51/96

Case no: 88/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COLIN VENTER	First Appellant
DAVID COHEN	Second Appellant
BAY NOMINEES (PTY) LTD	Third Appellant
and	
CREDIT GUARANTEE INSURANCE CORPORATION	
OF AFRICA LIMITED	First Respondent
N T C LIMITED	Second Respondent

Coram: **HEFER, F H GROSSKOPF, NIENABER, SCHUTZ JJA**

et ZULMAN AJA

Heard: 26 February 1996

Delivered: 13 May 1996

JUDGMENT

F H GROSSKOPF JA:

In an action instituted in the South Eastern Cape Local Division the first respondent claimed payment of the sum of R65 000 from the three appellants jointly and severally. The claim was based on an undertaking allegedly given by an attorney, Mr Myers, on behalf of the three appellants. During the course of the trial and as a result of an amendment to the appellants' plea the second respondent brought a successful application for leave to intervene as second plaintiff, claiming in the alternative that the undertaking had been given in its favour.

For the sake of convenience I shall refer to the first and second respondents as the first and second plaintiffs, and to the three appellants as first, second and third defendants respectively. I should point out that the first defendant did not note or prosecute any appeal and that he is therefore incorrectly cited as first appellant. He is indeed the respondent in the first plaintiff's cross-appeal, but I shall refer to him as first appellant in the order I propose to make.

The Court *a quo* (**Kroon, J**) gave judgment for the first plaintiff against the second and third defendants jointly and severally in the sum of R63 323. The first plaintiff's claim against the first defendant was dismissed on the ground that the first plaintiff failed to show that Myers had been authorized to bind the first defendant. The claim of the second plaintiff was dismissed. The Court *a quo* also made a number of costs orders, some of which will be dealt with hereunder.

The Court *a quo* granted the defendants leave to appeal against:

1. the order granting judgment in favour of the first plaintiff against the second and third defendants;

2. the order that not only the first defendant, but also the second and third defendants, pay the costs occasioned by the first plaintiff's opposition to the defendants' application to amend their plea dated 29 May 1992;

3. the order that all three the defendants pay the costs occasioned by their opposition to the second plaintiff's

application to intervene;

4. the order that the second and third defendants pay the second plaintiff's costs of trial.

Leave was also granted to the first plaintiff to cross-appeal against the dismissal of its claim against the first defendant. There was no cross-appeal by the second plaintiff, and the question whether the first defendant should also be liable for the second plaintiff's costs of trial was never raised on appeal.

The matter has a long and chequered history. There were a number of opposed applications to amend the pleadings, both before and during the trial, causing postponements and counter applications.

The salient facts are the following. During 1987 a company known as Contour Engineering (Pty) Limited ("Contour") became indebted to the second plaintiff in the sum of R65 057 in respect of goods sold and delivered by the second plaintiff to Contour. In consideration of credit facilities granted to it by the second plaintiff

Contour had signed a so-called second cession of book debts in favour of the second plaintiff. Contour was placed in liquidation towards the end of 1987, and the second plaintiff duly proved a secured claim against the company in liquidation.

The second plaintiff was covered by a policy of insurance in terms whereof the first plaintiff indemnified the second plaintiff against loss in respect of bad debts, including those of Contour, up to 75% of any such loss. When the second plaintiff submitted its claim to the first plaintiff in terms of the insurance policy, the first plaintiff required the second plaintiff to sign a "cession of dividends" form whereby it ceded to the first plaintiff its right to any dividend which might accrue to it arising from the liquidation of Contour. A copy of this cession of dividend was lodged with the liquidator of Contour who noted the interest of the first plaintiff in the matter. It is common cause that notwithstanding the cession of dividend the second plaintiff retained its claim against Contour, and therefore remained the creditor who could vote at meetings of creditors of Contour.

On 16 November 1988 the Court granted an order in terms whereof meetings of creditors and members of Contour were to he held for the purpose of considering an offer of compromise proposed by the third defendant. Meetings were convened for 7 December 1988, and the chairman of the meetings, Mr Van Zyl, had to report back to the Court on 14 December 1988.

The offer of compromise included the following provision:

> "the receiver shall, on behalf of [Contour], pay .... to creditors holding cessions of the book debts of [Contour] as security the amount to which they would be entitled from the nett worth of the recoverable book debts save that the proposer [the third defendant] warrants that [the second plaintiff] will receive a minimum of R30 000,00 from the realisation of the book debts in terms of its cession and undertakes to make good upon demand any shortfall arising from a difference between the amounts so recovered by [the second plaintiff] and the said amount of R30 000,00."

The second plaintiff was nevertheless convinced that the full amount due to it would be recovered, and it recommended to the first plaintiff that they should not accept the offer of compromise. The first plaintiff at first intimated that it would accept the offer of compromise, but subsequently decided to reject the offer and informed the second plaintiff accordingly. The second plaintiff consequently attended the meeting of creditors on 7 December 1988 and voted against the acceptance of the offer of compromise. Notwithstanding this opposition the offer was accepted.

Van Zyl, who was also the liquidator of Contour and the proposed receiver under the offer of compromise, testified at the trial. According to his evidence the first defendant got in touch with him on Friday 9 December 1988. The first defendant was concerned that the dissenting vote of the second plaintiff might cause the Court to refuse to sanction the proposed arrangement on 14 December 1988. The second defendant was in Israel at the time. The first defendant suggested that he and Van Zyl should go and see Myers, who was the attorney acting for the liquidators of Contour and for the other parties interested in the proposed arrangement in terms of s 311 of the Companies Act 61 of 1973 ("the Act"). Myers tried to telephone the first plaintiff to enquire whether it would not reconsider its rejection of the offer of compromise. Myers could not get through to the first plaintiff on the telephone and Van Zyl eventually left, leaving the first defendant behind with Myers. Later, when dealing with the cross-appeal, I shall refer in greater detail to the evidence of Van Zyl concerning the first defendant's conduct and statements on that Friday.

Van Zyl heard on Monday 12 December 1988 that " a deal had been done". Neither Myers nor the first defendant testified at the trial to explain what this "deal" was. The only other witness who could give direct evidence about the nature and conclusion of the "deal" was Mr Wallace, a manager in the employ of the first plaintiff at the time. He was the person who eventually spoke to Myers over the telephone on Friday 9 December 1988. According to Wallace he and Myers reached agreement ("the agreement") over the telephone with regard to the terms of an undertaking ("the undertaking") by the defendants. The terms of the undertaking were subsequently set out in writing by means of an exchange of facsimile transmissions on Monday 12 December 1988. It is no longer in dispute that these terms are correctly set forth in the message transmitted by Mr McDonald, an employee of the first plaintiff, to Myers on 12 December 1988. It reads as follows:

"Message: Agreed as follows:

1. Should collection of book debts not realise R65 000 within 6 months of 7/12/88. Then the offeror and the parties hereunder (in para 2) will make up any shortfall.

2. This is agreed to by Colin Venter, David Cohen and Bay Nominees (Pty) Ltd jointly and severally.

3. Our agreement withdraws any opposition to the acceptance of the offer.

4. The parties in para 2 above agree to make up any shortfall within 30 days of the expiry of the period in para 1 above.

(signed G McDonald)
p.p. Credit Guarantee

Agreed for
C. Venter
D. Cohen
Bay Nominees (Pty) Ltd."

On 13 December 1988 McDonald sent a further message to Myers reading as follows:

"We have had no response to our fax of 12/12/88. We therefore assume that our proposal has been accepted by C. Venter, D. Cohen and Bay Nominees (Pty) Ltd jointly & severally. On this basis we will not oppose the offer of compromise.

However should you be in any doubt whether the offer has been accepted by your clients please notify us immediately in order to afford us an opportunity to oppose the offer."

The question whether Myers was in fact authorized to bind the first defendant remains in dispute and will be considered when I deal with the cross-appeal.

Mr Rosenthal, who appeared on behalf of the second and third defendants, submitted that the appeal should succeed on any one of three alternative bases. First, on the ground that the first plaintiff has failed to discharge the onus of proving the amount of the shortfall which was due to it in terms of the undertaking. Secondly, on the basis that Myers and Wallace were not *ad idem* as to whom Wallace was representing when he and Myers entered into the agreement. Thirdly, that the agreement was a secret agreement which was *contra bonos mores,* and that its concealment was contrary to public policy.

1.The shortfall:

I shall assume, but without deciding, that the first plaintiff bore the onus of proving the extent of the "shortfall" which the defendants were obliged to pay in terms of the undertaking. The question is whether the first plaintiff discharged that onus.

The undertaking was that any "shortfall" would be made up by the defendants "should collection of book debts not realise R65 000 within 6 months". Mr Rosenthal submitted that in order to prove the "shortfall" the first plaintiff first had to prove the total amount of book debts actually collected, and from that amount there had to be deducted the book debts which were collected for the account of the Standard Bank, which held the first cession of book debts. Counsel further submitted that there would then be a shortfall only to the extent that the balance of the book debts collected did not realise R65 000. It is common cause that the plaintiffs in actual fact received no money from the collection of book debts, but according to counsel's argument that was totally irrelevant. The submission, therefore, was that the first plaintiff had to prove the shortfall by determining the balance of the book debts collected, irrespective of any actual payments to the plaintiffs.

I do not agree with Mr Rosenthal's interpretation of the undertaking. The undertaking should be construed in its context, and with a view to what the parties intended to achieve (**Jaga v Dönges NO**

and Another; Bhana v Dönges NO and Another 1950(4) 653(A) at 662G-H; **Swart en 'n Ander v Cape Fabrix (Pty) Ltd** 1979(1) SA 195(A) at 202 B-C). Insofar as the words used in the undertaking are capable of bearing different meanings, a "purposive construction" may be applied (**Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others** 1990(1) SA 925(A) at 942I-944A).

The first plaintiff insisted on payment of the sum of R65 000 and the agreement was concluded on that basis. The wording of the undertaking in my opinion shows that the parties intended that the debt of R65 000 should, in the first instance, be reduced by means of payments derived from the collection of book debts. The defendants would then be liable for any shortfall. I cannot believe that the parties intended that the R65 000 debt would be reduced by the mere collection of book debts, and without the money being paid over to either of the plaintiffs. The parties to the agreement were after all business people and one would expect them to have concluded an agreement which makes business sense. The first and second plaintiffs had no control over the collection of the book debts or the disbursement of the money so realised. I find it highly unlikely that the first plaintiff would in those circumstances have agreed to an arrangement whereby its claim of R65 000 would be reduced, not by actual payments, but by the alleged collection of book debts by undisclosed persons. In my opinion it is far more likely that the parties intended the shortfall to mean the deficit which remained after the money from the book debts had been paid over. Seeing that no payments were made in this regard, the first plaintiff has proved a shortfall of R65 000.

I am in any event of the view that the first plaintiff has discharged the onus even on the basis of the interpretation suggested by Mr Rosenthal. That was also the conclusion of the Court *a quo*.

The liquidator, Van Zyl, testified that he had collected book debts of Contour to the value of R66 430. After deducting his fee of

R8 449 Van Zyl was left with a net balance of R57 981 for distribution amongst creditors secured by a cession of books debts. R56 304 was paid to the Standard Bank. The balance of R1 677 was supposed to have been paid to the second plaintiff, but in settling their mutual accounts Van Zyl gave the second defendant credit for this amount. The Court *a quo* deducted this amount of R1 677 from the first plaintiff's claim of R65 000 and gave judgment in its favour for the balance of R63 323.

There is no evidence that Van Zyl recovered any further book debts. His uncontested evidence was that he had collected 90% of the book debts, and that the claims relating to the remaining book debts were opposed on legal grounds. Van Zyl did not attempt to collect any of the remaining book debts, but handed them to the second defendant for collection.

Mr Rosenthal submitted that Van Zyl was not entitled to the fee of R8 449 and maintained that this amount should also be deducted from the amount of first plaintiff's claim. In support of his submission in this regard counsel placed reliance on the terms of the offer of compromise which allowed the liquidator the sum of only R9 500 in respect of certain costs and fees. I should point out that this argument was never raised during the course of the trial. It was not even mentioned in counsel's heads of argument. Van Zyl's evidence was that he was entitled to this fee of R8 449. That evidence was never challenged in cross-examination and I see no reason why it should be rejected. It is also of some significance that the offer of compromise provides that creditors holding cessions of book debts of Contour as security would be entitled to payment from "the nett worth" of the recoverable book debts. The quoted words suggest that the deduction of certain expenses in recovering the book debts was envisaged.

Counsel further pointed out that Van Zyl had delegated the task of collecting the remaining outstanding book debts to the second defendant, alternatively to the first defendant, and submitted that the first plaintiff had failed to prove how much of these outstanding book debts had in fact been recovered by the first or second defendant. The defendants' reply to the first plaintiff's request for particulars for trial in my opinion provides a complete answer to this submission. The first plaintiff requested full details of the book debts which had been collected, including particulars by whom it had been collected and the amounts so recovered. The defendants' answer was that they have no knowledge of "the allegations" contained in the request. I understand this answer to mean that neither the first nor the second defendant collected any book debts. There is in any event no evidence to suggest that they did recover any book debts.

It follows that the first plaintiff has discharged the onus of proving a shortfall of not less than R63 323.

2. The identity of the contracting parties:

Mr Rosenthal submitted that the parties to the agreement never reached consensus inasmuch as the second and third defendants intended to contract with the first plaintiff, while the first plaintiff intended to represent the second plaintiff as contracting party.

The case for the second and third defendants had always been that they accepted that Wallace, in his negotiations with Myers, intended to represent the first plaintiff as the one contracting party, and that they likewise intended through Myers to conclude an agreement with the first plaintiff.

When Wallace testified in chief he confirmed that he had in fact represented the first plaintiff. In those circumstances there was no need to cross-examine Wallace on this aspect of the case, particularly where the defence now relied upon was never pleaded. Be that as it may, Wallace changed his evidence during cross-examination. He was reminded of the fact that the second plaintiff had throughout remained the creditor of Contour. He was referred to the action ("the first action") which had previously been instituted by the second plaintiff against the three defendants based on the same undertaking. It was pointed out to

Wallace that the particulars of claim in the first action alleged that the first plaintiff had indeed acted on behalf of the second plaintiff in concluding the agreement. Wallace then felt constrained to agree with counsel's suggestion that the first plaintiff had represented the second plaintiff, but he added:

> "I would say we acted on behalf of and in conjunction with [the second plaintiff]".

The first action had been withdrawn before the present action ("the second action") was instituted. The role of the first plaintiff as the principal was never in issue in the second action, at least not until Wallace changed his evidence during cross-examination. As a result of this new evidence the defendants sought an appropriate amendment to their plea. This in turn led to an application by the second plaintiff for leave to intervene in the matter. Both the amendment and the application to intervene were granted by the Court *a quo*.

Wallace was subsequently recalled by the first plaintiff to give further evidence. He then testified that after having given evidence on the previous occasion, he returned home to Johannesburg by aeroplane. That same evening he discussed his evidence with a friend who had knowledge of their type of insurance business. During the discussion Wallace suddenly realised that he had made "a straightforward mistake" when he testified that the first plaintiff had been acting on behalf of the second plaintiff.

The Court *a quo* carefully considered this new evidence of Wallace and concluded that he had given an adequate explanation for the mistake which he had previously made in his evidence. The impression which the witness had made on the learned judge played an important role in this decision. I see no reason for disturbing this credibility finding of the Court *a quo*.

The objective facts also lead to the conclusion that Wallace was correct when he subsequently testified that in entering into the agreement he had been acting on behalf of the first plaintiff as principal. The messages which passed between Wallace and Myers on 12 and 13 December 1988 made no mention of the second plaintiff, but referred to the first plaintiff as being one of the contracting parties. If the second plaintiff had been the real principal there is no reason why Wallace would not have disclosed that to Myers. It is therefore of some significance that the name of the second plaintiff was never mentioned in this regard during the negotiations.

A further factor which should be borne in mind is that Wallace never even discussed the proposed agreement with the second plaintiff. There is indeed no evidence that the first plaintiff, or anybody on its behalf, had been given a mandate to represent the second plaintiff in concluding the agreement with Myers. Any belief on the part of Wallace that he was acting on behalf of the second plaintiff would therefore have been mistaken inasmuch as he had no authority to represent the second plaintiff (**Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd** 1984(3)

SA 155(A) at 166C-D).

I therefore agree with the conclusion of the learned judge *a quo* that there was consensus. It was indeed the common intention of all the contracting parties that the undertaking would be in favour of the first plaintiff.

3. The secret agreement:

Mr Rosenthal submitted on behalf of the second and third defendants that the agreement in terms whereof they had undertaken to pay the first plaintiff any shortfall constituted a secret agreement which was *contra bonos mores* and therefore void. Counsel further submitted that the concealment of the agreement from the creditors and the Court whose sanction was being sought, was contrary to public policy and that the agreement should accordingly not be enforced by the Court.

I find it ironic that the second and third defendants should seek to escape liability on the basis that they concealed the so-called secret agreement from the creditors and the Court. There is no suggestion that the first plaintiff ever intended or attempted to withhold information concerning the agreement from anyone, or that it was aware of any concealment. The first plaintiff was in any event not a creditor of Contour. It had no duty to inform the Court or creditors of the agreement. If anybody had a duty to disclose the existence of the agreement and its terms it would have been the third defendant who had proposed the s 311 arrangement, and who was also a party to the so-called secret agreement. Van Zyl, who was the liquidator, chairman of meetings and receiver, knew of the agreement. He did not deem it necessary to mention the agreement to the Court because it had no effect on the offer of compromise and did not concern creditors.

The legal principles applicable to contracts which are alleged to be *contra bonos mores* or contrary to public policy are set out in **Sasfin (Pty) Ltd v Beukes** 1989(1) SA 1(A) at 7I-9G. At 9B-F Smalberger JA points out that public policy generally favours the utmost freedom of contract, and that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases (and see **Botha (now Griessel) and Another v Finanscredit (Pty) Ltd** 1989(3) SA 773(A) at 782H-783C).

In considering whether the agreement in the present case was against public policy or contrary to good morals, the following considerations should be borne in mind. The agreement was concluded only after the meetings in terms of s 311 of the Act had been held. There had been full disclosure of all the relevant known facts at those meetings. The majority of creditors were satisfied with the terms of the offer and voted in favour thereof at the meetings. The subsequent agreement provided for the eventual payment of any shortfall to the first plaintiff, who was not a creditor of Contour. Payment of any shortfall under the agreement would have been made from outside sources to which the creditors had no claim. The agreement did not affect the rights of creditors, or cause them actual or potential prejudice.

This was not a case where a decisive vote of a creditor had been "bought" or where a secret agreement had been made with one of the creditors to pay him more. (Henochsberg **On the Companies Act** 5th ed 624; Wille and Millin **Mercantile Law of South Africa** 18th ed p 34; **Levy v Katz** 1914 WLD 88).

In my opinion it would have made no difference in the present case if the terms of the undertaking had been brought to the attention of creditors and the Court whose sanction was being sought. There was nothing improper or immoral about the agreement, and I do not agree with counsel's submission that the failure to disclose its terms to creditors and the Court was contrary to public policy.

The appeal against the order granting judgment in favour of the first plaintiff against second and third defendants in the sum of R63 323, plus interest thereon, should accordingly be dismissed.

4. Cross-appeal:

The cross-appeal concerns the dismissal of the first plaintiff"s claim against the first defendant. The Court *a quo* found that the first plaintiff failed to prove that Myers had been duly authorized by the first defendant to conclude the agreement on his behalf.

Neither Myers nor the first defendant testified at the trial. Although Myers could be regarded , on the one hand, as a person who was in the opposing camp, the first plaintiff, on the other, was saddled with the onus. Myers was equally available to both sides, but for different reasons neither party wished to enlist him as a witness. No adverse inference should accordingly be drawn against either side for failing to call Myers.

The first defendant's failure to testify is a different matter. He was obviously able to give decisive evidence relating to his involvement in the third defendant, his interest in the sanctioning of the compromise and his instructions to Myers. Because these matters were peculiarly within his knowledge less evidence than otherwise would suffice to establish a *prima facie* case **(Union Government (Minister of Railways)** v Sykes 1913 AD 156 at 173-174 (per **Innes J**); Marine & Trade Insurance Co Ltd v Van der Schyff 1972(1) SA 26(A) at 39G-40C; New Zealand Construction (Pty) Ltd v Carpet Craft 1976 (1) SA 345(N) at 348F-H).

The question whether an adverse inference should be drawn depends to a large extent upon the particular circumstances of the case. No general rule can be laid down, but one of the circumstances that must be taken into account and given due weight, is the strength of the case which the first defendant had to meet (Galante v Dickinson 1950(2) SA 460 (A) at 465; Marine & Trade Insurance Co Ltd v Van der Schyff, supra, at 40 A-E (*per* **Jansen JA**) and at 49 F-H (*per* **Corbett JA**); Titus v Shield Insurance Co Ltd 1980(3) SA 119 (A) at 133 E-G). In Macu v Du Toit en 'n Ander 1983(4) 629(A) **Botha JA** remarked as follows at 647F-H:

> "Soos altyd wanneer die subjektiewe gemoedstoestand van 'n persoon in geskil is, kon die bewyslas ten aansien daarvan *prima*

> *facie* afgelos word deur getuienis van die omstandighede wat op die gegewe tydstip geheers het, soos bv mededelings wat die respondente aan die appellant gemaak het, die wyse van die optrede van die respondente en die appellant, en so meer, waaruit 'n afleiding geregverdig sou wees aangaande die appellant se gemoedstoestand. Wat wel 'n geldige en tersaaklike oorweging is, is dat die appellant se gemoedstoestand natuurlik binne sy eie besondere kennis gelê het, en dat die respondente gevolglik met min getuienis kon klaarkom om 'n weerleggingslas op die appellant te plaas (kyk bv *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26(A) *per* JANSEN AR op 40 A-C en die gesag daar aangehaal."

As was pointed out during argument in this Court, the first plaintiff cannot rely upon the extra-judicial statements, conduct and admissions of the "agent" himself to establish his authority when that is the very fact in issue (**New Zealand Construction** case, **supra**, at 348E; **Tuckers Land and Development Corporation (Pty) Ltd v Perpellief** 1978(2) SA 11 (T) at 15H). The fact that Myers represented to Wallace that he acted for the first defendant and that he was duly authorized to do so, cannot therefore assist the first plaintiff. For the same reason the first plaintiff cannot rely on the contents of the telefax transmissions which specifically refer to the first defendant as one of the parties being represented by Myers.

The Court may, however, take cognisance of the probabilities. It is in that regard that the conduct and statements of the first defendant on Friday 9 December 1988 when the agreement was concluded are of particular significance.

Attorney Myers was acting on behalf of the offeror (the third defendant). He also represented the liquidator, Van Zyl. In terms of the offer the third defendant warranted that the second plaintiff would receive a minimum of R30 000 from the realisation of the book debts in terms of its cession and undertook to make good upon demand any shortfall arising from a difference between the amount so recovered by the second plaintiff and the said amount of R30 000.

The first defendant, according to Van Zyl, was concerned that the first plaintiff's opposition to the sanctioning of the offer might jeopardize it. He suggested to Van Zyl that they approach Myers with the request to phone the first plaintiff and persuade it to reconsider its position. The first defendant's involvement in the subsequent events appears from the following extract from the evidence in chief of Van Zyl:

> "You were not aware of the details of what had been negotiated between Mr Myers and Venter [the first defendant] and Credit Guarantee [the first plaintiff]? --- No. Mr Myers took the view that he could not understand why they kept changing their mind and he wanted to know what the problem was. And couldn't they accommodate them in some way or another.
>
> Do you know what the accommodation consisted of or weren't you involved in that? --- I think Mr Venter suggested that they offer - because they had been guaranteed R30 000,00 and he had offered them more. I can't remember how much. That was the basis, that they were offering a bit more.
>
> I see. So your understanding of the negotiation was that Mr Venter said well, let us try and offer them a little more and see whether we can't do a deal as it were. -- That is so yes.
>
> And you were informed on the Monday that in fact the deal had been done. --- That is correct."

And under cross-examination he said:

> "- when we were there Mr Venter suggested that they try and up

the (indistinct) because I (intervention).

They try and up? -- Try and up this R30 000,00 that they up the figure.

Now on whose behalf should the figure be upped? -- It would have been on behalf of the offeror."

The introduction of the first and second defendants as additional guarantors alongside the third defendant came about at the insistence of Wallace who confirmed that it was standard practice that the personalities behind the nominee company also bind themselves. The averment that the first defendant was one of the personalities behind the third defendant was not challenged by counsel who then appeared for the first defendant; and it would provide an explanation of why the first defendant might have been prepared to assume joint personal liability with the second and third defendants.

The conduct and statements of the first defendant on that Friday show to what extent he identified himself with the offer of compromise. He was the person who was concerned about the first plaintiff's opposition to the proposed scheme and he took the initiative to seek to rectify the position. It was he who suggested that they go and see Myers. He apparently knew Myers as the attorney who had prepared the offer of compromise and the application to court. His relationship with Myers was so close that he could request Myers to telephone the first plaintiff in order to negotiate and reach an accommodation. It is not without significance that the first defendant was the one who suggested that "they" should offer the first plaintiff more money.

The aforegoing facts conjure up the following possibilities about the interaction between Myers on the one hand and the first and second defendants on the other:

a) that the first defendant was merely attending to the second defendant's interests while the latter was overseas; and that all his actions, such as escorting Van Zyl to Myers' office and offering suggestions as to how the compromise could be protected, were consistent with that hypothesis; or

b) that the first defendant had a stake in the third defendant together with the second defendant and that he was acting on behalf of both of them when Myers, with his knowledge and most probably in his presence, had the various telephone conversations with Wallace.

I am of the view that the latter hypothesis is the more likely of the two. It would explain why the second defendant did not dispute Myers' authority to commit him in his absence to the undertaking; whereas the first hypothesis means that Myers, an attorney, having just discussed the matter with the first defendant, gave the undertaking on behalf of the two defendants either because he misunderstood the true position (which is unlikely) or because he expected, for a reason which is not immediately apparent, that his actions would be ratified ex post facto, (failing which he would of course be exposed to an action for damages for breach of warranty of authority).

In my judgment the first plaintiff had done enough to establish at least a *prima facie* case - one which called for an explanation by the first defendant. That explanation was not forthcoming. In the absence of any evidence by or on behalf of the first defendant that *prima facie* case became conclusive. I am accordingly of the view that the first plaintiff's cross-appeal against the dismissal of its claim against the first defendant should be allowed.

5. Costs orders:

5.1 The Court *a quo* ordered all three defendants to pay the costs occasioned by the first plaintiff's opposition to the defendant's application to amend their plea dated 29 May 1992. The particular component of the proposed amendment which was opposed by the first plaintiff, was the introduction by the first defendant of the defence that Myers was not authorized to represent him. That amendment concerned only the first defendant and the other two defendants had no interest therein. It is common cause that the costs order which included the other two defendants was made *per incuriam*, and that the appeal of the second and third defendants should succeed in this respect. The success of the second and third defendants in this connection cannot, however, affect the costs of appeal.

5.2 The Court *a quo* ordered all three defendants to pay the costs occasioned by their opposition to the second plaintiff's application to intervene. Mr Rosenthal submitted on behalf of the second and third defendants that their amended plea (based on Wallace's evidence that the first plaintiff had acted on behalf of the second plaintiff) raised the defence of a lack of consensus, and that joinder of the second plaintiff could not alter that defence or take the matter any further. That argument of course presupposes that the defence raised in the amended plea was unassailable.

When the Court *a quo* made the ruling which allowed the intervention of the second plaintiff, the Court reserved the question of costs. These costs were dealt with in detail when the Court *a quo* gave judgment in the matter, and I am not persuaded that the learned judge did not exercise a judicial discretion when he made that costs order. The appeal against that costs order should accordingly be dismissed.

5.3 The Court *a quo* ordered the second and third defendants to pay the second plaintiff's cost of trial notwithstanding the fact that the claims of the second plaintiff against the second and third defendants were dismissed. In coming to that conclusion the Court *a quo* took account of the fact that it was as a direct result of the defendants' decision to invoke the specific defence relating to the capacity in which Wallace had contracted, that the second plaintiff intervened in the proceedings. That defence was not upheld by the Court *a quo*.

The second and third defendants objected to paying the costs of a party who had achieved no success at all, and submitted that no good grounds exist why costs should not follow the event.

It has not been suggested that the Court *a quo* did not exercise a judicial discretion with regard to this issue. In view of the unusual circumstances which caused the second plaintiff's intervention I am not prepared to find that the Court *a quo* did not exercise a proper discretion. The appeal against this costs order can accordingly not succeed.

6. Order of the Court *a quo*:

For the purpose of understanding the order I propose to make I set out those paragraphs of the order of the Court *a quo* which are specifically referred to in the proposed order.

"(2) The claims of the first and second plaintiffs against the first defendant are dismissed."

"(3) The claims of the second plaintiff against the second and third defendants are dismissed."

"(4) Judgment for payment of the sum of R63 323,00, together with interest thereon at the legal rate from 7 July 1989 to date of payment, is entered in the first plaintiff's favour against the second and third defendants, jointly and severally, the one paying the other to be absolved."

"(5) (c) The costs of, and arising out of, the defendants' application to amend their plea dated 29 May 1992, including the costs occasioned by the first plaintiff's opposition thereto, will be paid by the first, second and third defendants, jointly and severally, the one paying the other to be absolved."

"(6) Subject to the provisions of paragraph (5) the costs of the first and second plaintiffs will be paid by the second and third defendants, jointly and severally, the one paying the other to be absolved."

"(7) Subject to the provisions of paragraph (5) the costs of the first defendant will be paid as follows:

(a) Prior to the date of the second plaintiff's application for leave to intervene - by the first plaintiff.

(b) As from the date of the second plaintiff's application for leave to intervene - by the first and second plaintiffs, jointly and severally, the one paying the other to be absolved."

The following order is made:

1. The appeal of the second and third appellants against the order granting judgment in favour of the first respondent in the sum of R63 323, together with interest, is dismissed with costs.

2. The appeal of the second and third appellants against the order for costs arising out of the appellants' application to amend their plea dated 29 May 1992 is allowed, and paragraph (5)(c) of the order of the Court *a quo* is amended to read as follows:

"(5)(c) The costs of, and arising out of, the defendants' application to amend their plea dated 29 May 1992, will be paid by the first, second and third defendants, jointly and severally, the one paying the other to be absolved; but the costs occasioned by the first plaintiff's opposition thereto, will be paid by the first defendant alone."

3. The appeal against the order that the first, second and third appellants pay the costs occasioned by their opposition to the second respondent's application to intervene is dismissed with

costs.

4. The appeal against the order that the second and third appellants pay the second respondent's costs of trial is dismissed with costs.

5. The cross-appeal by the first respondent against the dismissal of its claim against the first appellant is upheld with costs.

6. Paragraphs (2) and (7) of the order of the Court *a quo* are deleted, while paragraphs (3), (4) and (6) of that order are amended to read as follows:

> "(3) The claims of the second plaintiff against the first, second and third defendants are dismissed."
>
> "(4) Judgment for payment of the sum of R63 323, together with interest thereon at the legal rate from 7 July 1989 to date of payment, is entered in the first plaintiff's favour against the first, second and third defendants, jointly and severally, the one paying the other to be absolved."

"(6) Subject to the provisions of paragraph (5) the costs of the first plaintiff will be paid by the first, second and third defendants, jointly and severally, the one paying the other to be absolved; while the costs of the second plaintiff will be paid by the second and third defendants, jointly and severally, the one paying the other to be absolved."

F H GROSSKOPF
Judge of Appeal

Hefer	**JA**	
Nienaber	**JA**	
Schutz	**JA**	
Zulman	**AJA**	Concur