

SOUTH AFRICA / JUDGMENT

Odgers Foam Insulation Company (Pty) Ltd. v Standard Bank of South Africa Ltd.

(525/87) [1989] ZASCA 10 (16 March 1989)

[1989] ZASCA 10

COURT
Supreme Court of Appeal

BEFORE
G G Hoexter, Botha, Van Heerden, Grosskopf,
Nicholas

CASE / FILE NUMBER
525/87

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Case No. 525/87 - mp

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between: ODGERS FOAM INSULATION COMPANY Appellant
 (PROPRIETARY) LIMITED
 and
 THE STANDARD BANK OF SOUTH AFRICA Respondent LIMITED
CORAM: HOEXTER, BOTHA, VAN HEERDEN, JJA et F H GROSSKOPF, NICHOLAS
AJJA
HEARD: 16 February 1989
DELIVERED: 16 March 1989

JUDGMENT

HOEXTER, JA

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HOEXTER, JA In the Orange Free State Provincial Division two applications in which the appellant sought an interdict against the respondent were refused; and in a related counter-application by the respondent the latter was granted a declaratory order against the appellant. With leave of the Court below the appellant appeals against the aforesaid three orders. The appellant is a private company which carries on business at Welkom, and it is a customer of the respondent bank at the latter's Odendaalsrus branch. From a company ("Papenmeier") which carried on business in France the appellant bought goods at a price of almost 4 1/2 million French francs. By way of payment the appellant accepted ten bills of exchange, each dated 13 February 1984, drawn by

Papenmeier upon the appellant. Each bill was payable to the order of Papenmeier. The ten bills were guaranteed by the respondent.

The

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The bills were payable at six-monthly intervals, the first falling due on 1 August 1984 and the last on 1 February 1990. The ten bills were drafted in the French language, save that in the first two columns thereof the French headings were rendered also in English. The amounts were stated in French francs and (in terms of equivalent South African currency) each bill involved a payment in excess of R100 000. The acceptance of the bills by the appellant and their guaranty by the respondent took place at a meeting in Welkom on 13 February

1984. The meeting was attended, inter alios, by a director of the appellant ("Odgers"), the respondent's manager at its Odendaalsrus branch ("the manager"), and two representatives of Papenmeier. On behalf of the appellant Odgers signed the bills to accept them and the guaranty was effected by the signature on each bill of the manager on behalf of the respondent. The bills were then delivered to the

aforesaid

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aforesaid representatives of Papenmeier. On 2 March 1985 the manager requested Odgers, on behalf of the appellant, to sign a document which bore the heading "Request to issue a Guarantee". To this document reference will be made as "the RG". Odgers duly signed the RG on behalf of the appellant. The manager should have procured such signature to the RG at the time of the respondent's guaranty of the ten bills but, through an oversight on his part, he omitted to do so until 2 March 1985. Nothing turns on the fact that the RG was signed by the appellant only after the respondent had already guaranteed the bills.

The RG is couched in the following terms:-

"I/We hereby irrevocably request the Standard Bank of South Africa Limited to become guarantor on my/our behalf in favour of the PAPENMEIER FRANCE S.a.r.l. for the sum FRF 4.486.180 on terms set out in the bills drawn on the company and I/we ODGERS FOAM INSULATION COMPANY (PTY) LIMITED hereby authorise the said Bank without any further reference to me/us to pay or comply

with 5

with any claim which may be made against the Bank by the guaranteed party under the said guarantee against production of the documents, if any, called for therein without any obligation on the part of the Bank to ascertain the correctness or otherwise of any amount claimed or the validity of the grounds on which any such claim is based, and to charge against my/our account, or against any separate cover held for my/our account, any sum or sums it may be called upon to

pay by reason of the said guarantee and with any expense to which the Bank may be put in connection therewith including commission payable half yearly on at the Bank's rates for the issue of guarantees, during the currency of the guarantee. I/We agree that I/We will have no claim against the Bank should any payment be made by the Bank under the guarantee even if the payment is not claimable from me/us or otherwise.

I/We acknowledge that the Bank has the right at any time during the existence of the guarantee to call upon me/us to furnish it forthwith with cash or any approved security(ies) for the guarantee in whole or in part and at its sole discretion, and in the event of the Bank calling upon me/us to do so, and upon me/us failing to comply with its request, the Bank is hereby entitled and authorised to give notice to cancel or call up the guarantee and/or to determine it and to charge against my/our account, or against any separate cover held, any such sums

it

6 it may be called upon to pay as a result thereof. I/We record that this request is irrevocable and that I/We cannot instruct the Bank not to pay any amount or amounts claimed from the Bank under the guarantee." So much for what is set forth in the body of the

RG. I turn to the bills to which the RG refers. Each bill has three columns. The right-hand column reflects Papenmeier

(under the signature of its manager) as the drawer, and it reflects the date of issue of the bill as 13 February 1984.

It states the amount of the bill, the due date thereof; and

that the bill is payable to the order of Papenmeier. It

states that the drawee is the appellant, setting forth the appellant's address in Welkom and that the appellant's "domiciliation" is the respondent's Odendaarsrus branch. The

left-hand column of the bill bears a heading given in four different languages, including the French word "ACCEPTATION" and the English word "ACCEPTANCE". In the space thereunder

Odgers

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Odgers by his signature signified the appellant's assent to the drawer's order. The central column of the bill bears the heading "AVAL" and below it the word "GUARANTEE". Thereunder appears the manager's signature on behalf of the respondent. Certified translations of the bills were placed before the Court below. The words "à l'ordre de : nous mêmes" appearing in the right-hand column of each bill have been rendered in the certified translation as "to the order of ourselves". In the central column and under the heading "AVAL GUARANTEE" the following words appear in each bill: "BON POUR AVAL DU TIRE" and these have been translated as:-

"GOOD FOR DRAWEE GUARANTEE". The fourth and fifth bills fell respectively due

on

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on 1 February 1986 and 1 August 1986. By 1986 the bills had been negotiated to and were held by the Société Generale pour le Commerce Extérieure ("the SG"). On the aforesaid due dates the appellant as acceptor failed to make payment, and the SG claimed payment of the amounts of the fourth and fifth bills from the respondent. The appellant alleged that the goods delivered to it by Papenmeier were defective and instructed the respondent not to make payment of the bills. The respondent considered that by reason of its guaranty of the bills it was obliged to make payment to the SG; and it intimated to the appellant that it proposed to disregard the latter's instructions not to pay. The upshot was that during 1986 the appellant launched two successive applications in the Court below in an attempt to interdict the respondent from making payment to the SG under the fourth and fifth bills, and the bills falling

due

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due thereafter; while in turn the respondent during May 1987 brought an application against the appellant for an order declaring that the respondent was entitled to pay the bills in question and to debit the appellant's account therefor or otherwise to recover payment thereof from the appellant. In August 1987 all three matters were argued before SMUTS, JP. The learned Judge-President found against the appellant and in favour of the respondent. The rules nisi initially granted at the instance of the appellant were discharged with costs; and it was declared that the respondent was entitled to pay the bills which had fallen due on 1 February 1986 and 1 August 1986 respectively; and to debit the appellant's bank account in the amounts so paid, or otherwise to recover such amounts from the appellant. The appellant was ordered to pay the costs (including the costs of two counsel) of the respondent's counter-application for a declaratory order.

In

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In terms of the RG the appellant requested the respondent to become a guarantor on the appellant's behalf

in favour of Papenmeier for the total amount of the bills; and the appellant authorised the respondent to pay any claim made against the respondent:-

"... by the guaranteed party under the said guarantee."

(My underlining)

In the Court below it was contended for the appellant that upon a proper construction of the RG the words "guaranteed party" in the above context signified Papenmeier and Papen-meier alone. That contention was rejected by the learned Judge-President who considered that "guaranteed party" encompassed not merely Papenmeier but also -

"....any other person to whom Papenmeier's rights under the bills of exchange might be made over by endorsement."

On appeal it was submitted on behalf of the appellant that the

Court

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Court below had erred in so construing the RG. In my view that submission is untenable. The RG envisages a guaranty in favour of Papenmeier for the sum of 4 486 180 French francs -

" on the terms set out in the bills"

drawn on the appellant. It follows that the true intent and scope of the guaranty has to be ascertained by reference to the bills. It is rudimentary that the liability of a signatory of an aval may be transferred simply by negotiation of the negotiable instrument. Inasmuch as the contract of aval partakes of the character of the bill itself, the rights of the payee as against the signer of an aval pass to and give the same rights to any subsequent holder of the bill as if the signer's liability had been undertaken personally to the latter. It is with this essential quality of the contract of aval in mind that the bills must be examined and the compass of the RG must be determined.

When

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When one looks at the bills what leaps to the eye is the fact that they are payable to the order of Papenmeier. There being no restriction whatever on the negotiation of the bills by Papenmeier, a signer of an aval is here not merely a surety in respect of the appellant's liability to Papenmeier; in these circumstances the signer of an aval clearly undertakes also to every subsequent holder of the bills that he will be liable for due payment thereof in case of default of the original parties to the bills. In my view the meaning which was assigned to "the guaranteed party" by the Court below was the proper and correct one. It follows that the appeal must fail. A further matter requires brief attention. In authorising the respondent to pay the guaranteed party without further reference to the appellant, the RG relieves the respondent of:-

"....any

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any obligation.... to ascertain the correctness or otherwise of any amount claimed or the validity of the grounds on which any such claim is based "

During the course of argument the question was shortly debated whether the respondent would be entitled to pay pursuant to the terms of the RG in a situation in which the respondent had clear and certain knowledge, or perhaps had simply reason to believe, that the amount being claimed was incorrect or that the claim was invalid. This is not an issue which arises in the present appeal and it is unnecessary to express any opinion thereon.

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

G G HOEXTER, JA

BOTHA, JA) VAN HEERDEN, JA) GROSSKOPF, AJA) Concur

NICHOLAS, AJA)

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