

SOUTH AFRICA / JUDGMENT

Kilburn v Tuning Fork (Pty) Ltd (211/2014)
[2015]
ZASCA 53; 2015 (6) SA 244 (SCA) (27 March 2015)
[2015] ZASCA 53

COURT

Supreme Court of Appeal

BEFORE

Cachalia, Mhlantla, Saldulker, Gorven, Meyer

CASE / FILE NUMBER

211/2014

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 211/2014

Reportable

In the matter between:

IAN KILBURN.....APPELLANT

and

TUNING FORK (PTY) LTD.....RESPONDENT

Neutral citation: Kilburn v Tuning Fork (Pty) Ltd [2015] ZASCA 53 (27 March 2015)

Coram: Cachalia, Mhlantla, Saldulker JJA and Gorven and Meyer AJJA

Heard: 23 February 2015

Delivered: 27 March 2015

Summary: Suretyship – Interpretation – apparent conflict between heading and detailed provisions of deed of suretyship not real when effect is given to each and every word, read in context and taking into account the circumstances in which it came into existence.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Mbha J sitting as court of first instance):

(a) The appeal succeeds with costs.

(b) The order of the court below is set aside and substituted as follows:

‘The application against the second respondent is dismissed with costs.’

Saldulker JA et Meyer AJA (Cachalia and Mhlantla JJA and Gorven AJA concurring):

- [1] On 13 December 2013, the Gauteng Local Division, Johannesburg (Mbha J) granted judgment against the appellant (the surety) in favour of the respondent (the creditor). This appeal against that judgment is with the leave of the court below and concerns the interpretation of a deed of suretyship.
- [2] It is important to understand the factual matrix within which the deed of suretyship came into existence. McCarthy Limited (McCarthy) conducted the importation and distribution of Yamaha motorcycles, marine products, power products, golf cart parts and accessories, musical instruments, audio visual products and intelligent machinery under the trade names Yamaha Distributors, Balanced Audio, Global Music, Music Inc, After Market Products and Hawker Richardson. On 3 June 1993 McCarthy and Kilburn Auto Enterprises (Pty) Ltd t/a Johannesburg Yamaha (Kilburn Auto) concluded a dealership agreement in terms of which Kilburn Auto was appointed as an authorised dealer with the right to purchase products for retail sale from McCarthy’s Yamaha Distributors division on certain terms and conditions.
- [3] With effect from 1 January 2011, McCarthy sold these business divisions to the respondent, Tuning Fork (Pty) Ltd (Tuning Fork), a wholly owned subsidiary of the Bidvest Group Limited. All risk in, and benefits flowing from, the agreement passed to Tuning Fork on 1 July 2011. The internal structures and operating activities of the trading divisions remained the same, except that Tuning Fork reduced the number of divisions from six to five. Music Inc fell away.
- [4] The trading divisions operate distinct businesses in the sense that they sell and market different products. Each division is run by its own general manager, credit controller, sales personnel and employees. Separate contracts are concluded, distinct bank accounts are operated, invoices issued and stationery used. Only dealers having entered into dealership agreements appointing them as Yamaha dealers are permitted to purchase products from the Yamaha Distributors division whereas all traders are at liberty to purchase products from the After Market Products division. Products and services sold by the Yamaha Distributors division are not readily available to its After Market Products division customers ‘unless they are Yamaha dealers who are permitted to purchase competing products or operate other businesses.’ This is so because Tuning Fork itself is subject to the constraints of its agreement with the Yamaha Motor Corporation.
- [5] Kilburn Auto was also a customer of the After Market Products division and operated an accounting facility with the latter, with its credit limit at R20 000 for goods purchased from that division. This credit facility was unsecured. In an email dated 16 May 2011, the After Market Products division required Kilburn Auto to complete a new credit application form

and to furnish it with security in the form of a deed of suretyship. The reason given was that the After Market Products division had ‘moved out from under McCarthy Limited and [was] now Tuning Fork Limited trading as After Market Products.’ Attached to the email were a number of After Market Products documents, including that division’s credit application form, deed of suretyship and credit application procedure and guidelines for the completion of the credit application and the deed of suretyship. Each of the attached documents was identified and described in the email as peculiar to the After Market Products division.

- [6] The credit application incorporated standard terms and conditions subject to which all purchases were to be made from After Market Products by a ‘customer . . . which has been granted credit in terms of this application’. The relationship created between such customer and After Market Products is stated to be ‘that of a Customer buying as an independent contractor from

AFTER MARKET PRODUCTS and reselling to end-users and other re-sellers.’ In addition, the credit application included

an undertaking that the credit manager of the After Market Products division would be notified in writing of any changes to certain

particulars furnished in the form.

- [7] On 24 May 2011, Kilburn signed the credit application form on behalf of Kilburn Auto and the deed of suretyship and submitted them to the After Market Products division. The heading of the required deed of suretyship reads as follows-

‘DEED OF SURETYSHIP – TUNING FORK (PTY) LTD T/A AFTER MARKET PRODUCTS’

and the introductory and other relevant provisions thus-

‘I, the undersigned, (full name of the “Surety”) IAN KILBURN Identity Number 6711215130085 do hereby bind myself irrevocably as Surety and co-principal Debtor in solidum and jointly and severally with KILBURN AUTO ENTERPRISES (PTY) LTD 9302973/07 (“the

Debtor”) to and in favour of Tuning Fork (Pty) Ltd Registration No: 2010/001048/07 (“the Creditor”) its successors in title or assigns:-

1. For the due fulfillment by the Debtor of all its obligations to the Creditor of whatsoever nature and howsoever arising, whether already incurred or which may from time to time hereafter be incurred, as a continuing surety, and notwithstanding any change in or temporary extinction of such obligations and without limiting the generality of the foregoing, for the payment of all monies which are due or may become due and owing from time to time, whether for damages or otherwise, by the Debtor to the Creditor in terms of or arising out of the enforcement, breach or cancellation of any agreement between the Creditor and the Debtor.

...

6. The Surety acknowledges and understands that this document constitutes a personal Deed of Suretyship, which renders him/her personally liable for the debts of the principal debtor.'
- [8] It is common cause that Kilburn Auto breached the terms of the dealership agreement, and failed to make payment to Tuning Fork of the outstanding invoices issued by the Yamaha Distributors division amounting to R808 883.01 as at 29 August 2012 plus interest thereon at the rate of 15.5% per annum. As a result, Tuning Fork launched an application in the high court in which it claimed payment of that amount, as well as ancillary relief, and costs jointly and severally from Kilburn Auto as the principal debtor and from Kilburn as surety. Kilburn Auto did not oppose the application and default judgment was granted against it.
- [9] Kilburn however opposed the application. He contended that Kilburn Auto had discharged its principal indebtedness to Tuning Fork that had arisen from purchases made from the After Market Products division and that he, as surety, was accordingly not liable under the deed of suretyship. It was common cause that the indebtedness of Kilburn Auto in respect of the After Market Products division had been discharged. Tuning Fork contended that the terms found in the body of the deed of suretyship are widely worded and cover any indebtedness that had arisen from purchases made by Kilburn Auto from any of its other trading divisions, and in particular its Yamaha Distributors division. The interpretation contended for by Tuning Fork found favour with the high court. It held that the words 'AFTER MARKET PRODUCTS' used in the heading of the deed of suretyship were no more than the usage of a trading name, merely intended to enhance the identification of Tuning Fork. Because there is only one legal person, the high court held that the creditor in terms of the deed of suretyship is Tuning Fork and not any one of its trading divisions. It therefore granted an order against Kilburn as well.
- [10] Before us, the issue now to be decided is whether Tuning Fork has a contractual right derived from the deed of suretyship to recover from Kilburn, as surety, the indebtedness that arose from the purchases made on credit by Kilburn Auto from Tuning Fork's Yamaha Distributors division. This requires a proper construction of the deed of suretyship. Its provisions must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.)
- [11] As to the language used in the deed, the words 'DEED OF SURETYSHIP' that appear in the heading obviously identify the nature of the document. The words 'TUNING FORK (PTY) LTD' when read in context with the introductory paragraph of the deed of suretyship refer to the creditor. Only Tuning Fork (Pty) Ltd and not any of its business divisions can legally be the creditor as the high court held. Divisions operating within the same juristic entity are not in law regarded as distinct or severable or as separate personalities. (See *Two Sixty Four Investments (Pty) Ltd v Trust Bank* 1993 (3) SA 384 (W) at 385F-G.)

- [12] The words 'T/A AFTER MARKET PRODUCTS' are also included in the heading of the deed of suretyship. Contextually we know that Tuning Fork trades under the names of five separate and distinct divisions. What then was intended by the inclusion of this particular trading name in the heading of the deed of suretyship?
- [13] Tuning Fork raised three contentions. First, that the heading conflicts with the body of the deed of suretyship. Secondly, that the words 'T/A AFTER MARKET PRODUCTS' were included for purely administrative purposes and did not affect the construction of the deed. Thirdly, that the context in which the deed came into existence was a neutral factor.
- [14] In dealing with the first contention, Tuning Forks relied on a dictum of Cloete JA in *Sentinel Mining Industry Retirement Fund & another v WAZ Props (Pty) Ltd & another* 2013 (3) SA 132 (SCA) para 10, where he said, '... where a heading conflicts with the body of the contract, it must be the body of the contract which prevails because the parties' intention is more likely to appear from the provisions they have spelt out than from an abbreviation they have chosen to identify the effect of those provisions'. Cloete JA went on to say, however, that '... where the heading and the detailed provisions can be read together, that should be done. And in the present case, they can.' They can also be read together in the present matter. The apparent conflict between the heading and the detailed provisions of the deed of suretyship disappears when they are read together.
- [15] Turning to the second contention, Tuning Fork's argument is that these words are meaningless or superfluous and in the words of their counsel, merely 'administrative'; any one or none of the five trading names could have been included in the heading. This contention in our view is flawed, as it militates against the longstanding precept of interpretation that every word must be given a meaning. A court should not conclude, without good reason, that words in a single document are tautologous or superfluous. (See *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC) para 99; *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) para 13.) In the present matter the words are not meaningless or superfluous. Thus, the meaning that the high court attributed to the concluding words of the heading - 'T/A AFTER MARKET PRODUCTS' - that they are intended to enhance the identification of the creditor, has no basis in its language or context.
- [16] The third contention was that the context in which the deed came into being is a neutral factor. Linguistically, when these words are read in isolation and in the context of the body of the deed of suretyship, it may be thought that they are not clear. However clarity is achieved when the language is considered in the light of the relevant factual matrix, including the purpose of the deed of suretyship and the circumstances in which it came to be prepared and produced. And it is clear that the deed of suretyship came into existence only because security was required for Kilburn Auto to buy goods on credit from the After Market Products division. Kilburn was rendered personally liable on the terms set out in the deed of suretyship for only the debts incurred by Kilburn Auto in purchasing goods on credit from the After Market Products division. Whilst there is, in law, only one creditor, there is

nothing to prevent a suretyship securing only certain debts due to that creditor.

[17] To conclude, we hold that there is no conflict between the heading and the body of the deed of suretyship. When effect is given to all the words in the deed of suretyship, and account is taken of the circumstances in which it came into existence, the liability of Kilburn is limited to those debts incurred by Kilburn Auto in its purchases from the After Market Products division of Tuning Fork. This means that the appeal must succeed and the order of the high court holding Kilburn liable for the debts of Kilburn Auto to the Yamaha Products division must be set aside.

[18] In the result the following order is made:

(b) The order of the court a quo is set aside and replaced with:

‘The application against the second respondent is dismissed with costs.’

H SALDULKER

JUDGE OF APPEAL

PA MEYER

ACTING JUDGE OF APPEAL

APPEARANCES:

Appellant: C Acker

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