

REPORTABLE

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

CASE NO : 389 / 97

In the matter between

ABSA BANK LIMITED

Appellant

and

JOHN GARRICK DAVIDSON

Respondent

COURT

**Smalberger JA, Vivier JA, Harms JA,
Olivier JA, Farlam AJA**

DATE OF HEARING

8 November 1999

DATE OF JUDGMENT

30 November 1999

Suretyship - estoppel - prejudicial conduct by creditor

JUDGMENT

OLIVIER JA

OLIVIER JA

[1] In June 1992 ABSA Bank Limited (“ABSA”) instituted action in the then Cape of Good Hope Provincial Division of the Supreme Court against the Respondent, John Garrick Davidson (“Davidson”), as first defendant and one Peter Martin Myburgh (“Myburgh”) as second defendant. The claim, which is the subject of this appeal, is for payment of R 372 101,89, interest thereon at ABSA’s prime rate of interest plus 2% *per annum* capitalised monthly from 21 May 1992 to date of payment, and costs of suit on the scale as between attorney and client.

The claim, in all its component parts, is based on separate but identical deeds of suretyship signed by Davidson and Myburgh at Cape Town on 24 February 1989.

After the institution of the action Myburgh passed away and his estate was sequestrated as insolvent. Davidson remained as the sole defendant.

[2] The action went on trial before Foxcroft J, who dismissed the claim with costs. The learned judge subsequently refused ABSA leave to appeal. Such

leave was given by this Court.

[3] ABSA is a duly incorporated and registered bank. On 1 July 1990 the Trust Bank of Africa Limited (“Trust Bank” and/or “the Bank”) changed its name to Bankorp Limited. With effect from 1 August 1992 (by virtue of section 54 of the Banks Act 94 of 1990 as amended) ABSA succeeded to the rights, obligations, assets and liabilities of Bankorp Limited. It was common cause that at the time of the trial ABSA traded through banking divisions known *inter alia* as Trust Bank and Bankfin.

[4] Davidson is a businessman and a qualified chartered accountant, with experience as auditor, financial management consultant, general manager and director of companies.

[5] On 24 February 1989 Davidson, in his capacity as a director of Whistlers

Interiors (Pty) Limited (“Whistlers”), applied to the Bank on Whistlers’ behalf for the opening of a cheque account. The application was accepted and an account was opened on 27 February 1989.

[6] The banker-customer contract between the Bank and Whistlers, which was in a standard written form, stipulated that the latter would from time to time appoint and authorise officials to operate the account on its behalf, and that the authorised officials

... may sign all documents in connection with any transaction which the Applicant [Whistlers] may enter into with Trust Bank.

It further provided *inter alia* that -

- (d) Trust Bank be and is hereby authorised and requested to honour all cheques, vouchers, bills and other negotiable instruments drawn on Trust Bank and purporting to be

signed, made or accepted by the authorised signatories on behalf of the said Applicant and to debit the said Applicant's account with the relevant amounts, whether the account is in credit or otherwise ...

- (e) Trust Bank be and is hereby requested and authorised to allow the Applicant to overdraw its cheque account(s) from time to time and to enter into other liabilities with Trust Bank, whether direct or indirect or from whatsoever cause arising for an unlimited amount, on the understanding that the facilities allowed will always be in the discretion of Trust Bank until the authority is cancelled in writing.
- (f) The Applicant undertakes to pay all bank charges and finance charges as Trust Bank may from time to time levy in accordance with general banking practice. Should the said account at any stage become overdrawn, the Applicant undertakes to pay Trust Bank on demand the amount by which the account is overdrawn ...

It is not disputed that these terms governed the contractual relationship between

Whistlers and the Bank.

[7] On the same day that the application to open the account was made, Davidson and Myburgh signed unlimited deeds of suretyship in which each of them bound himself to the Trust Bank, its order or assigns, as surety and co-principal debtor *in solidum* for the due and proper payment by Whistlers (the debtor) -

... of each and every amount which the debtor is at present indebted to the Bank or may in future become indebted to the Bank, whether as borrower or as surety and whether alone or jointly with others, or from whatsoever other cause arising, and notwithstanding any fluctuation in the amount or even temporary extinction thereof, as well as for the due and proper performance of all other obligations of whatsoever nature which the debtor has or may in future incur in favour of the Bank.

The deeds of suretyship went on to provide *inter alia* as follows :

I hereby declare that the extent, nature and duration of the obligations incurred by the debtor shall at all times be in the

discretion of the Bank, and that the Bank shall have the right, in its own discretion and without affecting or vitiating any of its rights in terms hereof, and without reference to me, to release any securities and guarantees, to grant extension of time for payment to the debtor and to enter into any other agreement, settlement or compromise with the debtor, on the understanding that the surety's obligation by virtue hereof, will be unlimited ...

and ...

I agree that no termination, cancellation, limitation or variation of my obligations in terms of this suretyship shall be of any force or effect unless agreed to in writing and signed by the Bank.

and

I agree that all admissions and acknowledgements of indebtedness by the debtor shall be binding on me and the Bank shall be free to enter into, cancel, vary, add to and/or amend any contracts/s with the debtor without reference to me, on the basis that every such contract, cancellation, variation, addition or amendment shall be as binding on me as if I had expressly consented thereto. The Bank may at any time, in its sole and absolute discretion, without prejudice to any of its rights and without notice to me release any one or more of my co-sureties (if any).

and ...

I hereby expressly renounce the benefits arising from the legal exceptions *ordinis seu excussionis et divisionis, de duobus vel pluribus reis debendi*, and *cedendarum actionum* and I declare that I am fully acquainted with the meaning thereof and understand and appreciate same.

It is not disputed that the deeds of suretyship thus signed became valid and binding upon Davidson and Myburgh.

[8] It was common cause that on 12 April 1991 Whistlers was provisionally liquidated as insolvent, the order being made final on 6 May 1991. On 10 June 1992 the present action was instituted.

[9] The *causa causans* of the later problems between ABSA and Davidson emanated from the termination of Davidson's shareholding in Whistlers and his perception that such termination also changed, in one way or another, his obligations as surety *vis-a-vis* Trust Bank. On 21 August 1990 Davidson signed

a written agreement with Myburgh in terms of which Myburgh purchased Davidson's shares and loan account in Whistlers. The agreement further provided that Myburgh was to procure Davidson's release from certain deeds of suretyship, including the suretyship in favour of the Bank. In fact, Davidson and Myburgh had reached agreement in principle much earlier (probably April 1990), and the written agreement had gone through several drafts before the final version was signed. Myburgh never succeeded in obtaining the release of Davidson as surety for the debts of Whistlers *vis-a-vis* Trust Bank. **The fact is that Davidson was never released by Trust Bank as surety and co-principal debtor.**

[10] When sued by Trust Bank as mentioned previously, Davidson raised three defences which can be subsumed under two legal categories, *viz* (a) *estoppel*, in that Trust Bank negligently misrepresented to Davidson, to his detriment, that he had been released as surety; and (b), alternatively, that Trust Bank, subsequent

to its acquiring notice that Davidson had sold his shares in Whistlers and wished to be released as surety, had dealt with the Whistlers account in such a way as to **prejudice** Davidson as surety, thereby, in law, causing his automatic release as surety. Under this category, Davidson relied on two prejudicial acts by Trust Bank : (i) debiting the Whistlers account with two cheques and four debit orders drawn on the said account by Whistlers, well-knowing that the cheques and debit orders were drawn to pay for a Ferrari motor vehicle bought by Myburgh for his own use; and (ii) allowing a doubling of the Whistlers overdraft.

[11] I will deal first with the *estoppel* defence, which need not detain us unduly.

The main reason for the demise of this defence was that the facts necessary to sustain *estoppel as pleaded* were not proved.

[12] The very basis of the defence of *estoppel, as pleaded*, was that Davidson had written a letter to Trust Bank on 7 May 1990, which reads as follows :

... hereby note that my interest in the above company [Whistlers] has been purchased by Mr PM Myburgh who in terms of a shareholders agreement is required to secure my release from all suretyships. Messrs Nieuwoudt, Myers and Verwey have been advised of this and unless I hear from you to the contrary will regard the surety as cancelled.

Davidson pleaded that after having received this letter and with full knowledge of its contents, Trust Bank never replied to it at all, thereby representing to him that he had been released as a surety. Hence the defence of *estoppel*. As pleaded, the alleged misrepresentation depended upon the receipt by Trust Bank of the Davidson letter of 7 May 1990.

[13] Davidson, however, has singularly failed to prove the factual basis of the *estoppel* defence. Counsel readily conceded during argument that the evidence does not establish either the despatch or the receipt of the letter. The argument then relied upon was that ABSA, having knowledge of the agreement in principle

which obliged Myburgh to secure Davidson's release from the deed of suretyship, by inaction represented to the latter that he was indeed so released. One need only state the proposition to realise that it is without any merit. If Davidson suffered under any misapprehension as to his liability towards ABSA it was of his own making and not as the result of any wrongdoing by ABSA. I would in any event have thought, in the light of the provision in the deed of suretyship that any consensual cancellation required a written document signed by ABSA for validity, that only a representation that Davidson was so released could have sufficed for a valid recourse to *estoppel*. The defence of *estoppel* has accordingly not been proved.

[14] This brings me to the two instances of prejudicial conduct relied on by Davidson. On behalf of Davidson it was submitted that there is a general so-called "prejudice principle" in our law to the effect that if a creditor should do anything in his dealings with the principal debtor which has the effect of

prejudicing the surety, the latter is fully released. That such a wide and unqualified principle exists in our law cannot be correct, as the facts of this case illustrate.

[15] (i) The Ferrari matter

Myburgh had a predilection for Ferrari motor cars. He owned several. During October 1990 Myburgh entered into a written rental agreement with Santam Bank in terms of which he owed the Bank R 683 315,23 for a Ferrari.

The Ferrari was for Myburgh's own use and, at the end of the agreement, would become his property. At that stage, it will be remembered, Davidson had already sold his shares to Myburgh and had resigned as a director of Whistlers. He had not been released as surety by Trust Bank. In order to reduce his indebtedness to Santam Bank, Myburgh drew two cheques and signed four debit orders on the account of Whistlers at Trust Bank. The cheque and debit orders were honoured by Trust Bank and the Whistlers account accordingly debited. The particulars of

the debits are as follows :

01-11-90	Cheque	R 15 471,86
12-12-90	Cheque	R 15 471,86
13-12-90	Debit Order	R 15 471,86
31-01-91	Debit Order	R 15 471,86
01-03-91	Debit Order	R 15 471,86
02-04-91	Debit Order	R <u>15 471,86</u>
	Total	R <u>92 831,16</u>

[16] Davidson’s case is that he was prejudiced as surety by Trust Bank honouring the cheques and debit orders for a personal debt of Myburgh without informing him, Davidson, of its intention to do so, well-knowing that he had sold his shares to Myburgh and wished to be released as surety.

[17] Foxcroft J in the court *a quo* accepted this argument. His view was that Trust Bank had “wrongly” debited the Whistlers account. Davidson was prejudiced thereby and was therefore released as surety, from

... the moment the Bank first debited the principal debtor (for which he was standing surety) in a sum which it was not legally liable to pay.

[18] The conclusion reached by Foxcroft J assumes that a surety is always released even if the extent of the prejudice is substantially smaller than, or bears no relation to, the surety's obligations. The correctness of this assumption is questionable but need not for purposes of this case be considered any further.

[19] As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the

plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances. In the event, however, Davidson failed to prove such a breach.

[20] Turning to the relevant contracts, clauses (d) and (e) of the principal agreement between Trust Bank and Whistlers have been quoted in para [6] above. As appears from their terms they authorised Trust Bank “ to honour all cheques, vouchers, bills and other negotiable instruments drawn on Trust Bank and purporting to be signed, made or accepted by the authorised signatories on behalf of [Whistlers]” and “to allow [Whistlers] to overdraw its cheque account ... in the discretion of Trust Bank.”

[21] It was not disputed that Myburgh was an authorised signatory on behalf of Whistlers. In fact, it was conceded by Davidson. It follows that Trust Bank even if it knew that the Ferrari was bought by Myburgh, could not have refused to

honour the aforesaid cheques and debit orders. Quite apart from that, the Bank could not know what internal arrangements were made between Myburgh and Whistlers for the crediting of Myburgh's loan account in Whistlers. Consequently Trust Bank cannot be faulted in view of the terms of the principal agreement for not having concerned itself with the nature of the debt.

[22] That being the position, the Whistlers account was correctly debited with the Ferrari payments. Davidson, who bound himself as surety and co-principal debtor for the debts of Whistlers "... from whatsoever ... cause ...", cannot in law be heard to say that he was unlawfully prejudiced by the debits now under discussion.

[23] (ii) The increase of the overdraft

Davidson's case is that when he sold his shares to Myburgh (in August 1990) the Whistlers overdraft limit was R 150 000,00. Thereafter, well

knowing of the sale and of Davidson's wish to be released as surety and without informing him, Trust Bank raised the overdraft to R300 000,00. Davidson says he was prejudiced thereby and thus released as surety.

[24] Assuming that the Bank had the knowledge ascribed to it by Davidson and that he was not advised of the increase of the overdraft, he, once again, cannot rely on the prejudice doctrine as contended for in view of the terms of the relevant contracts.

[25] The main contract between Trust Bank and Whistlers deals with the matter of overdrafts in clause (e) (quoted in paragraph **[6]** above) which permits Trust Bank in its discretion to allow an overdraft "for an unlimited amount".

[26] In raising the overdraft limit, even with all the knowledge ascribed to by Davidson, Trust Bank acted within its contractual rights to exercise its discretion

so as to allow an increase in the overdraft. In the suretyship agreement, as appears from paragraph [7] above, Davidson bound himself as surety and co-principal debtor for an unlimited amount

... notwithstanding any fluctuation in the amount or even temporary extinction thereof, as well as for the due and proper performance of all other obligations of whatsoever nature which the debtor has or may in future incur in favour of the Bank

and agreed that the obligations of the debtor “shall at all times be in the discretion of the Bank”. Having agreed to these terms, it does not lie in the mouth of Davidson to plead prejudice in respect of something which Trust Bank could legally do.

[27] The defences raised by Davidson to the claim being unsustainable, the appeal must succeed and the claim be upheld. The right to attorney and client costs was provided for in the suretyship agreement.

[28] Before concluding this judgment, there is one other matter that should be mentioned. It is the inclusion in the record of numerous documents and letters which were never properly proved at the trial as exhibits, were never used at the trial or in the appeal, and which are patently irrelevant. All this arises from the unacceptable practice at the trial of counsel being allowed to place a so-called “bundle” of documents before the Court. Most of these documents were never proved or used at the trial. Those that were used remained in the bundle and the rest were not removed. The result is that 553 pages of so-called exhibits were placed before us. Not more than approximately 25 of these pages were relevant.

Furthermore, the relevant exhibits were not properly identified and caused the judges of this Court a lot of wasted time and effort. This Court has on more than one occasion expressed its displeasure at the practice of placing unnecessary documents before it and intimated that in appropriate cases an award of costs *de bonis propriis* may be made (see **Government of RSA v Maskam Boukontrakteurs (Edms) Bpk** 1984 (1) SA 680 (A) at 692 E *et seq* and cases

there cited; ***Louw v WP Koöperatief Bpk en Andere*** 1994 (3) SA 434 (A) at 447

D - 448 C).

[29] At the hearing of this appeal the matter of the record was not taken up with counsel. For this reason a punitive costs order will not be made, but the attention of practitioners, especially those appearing at the trial, is once again drawn to the displeasure of this Court at the habit of putting bundles of unproved and irrelevant documents before a trial court and eventually a court of appeal.

[30] The following orders are made :

- 1 The appeal succeeds with costs on the scale as between attorney and client, including the costs occasioned by the employment of two counsel.

- 2 The judgment of the court *a quo* is set aside and replaced by the following order :

Judgment is granted in favour of the plaintiff for :

- (i) Payment of the sum of R372 101,89.
- (ii) Interest thereon at the plaintiff's prime rate of interest plus 2% *per annum* capitalised monthly, from 21 May 1992 to date of payment (the said prime rate being as set out in annexure "E" to the plaintiff's Particulars of Claim, as amended, in respect of the periods referred to therein);
- (iii) Costs of suit on the scale as between attorney and client, including the costs occasioned by the employment of two counsel.

PJJ OLIVIER JA

CONCURRING :

SMALBERGER JA

VIVIER JA

HARMS JA

FARLAM AJA

