credit agreements. It was submitted that GWK chose the former to the exclusion of the latter to its detriment, as shown by clauses 5 and 11.1 of the AOD. Absent an amendment, whilst the 2009 action was pending, to incorporate a claim based on the underlying credit agreements, so it was argued, it was not open to GWK to rely on a different ground to claim the same thing. In terms of the 'once and for all' rule, all claims generated by the same cause of action had to be instituted in one action (*National Sorghum Breweries Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 241D-E).

[15] It was further argued on behalf of the Trust that the high court erred in rejecting their submission that the outcome of the 2009 action rendered any claim based on the principal agreements *res judicata*, or that the latter claim was precluded by issue estoppel, because neither the Trust nor Henque was a party to the 2009 action based on the AOD. Although no cause of action was pleaded against them, nor relief sought from them, a surety is regarded as the 'same party' for purposes of a *res judicata* plea (*Aon South Africa (Pty) Ltd v Van den Heever NO and Others* 2018 (6) SA 38 (SCA) para 27).

[16] This Court in *Transalloys v Mineral-loy* [2017] ZASCA 95 para 22, with reference to *Prinsloo NO & others v Goldex* 15 (Pty) Ltd and Another [2012] ZASCA 28; 2014 (5) SA 297 (SCA) (para 10), described *res judicata* and issue estoppel as follows:

'The expression of 'res judicata' literally means that *the matter has already been decided.* The gist of the plea is that the matter or question raised by the other side had been *finally adjudicated upon in the proceedings between the parties* and that it therefore cannot be raised again. According to Voet 24.1.1, the exceptio was available at common law if it were shown that the judgment in the earlier case was given in a *dispute between the same parties,* for the *same relief* on the *same ground* or on the *same cause* (idem actor, idem res et eadem causa petendi) . . . In time the requirements were, however, relaxed in situations which gave rise to what became known as issue estoppel. This is explained as follows by Scott JA in *Smith v Porritt and others* 2008 (6) SA 303 (SCA) para 10:

"Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the *parties must be the same* (*idem actor*) and that the *same issue* (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of *fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and* relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in

Kommissaris van Binnelandse Inkomste v Absa Bank BPK 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. *The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by ase basis.* (*KBI v Absa Bank supra* at 670E-F.) Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others."'(Emphasis added.)

[17] In the present case, even if one were to accept generously, in favour of the appellants, that the parties in the earlier and subsequent litigation were essentially the same, in order to raise res judicata successfully the appellants must still establish that 'the same relief on the same ground or on the same cause' was claimed by GWK, to justify holding onto its security. In *Aon* this court said the following (at para 22):

'As mentioned earlier the plea of res judicata in this case takes the attenuated form commonly referred to as issue estoppel. Res judicata deals with the situation where the same parties are in dispute over the same cause of action and the same relief, and in the form of issue estoppel arises:

" Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issues of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if had been made so in express terms." '

(Citations omitted).

[18] In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825G, Corbett JA stated that 'cause of action . . . is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action'. In deciding whether the same relief is being sought on the same ground, the starting point is 'to compare the relevant facts of the two cases upon which reliance is placed for

the contention that the cause of action (in the extended sense of an essential element) is the same in both' (*Janse Van Rensburg NO v Steenkamp* [2008] ZASCA para 25).

[19] Applied to the present case, it is clear that GWK in the 2009 action, did not claim the same thing on the same ground. As stated earlier, its claim in that action was founded on the AOD, and then only for payment of the arrears. That much is clear from both the judgments of Kruger J and the full court. Those judgments themselves distinguish between GWK's cause of action based on the AOD and its causes of action based on the principal agreements. Indeed, Karob and Wilke defended the 2009 action on the basis that only the arrears of R 4 831 873.05 were due to GWK; that Wilke had already paid that amount; and that the difference between the sum of R 12 787 871.82 in the AOD and the arrears, was not due to GWK under the AOD but by reason of various other causes of action ('uit hoofde van verskeie ander skuldoorsake'). (2/395/3.3-3.5)

[20] The contention that GWK elected to sue on the AOD to its detriment, is both opportunistic and wrong. The execution of the AOD, the breach of which created a distinct cause of action, did not extinguish the principal agreements between the parties. These agreements retained their independent existence after the conclusion of the AOD. Even if the action based on the AOD, which was restricted to claiming the arrears, was not successful, nothing precluded GWK from resorting to the causes of action in terms of the original principal agreements. It expressly reserved the right to do so in clause 11.1 of the AOD. And there is nothing to suggest that GWK waived this right.

[21] Furthermore, a party may choose any one of the several legal avenues available to it. If it chooses to pursue sustainable relief that would not necessarily mean that such a party has abandoned the other. Seeking payment of arrears in terms of the AOD can hardly be said to exclude a claim for the amounts outstanding in terms of the underlying credit agreements. More so, since that right

has been expressly reserved it must also be borne in mind that in essence Kruger J found that the amount of the arrears owing at the time had not been proved.

[22] For the reasons aforesaid the appeal is dismissed with costs, including the costs consequent upon employment of two counsel.

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DV DLODLO

JUDGE OF APPEAL

Appearances

For appellants:	S Grobler SC
Instructed by:	JA Botha Attorneys, Bethlehem
	McIntyre Van Der Post, Bloemfontein
For respondent:	W Luderitz SC and P Lourens
Instructed by:	Werksmans Attorneys, Sandton
	Symington & De Kok, Bloemfontein.