

SOUTH AFRICA / JUDGMENT

Pioneer Drill and Blast (Pty) Ltd v Deyssel (055056/2023) [2024] ZAGPPHC 1131 (4 November 2024)

[2024] ZAGPPHC 1131

COURT

North Gauteng High Court, Pretoria

BEFORE

Woodrow

CASE / FILE NUMBER

055056/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 055056 / 2023

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: YES

DATE:

4 November 2024

In

the matter between:

PIONEER

DRILL AND BLAST (PTY) LTD

Applicant

and

CORNELIUS

JOHANNES DEYSEL

Respondent

JUDGMENT

Woodrow, AJ:

Introduction

- [1] The applicant (“Pioneer”) seeks judgment against the respondent (“Mr Deysel”) for payment of the sum of R3,661,455.25, together with interest calculated at the rate of 10,75% per annum a tempore morae to date of final payment, and costs on the attorney and client scale.
- [2] The claim of Pioneer is based on a suretyship agreement in terms of which Mr Deysel bound himself as surety and co-principal debtor to Pioneer for the due and proper fulfilment by a company, Deymine (Pty) Limited (“Deymine”), of its obligations to Pioneer in terms of a written services agreement.

Synopsis of the facts

- [3] Deymine conducts business as an open cast drilling and blasting specialist, primarily in the coalfields of Mpumalanga.
- [4] Pioneer conducted drilling and blasting activities on behalf of Deymine at a colliery owned by a company known as IPP Equipment (Pty) Ltd (“IPP”).
- [5] Pioneer provided these services in terms of a written services agreement between Pioneer and Deymine (the “services agreement”). Mr Deysel, a director of Deymine, represented Deymine in concluding the services agreement. Whilst the services agreement was signed by Mr Deysel on behalf of Deymine on 9 September 2021, the services agreement governed the contractual relationship between Deymine and Pioneer from the inception of such relationship in June 2021.
- [6] On 9 September 2021, Pioneer and Mr Deysel concluded a written suretyship agreement (the “suretyship”) in terms of which Mr Deysel bound himself as surety and co-principal debtor with Deymine for the due and proper fulfilment by Deymine of all its obligations in terms of the services agreement to Pioneer.[1]
- [7] Deymine struggled to timeously pay Pioneer and adhere to its obligations under the services agreement.
- [8] In order to provide itself with further security for Deymine's increasing indebtedness, following discussions between Pioneer and Deymine, Pioneer entered into a cession agreement with Deymine and IPP on 26 May 2022 (the “cession agreement”). In terms of the cession agreement, Pioneer would supply Deymine with services to enable Deymine to perform its obligations to IPP, and Deymine ceded its right to payment from IPP to Pioneer should Deymine default on payment to Pioneer.

- [9] During October and November 2022, Pioneer called upon IPP to make various payments in terms of the cession agreement. Mr Deysel was copied into such correspondence regarding the indebtedness of Deymine to Pioneer.
- [10] On 30 November 2022, it came to Pioneer's attention that Deymine had concluded various other cession agreements between Deymine, IPP and other third-party creditors, which Pioneer had not known about.
- [11] On or about 8 December 2022, Pioneer and Deymine agreed to a payment plan regarding the amount that had not been settled at the end of November 2022 (which was the sum of R4,731,120.99). The parties also agreed inter alia that if Deymine's contract with IPP came to an end for any reason, the full outstanding amount would become due and payable.
- [12] On 19 December 2022, IPP terminated Deymine's services with effect from 18 January 2023. Pioneer learnt of the implementation of such termination in late January 2023.
- [13] In February 2023, Pioneer learnt of other creditors of Deymine seeking to enforce their cession agreements in respect of amounts due by Deymine to such other creditors.
- [14] On 20 and 21 February 2023, Pioneer addressed letters of demand to Deymine and Mr Deysel respectively, demanding payment of the sum of R3,661,455.25 that Pioneer alleged was due and owing by Deymine (in terms of the services agreement) and by Mr Deysel (in terms of the suretyship).
- [15] Pioneer claims that Deymine is indebted to it in the sum of R3,661,455.25. Despite demand, Deymine has failed to make payment to Pioneer for the aforesaid amount.
- [16] There is no real dispute that Deymine is indebted to Pioneer in the sum of R3,661,455.25. In fact, this has been admitted,[2] although part of the defences raised by Mr Deysel involve an allegation that it is IPP and not Deymine that is the true debtor.

Mr Deysel's case is that he is not indebted to Pioneer in the aforesaid amount based on the issues raised (which are summarised under the heading "Issues" below).

- [17] On 1 August 2023, Deymine was placed in final liquidation by the High Court, Johannesburg, pursuant to an application launched at the instance of Pioneer.
- [18] Pioneer seeks payment of the amount owed by Deymine from Mr Deysel, in his capacity as surety and co-principal debtor with Deymine. Pioneer attaches a certificate of balance to its founding affidavit confirming the amount due, as is envisaged in clause 9 of the suretyship.
- [19] Despite demand, Mr Deysel has failed to make payment of the amount claimed by Deymine.

Issues

- [20] As submitted in heads of argument filed on behalf of Mr Deysel, Mr Deysel confines his opposition to the following aspects:

“1.5.1. The material non joinder of Deymine (Pty) Ltd;

1.5.2. The suretyship agreement and the validity thereof;

1.5.3. The cession agreement; and

1.5.4. The material dispute of fact which is evident from the papers filed in support and opposition of this application.”

Non joinder of Deymine

[21] Mr Deysel raises the non-joinder of Deymine in his defence to the claim of Pioneer.

[22] In *Burger v Rand Water Board and Another*, the Supreme Court of Appeal held as follows:[3]

[7] The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the court might make.

[23] We are not dealing with a case involving joint owners, joint contractors or partners.

[24] Joinder of necessity requires that the party that has not been joined has a direct and substantial interest, a legal interest, in the subject matter of the litigation. A mere commercial or financial interest is not sufficient.[4]

[25] The test for non-joinder is set out by the Supreme Court of Appeal in *Absa Bank Ltd v Naude NO*,[5] as follows:[6]

[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, KwaZulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.

[26] It was submitted on behalf of Mr Deysel that Deymine “... stands to suffer extensive prejudice in that it will not be afforded an opportunity to respond to the allegations made in this application by [Pioneer] against [Mr Deysel] and will inevitably undermine the principle of audi [alteram] partem as Deymine (Pty) Ltd will not be afforded an opportunity to place its version before this Honourable Court.”

[27] Such alleged prejudice does not transform any interest of Deymine in the present application into a legal interest in the subject-matter of the present litigation. Simply put, any order or judgment granted herein cannot prejudice the interests of Deymine in any respect whatsoever. Deymine has no legal interest in the present matter.

[28] The claim in this matter is against Mr Deysel, a surety and co-principal debtor. As co-principal debtor, Mr Deysel has tacitly renounced the ordinary benefits available to a surety, such as those of excussion and division, and he is liable jointly and severally with Deymine.

[7] In fact, Mr Deysel has expressly renounced such rights.[8] Mr Deysel is liable jointly and severally with Deymine to Pioneer. Because their liability is joint and several, Pioneer as creditor may proceed against the co-debtors individually or jointly. The fact that Mr Deysel is liable jointly and severally with Deymine does not mean that Deymine has a legal interest in the subject matter of this application – no relief is being sought against Deymine herein, Pioneer having elected, as it is entitled to do, to proceed only against Mr Deysel in this application.

[29] In *Boshoff v Propinvest Eleven (Pty) Limited*, [9] after reference to the principles set out in the cases of *Burger* and *United Watch* (referred to in this judgment above already), the court held as follows:[10]

[27] Principal debtors and co-sureties do not fall within the recognised categories of persons with respect to whom joinder is necessary. Moreover, a co-debtor does not have a legal interest in the subject-matter of the action. The interest of the co-debtor is merely financial.

[28] Indeed, if joinder of a co-debtor was required before judgment could be obtained against a surety, it would subvert our entire body of jurisprudence appertaining to suretyships.

[29] Accordingly, it was not necessary to join the principal debtor or van Dyk in order for the Respondent to proceed against the Appellant.

[30] Any interest that Deymine may have in these proceedings does not constitute a legal interest. The defence of non-joinder is without merit.

Validity of the suretyship agreement

[31] Counsel for Mr Deysel submits in heads of argument that Mr Deysel “... is not bound to the suretyship agreement as [Mr Deysel] did not understand the suretyship agreement, nor [were] the onerous terms and conditions thereof explained and or fully set out in the suretyship agreement.”

[32] Counsel for Mr Deysel refers to *Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd* 2007 (4) SA 577 (C) (the “Dole matter”) at 587 and quotes the following portion of the judgment: “A party to a contract who has concluded same whilst labouring under a bona fide and reasonable mistake as to its contents will not be bound by the provisions thereof.”

[33] The version of Mr Deysel and his defence are problematic at both a factual and legal level.

[34] The facts do not support the defence of Mr Deysel. Without being exhaustive:

- a. the exchange of correspondence between Pioneer and Mr Deysel preceding the signature of the suretyship put pay to any version of Mr Deysel that he did not know that he was signing a suretyship agreement – when asked, Mr Deysel confirmed that he was prepared to sign a suretyship, and that is precisely what he did.

- b. The terms of the suretyship are clear, are set out in the suretyship, and the suretyship constitutes a separate written agreement that stands on its own. Mr Deysel signed both the services agreement, on behalf of Deymine, and the suretyship, in his personal capacity.
 - c. The suretyship contains a bold heading “DEED OF SURETYSHIP”.[11]
 - d. Furthermore, Mr Deysel signed the suretyship in two separate spaces designated as follows: firstly as “Surety” and separately, secondly, “For and on behalf of the Debtor”.
 - e. Mr Deysel does not claim to be ignorant of business. Mr Deysel claims to be a “... well-known, reputable and credible businessman ...”.
 - f. The facts do not make out any case that Mr Deysel was misled nor that there was any form of misrepresentation on the part of Pioneer in respect of the suretyship.
- [35] I agree with the submission of counsel for Pioneer that Mr Deysel does not plead the defence of iustus error with any particularity at all, and that Schreiner JA's ratio statement in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*[12] is instructive both in respect of the very limited scope of the defence and the need to plead it in clear terms.
- [36] That pleaded in the Dole matter, (upon which Mr Deysel relies), at paragraph [8] – [10] thereof, stands in stark contrast to what is alleged by Mr Deysel in his answering affidavit. Furthermore, the paragraph in the Dole matter upon which Mr Deysel places reliance reads as follows:
- [22] A party to a contract who has concluded same whilst labouring under a bona fide and reasonable mistake as to its contents will not be bound by the provisions thereof. In particular, where the contracting party has been led to believe by the other party that the contract contains certain provisions, which in fact it does not, the party relying upon the misrepresentations will not be bound by the agreement. In this regard it was stated in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) at 175:
- [37] The Dole matter, properly construed, does not support the case of Mr Deysel.[13]
- [38] Mr Deysel makes out no case for a defence based on iustus error.[14] Mr Deysel makes out no case that he was misled by Pioneer as to the nature of the suretyship nor as to the terms which it contains. The facts of the matter do not show that Mr Deysel was misled at all. Furthermore, even if Mr Deysel laboured under an error, which, at best for him, would have been a unilateral error, Mr Deysel has not shown that such error was reasonable.
- [39] In having signed the suretyship, Mr Deysel is bound. Caveat subscriptor.

The cession agreement

- [40] Mr Deysel argues that Pioneer's claim against him is extinguished by virtue of the cession agreement, as any invoice that was not paid by Deymine should have been honoured and paid by IPP. Elsewhere, Mr Deysel alleges that IPP “indemnified” Deymine as provided for

and envisaged in the cession agreement. In the heads of argument filed on behalf of Mr Deysel, the submission is made that the services agreement "... was varied as a result of the cession agreement ...", that the obligations of Deymine to Pioneer were varied and as such Mr Deysel's obligations to Pioneer "... in terms of the suretyship agreement was also varied."

- [41] In my view, the cession agreement, properly construed, does not vary the services agreement nor does it indemnify Deymine, as alleged or at all. In terms of the cession agreement, Deymine ceded its right to demand payment from IPP to Pioneer in the event that Deymine defaulted on its payment obligations to Pioneer.[15] This did not release Deymine from its obligations to Pioneer in terms of the services agreement, nor did it substitute IPP for Deymine as Pioneer's debtor.
- [42] The cession agreement simply added an additional form of security for Pioneer in respect of Deymine's debt to it. The fact that in terms of the cession, Pioneer was entitled to seek payment from IPP if Deymine was in default of payment in terms of the services agreement does not somehow extinguish Deymine's obligation to make payment in terms of the services agreement.
- [43] In terms of the cession agreement, Pioneer obtained additional security. The suretyship provides that the rights of Pioneer under the suretyship are not affected by the obtaining by Pioneer of additional security.[16]
- [44] Deymine's obligations in terms of the services agreement to make payment to Pioneer of the debt due in terms thereof were not affected by the cession agreement.
- [45] Insofar as Mr Deysel seeks to contend for the replacement of Deymine as debtor with IPP as debtor, whilst Pioneer remained as creditor, Mr Deysel would be contending for a form of novation. On the facts of the matter and with reference to the terms of the cession agreement, I find that such contention is without merit. Novation involves a waiver of right, there is a presumption against novation, and the onus of showing that novation has occurred lies with the party asserting this.[17] Mr Deysel has not met this onus. However, even if Mr Deysel were able to show the novation contended for, which I have found he has not, then, in any event, the suretyship expressly provides that Mr Deysel shall be liable for the original obligation or the novated obligation at the election of Pioneer.[18]
- [46] This defence raised by Mr Deysel is without merit.

Material dispute of fact

- [47] In the heads of argument filed on behalf of Mr Deysel, the dispute of fact is described as follows:

"4.10. With these two principles in mind,[19] I turn to deal with the two issues at hand, apart from the joinder issue as encapsulated herein supra. Firstly, the issue of the cession agreement and secondly the validity of the suretyship agreement."

4.11. It is evident that subsequent to the conclusion of the suretyship agreement, the Applicant, IPP and Deymine (Pty) Ltd entered into a subsequent cession agreement. It is the Respondent's version that this agreement so concluded between the Applicant, Deymine and IPP varied the service agreement and as consequence also varied the suretyship agreement, which is accessory in nature, as IPP from the conclusion of the cession agreement assumed the responsibility and obligations to pay the Applicant's invoices directly to the Applicant and the Respondent did not bind himself as surety to IPP.

4.12. Secondly it is submitted that the Respondent was at the time that the alleged suretyship agreement was concluded uninformed and unaware of the onerous nature of the suretyship agreement and the extent of his obligations thereunder."

[48] The first point to make is that the 'Plascon Evans rule' is concerned with the test to be applied (in matters where final relief is sought on motion) to disputes of fact (and not to disputes in respect of the law).

[49] Be this as it may, Mr Deysel does not raise a real, genuine and bona fide dispute of fact regarding either the suretyship or the cession agreement which assists him in proving a defence to the claim of

Pioneer.[20] I have dealt with the contentions of Mr Deysel regarding the suretyship and the cession agreement under the headings above.

[50] With reference to the argument of Mr Deysel regarding both the suretyship and the cession agreement, his version vacillates - for example, at paragraph 24.1 to 24.2 of the answering affidavit he states as follows: (my emphasis)

"24.1 I deny that I am liable or indebted or responsible to pay the sum of R3 661 455,25, or any portion thereof, to the Applicant.

24.2 Deymine is liable and indebted to the Applicant, in an amount to be established or confirmed."

[51] There are various further contradictions and bare denials in the answering affidavit.

[52] Counsel for Mr Deysel submitted in oral argument that at least two issues, namely (a) Mr Deysel's knowledge of the consequences of the suretyship, and (b) whether the cession agreement substituted the main agreement, ought to be referred for the hearing of viva voce evidence. I disagree. Mr Deysel does not in fact raise a real, genuine or bona fide dispute of fact that assists him in showing a defence to the claim of Pioneer. Accordingly, and further, there is no cognizable factual dispute to refer to trial and no issues to be referred for the hearing of oral evidence.

Conclusion

and order

[53] Mr Deysel is liable for payment of R3,661,455.25 to Pioneer as a result of binding himself as surety and co-principal debtor with Deymine for the due and proper fulfilment by Deymine of all its obligations in terms of the services agreement to Pioneer.

[54] The suretyship makes provision for costs on an attorney and own client scale.[21]

[55] Accordingly, an order is granted in the terms set out below.

1. The respondent is directed to pay to the applicant:
 - a. the sum of R3,661,455.25;
 - b. interest on the sum of R3,661,455.25 calculated at the rate of 10,75% per annum a tempore morae to date of final payment;
 - c. the costs of the application on the attorney and client scale.

WOODROW AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties and / or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 4TH day of November 2024.

Appearances

Counsel for the Applicant: Instructed by: C Bester Fluxmans incorporated Counsel for the Respondent: instructed by: FW Botes SC Macintosh Cross & Farquharson Attorneys Date of Hearing: Date of Judgment: 6 August 2024 4 November 2024

[1] Clause 3 of the suretyship provides, under the bold heading "SURETYSHIP" as follows: "The Surety hereby binds himself to Pioneer and its successors in title or assigns, as surety and co-principal debtor with the Debtor for the due and proper fulfilment by the Debtor of all its obligations in terms of the Services Agreement towards to Pioneer." (When quoting clauses of the suretyship herein, I have reproduced these verbatim as they stand in the agreement.)

[2] Founding affidavit, par 56 read with answering affidavit, par 62.

[3] 2007

(1) SA 30 (SCA) at par [7].

[4] United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972

(4) SA 409 (C) at 415E – H

[5] 2016 (6) SA 540 (SCA)

[6] Footnotes have been omitted from this quote.

[7] Neon and Cold Cathode Illuminations (Pty) Limited v Ephron 1978

(1) SA 463 (A) at 472

[8] Suretyship agreement, clause 16

[9] (A3028/2007)

[2007] ZAGPHC 147 (10 August 2007)

[10] at par [27] – [29]

[11] The suretyship document can certainly not be described as a “trap for the unwary”, and a reasonable person would not have been misled thereby. Cf. the very different document in *Brink v Humphries & Jewell (Pty) Ltd* 2005

(2) SA 419 (SCA) par [10] – [12].

[12] 1958

(2) SA 473 (A) 479: “... Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance

that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded. In the present case the plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable.”

[13] See in particular paragraphs [21] - [24], [29] and [49] thereof.

[14] Cf. *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000

(1) SA 167 (W) at 175 – 180. See also: *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011

(4) SA 72 (SCA) at par [9]; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007

(2) SA 599 (SCA) at par [9].

[15] Clause 2 of the cession agreement provides as follows: “Deymine (The cedent) have ceded their rights for payment from IPP ... (The Debtor) to Pioneer ... (The cessionary) should they default on their payment to them.”

[16] Clause 10 of the suretyship provides as follows: “The rights of Pioneer under this Suretyship shall not be affected or diminished if Pioneer at any time obtains any additional or other Suretyships, guarantees, securities or indemnities from the Surety or any other third party whatsoever in connection with the obligations of the Debtor and/or the Surety.”

[17] *Rodel Financial Service (Pty) Ltd v Naidoo and Another* 2013

(3) SA 151 (KZP) par [12].

- [18] Clause 4.9 of the suretyship provides as follows: “if any obligation Is novated the Surety shall be liable for the original obligation or the novated obligation at the election of Pioneer and whether or not the Surety was aware of the novation;”
- [19] The two principles referred to by counsel are (a) the trite principles applicable to the ‘Plascon Evans rule’ and (b) the trite principle that an applicant is required to make out its case in its founding papers.
- [20] Wightman t/a JW Construction v Headfour (Pty) Ltd [2008] ZASCA 6; 2008
- (3) SA 371 (SCA) par [13]: “A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. ...”.
- [21] Clause 15 of the suretyship provides as follows: “The Surety shall be responsible for all charges and expenses of whatsoever nature incurred by Pioneer in securing the performance of the obligations of the Debtor or the Surety, or enforcing the rights of Pioneer, including, without limitation, all legal costs, including attorney and own client costs, collection commissions and fees of tracing agents.”

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Prepared on 11 October 2026 · Esheria