

SOUTH AFRICA / JUDGMENT

Tuning Fork (Pty) Limited v Kilburn Auto Enterprises (Pty) Limited and Another (19349/2013) [2013]

ZAGPJHC 327 (13 December 2013)

[2013] ZAGPJHC 327

COURT

South Gauteng High Court, Johannesburg

BEFORE

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CASE / FILE NUMBER

19349/2013

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REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 19349/2013

In the matter between:

TUNING FORK (PTY) LIMITED Applicant and KILBURN AUTO ENTERPRISES (PTY) LIMITED t/a
JOHANNESBURG YAMAHA (Registration Number 1993/002973/07) First Respondent IAN
KILBURN Second Respondent

J U D G M E N T

MBHA J:

INTRODUCTION

- [1] In this case two pertinent legal aspects arise: firstly, the principles applicable to the interpretation of a contract of suretyship; and secondly, the legal status of a division or trade name under which a corporate entity, such as a registered company, trades
- [2] On 7 August 2013 the applicant obtained a judgment against the first respondent for payment of the amount of R808 883,01 in respect of goods sold and delivered, interest thereon and costs. The applicant now seeks a judgment against the second respondent pursuant to a contract of suretyship executed in favour of the applicant for the debts of the first respondent. The second respondent admits signing the deed of suretyship, but contends

that he executed the suretyship in favour of Tuning Fork (Pty) Ltd t/a After Market Products, one of the divisions of the applicant, and that the deed of suretyship was not intended to be in favour of all the applicant's trading divisions.

FACTUAL MATRIX AND

BACKGROUND

- [3] On 3 June 1993 McCarthy Limited (McCarthy) a public company, and the first respondent (Kilburn) concluded a dealership agreement in terms of which McCarthy appointed Kilburn as an authorised Yamaha dealer with the right to purchase products for retail sale from McCarthy.
 - [4] On or about 1 January 2011 the applicant purchased from McCarthy, as a going concern, the business conducted by McCarthy (the sale of business agreement) being the importation and distribution of Yamaha motorcycles, marine products, power products, golf carts parts and accessories musical instruments, audio visual products and intelligent machinery. The business was conducted under six trading divisions. Having purchased the business the applicant reduced the six trading divisions to five, being Tuning Fork (Pty) Ltd t/a Yamaha Distributors; Tuning Fork (Pty) Ltd t/a Balanced Auto; Tuning Fork (Pty) Ltd t/a Global Music; Tuning Fork (Pty) Ltd t/a After Market Products and Tuning Fork (Pty) Ltd t/a Hawker Richardson.
 - [5] In terms of clause 3 read with clause 8 of the sale of the business agreement, the business was sold by McCarthy to the applicant as a going concern and all risk in and benefits to the contracts of McCarthy in relation to the business, including the dealership agreement with Kilburn concluded on 3 June 1993, passed to the applicant. On 16 May 2011 Kilburn was advised by e-mail by one Sheldon Schostar, (Schostar), an employee of the applicant, who was working in the applicant's After Market Products division, that due to the purchase of the business by the applicant, a new credit application was required including the execution of a deed of suretyship. The e-mail was accompanied by a covering letter containing a blank credit application and deed of suretyship. On 24 May 2011 the second respondent signed the deed of suretyship as well as the credit application form and separate terms and conditions.
 - [6] The applicant complied with its obligations in terms of the dealership agreement, and in particular sold and delivered to Kilburn the products as agreed in terms of the conditions of sale in effect at the time of the purchase. However, Kilburn, in breach of the dealership agreement failed to pay the amount outstanding of R808 883,01 pursuant to a statement rendered to it by the applicant for products it had ordered and received from the applicant during the period 3 October 2011 until 28 November
2011. The applicant's case accordingly is that by virtue of the suretyship, the second respondent is liable to the applicant, jointly and severally with Kilburn, for payment of the full amount outstanding by Kilburn to the applicant in terms of the dealership

agreement.

ISSUE FOR

DETERMINATION

- [7] The second respondent, as I have already alluded to, denies that he is indebted to the applicant as surety and contends that the indebtedness for which judgment was granted against first respondent, was owed to the applicant's Yamaha Distributors division and that no amount is due to the applicant's After Market Products division. The crux of the matter is accordingly, whether or not the deed of suretyship executed by the second respondent, covers only the debt owed by Kilburn to the applicant's After Market Products division, or whether it included all its divisions.

ARGUMENT AND

SUBMISSIONS

- [8] In support for the contention that the suretyship was intended to be executed in favour of Tuning Fork (Pty) Ltd t/a After Market Products, the second respondent relies firstly, on the e-mail from Schostar, and the covering letter enclosing the "Credit Application and Deed of Suretyship" and the "Terms and Conditions" in which there is repeated reference to "Tuning Fork (Pty) Limited t/a After Market Products". The name was repeated, on no less than 43 occasions, in each and every document. Secondly, the heading of the suretyship "Deed of Suretyship, Tuning Fork (Pty) Limited t/a After Market Products", serves as an indication of the intention of the parties that a suretyship be provided for that particular division. In addition it was submitted that neither of the parties at any stage raised or mentioned the possibility of a suretyship in favour of any of the other trading divisions.
- [9] Reliance was further placed on an alleged ambiguity in the deed of suretyship: the document not only provides for a liability towards "Tuning Fork (Pty) Limited t/a After Market Products", but also to "Tuning Fork (Pty) Limited". Accordingly, for a proper interpretation of the suretyship, it is permissible to have reference to the context of the suretyship as well as the surrounding circumstances that preceded the signature thereof. The second respondent also contends that the deed of suretyship "must be strictly rather than liberally construed, and that the surety will not be held liable for anything other than what he expressly or by clear implication undertook to stand good for".[1] In addition, the contra proferentem rule should apply against the applicant, it having drafted the suretyship. [2]

THE LEGAL POSITION

- [10] As a starting point, it is necessary to quote verbatim the relevant parts of the deed of suretyship. It reads as follows:

"DEED OF SURETYSHIP – TUNING FORK (PTY) LTD T/A AFTER MARKET PRODUCTS

I, the undersigned, (full name of the ‘surety’)

IAN KILBURN Identity Number [...]

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 fulfilment 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 ...

...

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.” (emphasis added)

- [11] A “Suretyship” is a contract in terms of which one person (the surety) binds himself or herself as debtor to the

creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal

debtor if and to the extent that the principal fails, without lawful excuse, to render the performance himself or herself.[3]

- [12] The suretyship accordingly is accessory to the transaction which creates the obligation of the principal debtor. Put differently, a suretyship is conditional upon the existence of a principal obligation.[4] As in the case with any other contractual obligation, a surety’s duty is to render the performance which he or she has bound himself or herself to render. It accordingly follows that in the absence of a valid principal obligation, the surety is not bound. Furthermore, any defence available to the principal debtor also avails the surety. The surety remains entitled to dispute its terms, for example in relation to the identity of the creditor, or of the principal debtor. In this matter, although the second respondent admits that he signed the suretyship, he nonetheless disputes that he is liable to the applicant for the indebtedness of Kilburn. In essence, the identity of the creditor and the indebtedness are both placed in dispute.

- [13] Against this background, the ordinary principles of interpretation of contracts must be applied to the deed of suretyship to ascertain the true intention of the parties. It is trite that first and foremost, the intention of the parties is to be ascertained from the language used in the contract. The words used in the contract are given their ordinary grammatical meaning as it appears from the rules of grammar, dictionaries and even previous judicial decisions.[5] It is only if the ordinary meaning would be clearly contrary to the actual intention of the

parties[6] or in order to clarify inconsistency or avoid absurdity[7], that deviation from the ordinary or popular meaning approach, would be justified. I now turn to consider the ordinary or popular

grammatical meaning of the content of the suretyship to determine its terms, especially the identity of the creditor and the identification of the principal debt.

- [14] As far as the content of the deed of suretyship is concerned, the name and registration number of the applicant as creditor, namely, Tuning Fork (Pty) Ltd Registration No 2010/001048/07, are specifically set out and recorded in the contract of suretyship, and additionally it is recorded that the second respondent binds himself irrevocably as surety and co-principal debtor in solidum and jointly and severally with Kilburn “to and in favour of Tuning Fork (Pty) Limited, registration number 2010/001048/07 (‘the creditor’) ... for the due fulfilment by the debtor of all its obligations to the Creditor of whatsoever nature and howsoever arising”.
- [15] The ordinary or popular grammatical meaning of the deed of suretyship leaves one in no doubt that insofar as the identity of the creditor is concerned, it was in favour of the applicant as a whole and not only in respect of one of its divisions. The identification of the principal debt is clear: the second respondent clearly bound himself as surety and co-principal debtor, jointly and severally with Kilburn, for all its obligations of whatsoever nature and howsoever arising.
- [16] The conclusion that the contract of suretyship was executed in favour of the applicant also accords, in my view, with logic and common sense. It bears mention that although Kilburn only had a maximum credit limit of R20 000,00 in the After Market Products division, it was able to incur debts in excess of R800 000,00 in the Yamaha division. It therefore defies common sense that the applicant would insist on a deed of suretyship only in respect of the After Markets Products division where it would be exposed to much lesser risk. The second respondent’s reliance on the email dated 16 May 2011 by Schostar is misplaced. In the email, Schostar states that “... we have moved out from McCarthy Limited and are now Tuning Fork Limited Trading as After Market Products”. The content of this email is patently incorrect. As I have explained earlier, the applicant concluded the business sale agreement in its capacity as a registered corporate entity, namely Tuning Fork (Pty) Ltd and not as a division, which can be gleaned from the citation of the parties in the sale of business agreement. It does not therefore assist the second respondent that the phrase or name After Market Products appears in the documentation that accompanied the email and even for that matter, in the heading of the deed of suretyship. In my view, the content of the deed of suretyship unequivocally and in clear language makes it clear that the second respondent bound himself irrevocably as surety and co-principal debtor in solidum and jointly and severally with Kilburn, in favour of the applicant.

- [17] In the absence of ambiguity or uncertainty in the language used in the deed of suretyship, there is no need to invoke the secondary rules of interpretation.

THE LEGAL STATUS OF A DIVISION WITHIN A COMPANY AND THE EFFECT OF A TRADE NAME

- [18] Even if I am wrong in the finding I have made, the second respondent for another reason is nevertheless still liable to the applicant.
- [19] The second respondent submits that the After Market Products division is a separate entity on its own, somehow distinct from its company. This is legally untenable. Divisions operating within the same juristic entity are not, in law, regarded as distinct or severable or as separate personalities. In the present matter, all the various divisions form an integral part of one separate and indivisible company (or juristic entity), namely Tuning Fork (Pty) Ltd with registration number 2010/001048/07. This holds true even if each of these divisions operate distinct businesses, in the sense that different products are sold and marketed by those divisions to different clientèle. In the end all the profits or losses derived from the activities of the various divisions result in cumulative profit or loss for the applicant as a whole. Leveson J[8] succinctly explained the position as follows:

“Under our law no juristic person is capable of being divided into a number of separate juristic personalities, all forming a division of the whole. The concept is totally alien to our jurisprudence.... If in addition thereto it is said that the business is a division of a named company, registered according to the laws of the Republic, there is only one possible further reference and that is that the incorporated company trades through the medium of the business under that particular trading name. Indeed, an incorporated company may trade through the medium of a number of such businesses, each with a separate trade name. I know of no rule of law which disentitles it from doing so. None of them will thereby acquire separate corporate personality.”

- [20] The second respondent made much of the construction of the various divisions, their separate naming, that they operated separate accounts and that each had its own personnel. In this regard the facts are that with effect from 1 January 2011 the applicant, having registration number 2010/001048/07, purchased the business of McCarthy Limited with registration number 1991/003245/06, the business of McCarthy Limited comprised several trading divisions which applicant decided to rationalise and reduce to five. Whichever business division parties had dealings with, those dealings were with the applicant; on a parity of reasoning, the second respondent executed a suretyship in favour of the applicant in respect of any debt howsoever due to it.
- [21] Much was also made about the fact that the name or phrase “After Market Products” appeared as part of the heading on the deed of suretyship.

[22] In my view the usage and/or inclusion of “After Market Products” in the deed of suretyship (and in other documentation) is clearly no more than usage of a trading name which the applicant chose to use to enhance the identification of the applicant. I can do no better than Burochowitz J[9] when he stated that “...the use of a trade name is a mere expression or alias of the proprietor or owner thereof.” No separate legal status or identity, attaches to a trading name of a registered company.

[23] For these reasons the second respondent is liable jointly and severally with Kilburn in respect of the applicant’s claim.

[24] Judgment is granted in favour of the applicant against the second respondent for:

1. Payment of the sum of R808 883,01.
2. Interest on the amount of R808 883,01 at the rate of 15.5% per annum, calculated from 29 August 2012 until date of final payment.
3. Costs of suit.

B H MBHA

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

COUNSEL FOR APPLICANT : J LOURENS

INSTRUCTED BY : WERKSMAN INC.

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INSTRUCTED BY : GRANT RAE ATTORNEYS

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DATE OF JUDGMENT : 13 DECEMBER 2013

[1] Demetriou v O’Flaherty and Another 1973 (3) SA 691 (D&CLD) at 695.

[2] Zietsman v Building Society 1989 (3) SA 166 (OPD) at 177D.

[3] See LAWSA Volume 26 Joubert et al at paragraph 285.

[4] See LAWSA (supra) at paragraph 287; Caney’s The Law of Suretyship Sixth Edition by C F Forsyth J T Pretorius, p 30.

[5] Johannesburg Country Club v Scott 2004

(5) SA 511 (SCA) at 518D-G at 288

[6] Grand Central Airport (Pty) Ltd v AIG South Africa Limited 2004 (5) SA 284 (W) H-I.

[7] Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd

[2007] All SA 18 (SCA).

[8] Two Sixty Four Investents (Pty) Ltd v Trust Bank 1993 (3) SA W 384 at 385 G-H

[9] Lazy Lion Lodge (Johannesburg) (Pty) Ltd Case No 05/3731 (unreported) at paragraph 25

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