

SOUTH AFRICA / JUDGMENT

Astill v Lot 54 Falcon Park CC (AR 447/2011) [2012] ZAKZPHC 10 (20 February 2012)

[2012] ZAKZPHC 10

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen, Stretch

CASE / FILE NUMBER

AR 447/2011

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Case No AR 447/2011

IN THE HIGH COURT OF KWAZULU-NATAL, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

In the matter between :

CHRISTOPHER LIONEL ASTILLAppellant

and

LOT 54 FALCON PARK CCRespondent

Delivered : FEBRUARY 2012

J U D G M E N T

KOEN J :

INTRODUCTION :

[1] This is an appeal against a judgment for payment of various amounts of rental, water charges, rates and insurance owed by Two Be Sales Thirty One CC trading as Moulded Comfort Products ('the principal debtor') for which the appellant (the defendant in the Court a quo) had allegedly bound himself as surety and co-principal debtor.

[2] The parties shall be referred to as in the Court a quo.

BACKGROUND

:

- [3] The defendant was previously a member of the principal debtor. His membership ceased on or about 15 October 2004. The principal debtor occupied premises at Unit 4, Falcon House, 10 Lanner Road, New Germany. It did so in terms of a written agreement of lease concluded on 29 August 2001 for a period of three years from 1 September 2001 to 31 August 2004 ('the first lease'). From 1 September 2004 to 31 August 2007 it occupied the premises in terms of a written lease concluded on 30 July 2004. This lease also reflected that Mr K.R Hannaford, one of the members of the principal debtor, would be a 'guarantor'. From 1 September 2007 to 31 August 2009 the principal debtor occupied the premises in terms of a written lease agreement ('the last lease') executed on 18 July 2007, reflecting the same Mr Hannaford as guarantor. At the time of concluding the first lease, the defendant signed a written deed of suretyship, upon which the plaintiff's claim against him is based. The rental and other charges for which the defendant is sought to be held liable, arise in terms of the last agreement of lease, specifically the period from 1 March 2009 to 31 August 2009.

THE ISSUE :

- [4] The issue for determination is whether the obligations of the principal debtor in terms of the last lease are covered by the terms of the deed of suretyship concluded in 2001.

THE OPERATIVE TERM IN THE DEED OF SURETYSHIP:

- [5] Paragraph 1 of the deed of suretyship provided that the defendant bound himself unto and in favour of the plaintiff as creditor for: -

'The due payment on demand by the Creditor of all monies which the Principal Debtor may now or from time to time hereafter owe to the Creditor and arising from an agreement of lease executed by Principal Debtor with the Creditor.'

THE FINDING OF THE COURT A QUO :

- [6] The learned magistrate held that the deed of suretyship did include the amounts for which the principal debtor is liable, as claimed in the particulars of claim.

- [7] The learned magistrate concluded that:

'The words "from time to time hereafter, owe to the Creditor", foresees a future between the plaintiff and defendant and does not restrict the plaintiff to the 2001 lease specifically. If the intention was for the suretyship agreement to be restricted to the 2001 lease, provision should have been made for this clearly in the suretyship agreement.'

The rest of the words in paragraph 1 being, “and arising from an agreement of lease executed by the principal debtor and creditor”. The word “an” as opposed to “the” is used and can easily be interpreted to include further leases. The word “executed” read in context of the entire sentence does not specifically refer to a lease already entered into, as the parties may have further executed leases in the future and this was foreseeable by the defendant.’

THE APPROACH TO BE ADOPTED WHEN INTERPRETING A DEED OF SURETYSHIP:

[8] A deed of suretyship must be construed strictly.

[9] In *SA General Electric Co (Pty) Ltd v Sharfman and Others* NNO 1981 (1) SA 592 (W) at 597A to B, the following was said:

‘In construing the deed of suretyship it is as well to remember that broadly speaking a suretyship receives as a rule a somewhat strict interpretation, so that it may not be extended beyond what was expressed or was at least covered by the intention and sense of the words of the suretyship; see Voet 46.1.12; Wessels *The Law of Contract in South Africa* vol 2 paras 3891 - 3894. The surety is a favoured debtor and the creditor is bound to express clearly the extent of the surety's

liability. The surety takes upon himself a debt which is not his own and therefore he is not likely to intend to charge himself by implication with more onerous duties than are expressed in the contract.’

[10] The paragraphs from Wessels referred to were quoted with approval in *Wood Brothers v Gardner* (1886) 5 EDC 189 at 191. They were also referred to in this Division in *Van Rensburg v City Credit (Natal) (Pty) Ltd* 1980 (4) SA 500 (N) at 507G – H where Kriek J (with whom Broome J concurred) quoted with approval from the judgment of Barry J in *Wood Bros v Gardner* (supra) at 191, where the following was stated:

‘... the extent of a surety's liability must be expressed by him, or necessarily comprised in the terms of his contract. This contract is to be construed strictly – that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in the contract.’

[11] In *Patel v Patel and Another* 1968 (4) SA 51 (D) at 56A-B, Caney J held:

‘If there is ambiguity and interpretation leaves it in doubt whether the surety's obligation extends as far as the creditor would have it, it is the creditor's fault that he has not made express provision for this in the contract, to which (in the absence of admissible extrinsic evidence) must be applied the maxim *verba contra stipulatorem interpretanda sunt*.’

THE PLAINTIFF'S CASE:

- [12] Notwithstanding Mr Holmes of the plaintiff having testified that the principal 'had renewed leases' he elsewhere, under cross-examination testified that 'each time it was a new lease'. Counsel for the plaintiff contends that the plaintiff's case was always presented on the basis that the leases subsequent to the first lease were new leases to which the deed of suretyship applied, and that insofar as the learned magistrate concluded that they were renewals, this was incorrect.
- [13] I shall accept in this judgment, on the basis of the plaintiff's submission, that the subsequent and last leases were separate and new leases.

THE INTERPREATION TO BE GIVEN TO THE RELEVANT MATERIAL PROVISIONS OF THE DEED OF SURETYSHIP :

- [14] The operative words in the deed of suretyship indicating the principal debt secured by the suretyship, are that the defendant binds himself to payment of all monies 'arising from an agreement of lease executed by principal debtor with the creditor.' The word 'executed' is employed as a verb, not an adjective. It could therefore only relate to any agreement of lease which had already been executed, and not to refer to executed leases which might follow in the future between the creditor and the principal debtor. If the intention was to include leases to be executed in the future, then the term in the deed of suretyship should simply have referred to 'any future leases concluded between the parties', or words to that effect.
- [15] The reference to monies which 'may now or from time to time hereafter' be owing, is qualified by the words 'arising from an agreement of lease executed by principal debtor with the creditor', and therefore are not decisive. The words referring to monies which may 'from time to time hereafter' be owing cannot refer to all amounts which at any stage thereafter may from time to time be owing also in terms of subsequent leases not yet executed. Interpreted restrictively, it includes only such amounts as may become owing 'arising from an agreement of lease executed by the principal debtor with the creditor'.
- [16] Had the definite article 'the' been used to describe the agreement of lease executed, as opposed to the indefinite article 'an', then it might have been clearer that the first lease was the one intended to be referred to. Likewise, if that agreement of lease had been identified with reference to the date of signature, matters would have been placed beyond any doubt.
- [17] Conversely, if it was the intention to bind the surety in respect of any and all agreements of lease which may thereafter be executed by the principal debtor with the creditor, then one would have expected the word 'an' to rather have referred to 'any' and then the singular form 'agreement' would not have been used, but the plural 'agreements'.
- [18] Unfortunately however, the term in the agreement contained none of the wording in either paragraphs [16] or [17] above. The court has to ascertain the intention of the parties, as best as it can, from the words used.

[19] In argument, it has been stressed that the meaning of the wording in clause 1 of the deed of suretyship should not be sought in isolation and that it must be interpreted against the background of all the provisions of the deed of suretyship. Specifically, reference was made to clause 4 dealing inter alia with leniency or extensions of time which may be granted, which provides:

‘Any leniency or extension of time which may be granted to the Principal Debtor, or a variation or alteration of the said agreement or future agreement between Principal Debtor and the Creditor shall not be construed as a waiver of any of the Creditor’s right or claims ...’.

[20] The submission advanced by the plaintiff’s counsel is that as clause 4 refers to the ‘said agreement or future agreement’, the deed of suretyship in referring to ‘an agreement of lease executed by Principal Debtor with the Creditor’ must include any future ‘agreement of lease executed by Principal Debtor with the Creditor.’

[21] Clause 4 deals with the issue of leniency or extension. It appears that in preparing the deed of suretyship, words were carried forward in clause 4 which are not consistent with the rest of the document. The operative provision defining the obligations to be covered by the deed of suretyship, is clause 1 and not clause 4. Indeed if clause 4 dealing with leniency or extensions of time saw the need to refer not only to the ‘said agreement’ but also to a ‘future agreement’, then the omission of any reference to any ‘future agreement’ in clause 1 would suggest, all the more, that the claims covered by the suretyship were confined to those arising from the first agreement of lease which had been executed only and not extend to future agreements.

[22] Such an interpretation would also not necessarily render the words ‘or future agreement’ in clause 4 superfluous; one of the basic rules of interpretation to be guarded against. Clause 4 dealt with any variation or alteration of the said agreement or a future agreement. It is equally consistent with the notion that its terms covered not only variations of the first lease, but if the first lease was varied or altered in any way hence giving rise to a future agreement in revised form between the Principal Debtor and the Creditor during the currency of the first lease, variations or alterations of such revised future agreement as well.

[23] The creditor had it within its powers to stipulate clearly what was intended to be covered by the deed of suretyship.

[24] The learned magistrate in my view erred in seemingly being influenced by considerations such as that ‘if the intention was for the suretyship agreement to be restricted to the 2001 lease provision should have been made for this clearly in the suretyship agreement.’ If anything, if the suretyship was to apply to future leases, not executed at the time the suretyship was executed, then provision should have been made for this clearly in the suretyship agreement.

- [25] At best for the plaintiff there was an ambiguity in the deed of suretyship. If the intention was for the suretyship agreement to also include any subsequent lease agreements, then this should have been stated by the creditor. It could have done so expressly or possibly by referring to 'any' agreement of lease executed or to be executed, or, at the very least by referring to 'agreements' of lease 'executed or to be executed in the future' by the principal debtor.
- [26] In the light of the ambiguity, the clause must be interpreted against the interests of the plaintiff which had it within its powers to state exactly what it intended.
- [27] It follows that the learned magistrate erred in finding that the debt allegedly due by the principal debtor to it was covered by the deed of suretyship.
- [28] There was also a cross-appeal but in view of the conclusion to which I have come it is not necessary to consider the cross-appeal further.

ORDER :

[29] The following order is granted:

- (a) The appeal succeeds with costs;
- (b) The judgment of the Court a quo is set aside and substituted with an order that the plaintiff's claim be dismissed with costs, such costs to include counsel's fees where applicable.

STRETCH AJ : I agree.

DATE OF JUDGMENT : FEBRUARY 2012

DATE OF HEARING : 20 FEBRUARY 2012

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