



**SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL**

FROM The Registrar, Supreme Court of Appeal
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**Wilke NO & Others v Griekwaland Wes Korporatief Ltd (1327/2019) [2020]
ZASCA 182 (23 December 2020)**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (the SCA) today dismissed the appeal with costs and upheld an order of the Free State Division of the High Court, Bloemfontein.

The issue before the SCA was whether the Wilke Boerdery Trust (the Trust) remained bound as surety to Griekwaland Wes Korporatief Bpk (GWK) under the suretyship and whether the high court erred in rejecting the Trust's submission that the outcome of the action rendered any claim based on the principal agreements *res judicata*, or that the latter claim was precluded by issue estoppel.

The appellants, the trustees of Wilke Boerdery Trust, in February 2019, launched an application in the Free State Division of the High Court, Bloemfontein (the high court), for an order directing the respondent, Griekwaland Wes Korporatief Bpk (GWK), to cancel a surety bond registered in its favour in 2003, over two farms in Jacobsdal in the Free State Province (the surety bond). The surety bond was registered by Mr Charl Daniel Wilke (Wilke), and Henque 4335 CC (Henque) as security for goods sold and delivered, production credit granted and monies lent and advanced by GWK to them in the amounts of R 4 million (Wilke) and R 1 million (Henque), in respect of their farming operations. The Trust had bound itself to GWK as surety and co-principal debtor in a total amount of R5 million, for the due fulfilment of the obligations by the principal debtors, Wilke and Henque. The high court (Daffue J) dismissed the application with costs and held that the Trust remained bound as surety to GWK under the surety bond. The appeal before the SCA was with the leave of the high court (Daffue J).

Since August 2004, GWK extended credit to Henque and Karob Boerdery (Pty) Ltd (Karob), , pursuant to numerous credit agreements (the principal agreements). In March 2005, Wilke applied to GWK together with Henque and Karob to have the debts owing to GWK consolidated in a single account in the name of Karob. GWK approved the request on the express condition that notwithstanding the consolidation of the subject debts, all securities granted by Wilke and Henque would remain in place in securitisation of the liability to be assumed by Karob.

With effect from March 2005, the debt owed to GWK by Wilke and Henque at the time were consolidated with the debt of Karob, which assumed liability for those debts to GWK. Payments thereof by Karob to GWK remained secured by special notarial bonds registered in favour of GWK by Wilke in 2000 and Henque in 2003, to secure their indebtedness to GWK. In breach of numerous credit agreements and the debt consolidation, Karob failed to make payment to

GWK thereby breaching the principal agreements. These amounts owed to GWK were recorded in an acknowledgement of debt (AOD). On 11 September 2009 GWK issued a provisional sentence summons in the high court (Kruger J) against Karob and Wilke for payment based entirely on the AOD. On 19 September 2009 the court granted judgment against Karob and Wilke, jointly and severally, in an amount of R1 917 165.80, together with interest.

On 5 July 2010 GWK delivered its declaration in respect of the action. Karob was finally deregistered on 16 July 2010 for want of filing its annual returns. The matter proceeded to trial. On 13 August 2015, the high court (Kruger J) handed down judgment and dismissed GWK's action, essentially on the basis that GWK had failed to prove the arrear amounts owed in terms of the AOD. GWK was granted leave to appeal to a full court of the high court. The full court held that GWK had decided to institute legal proceedings in terms of the AOD and not the original causes of action or accounts.

As stated above, the matter came before the high court (Daffue J) had regard to the finding of Kruger J that the parties to the AOD intended to deal only with the arrears. The court a quo, however, emphasised that the AOD was not a novation of the original debts or underlying credit agreements and that GWK had expressly retained the right to sue the respective debtors on the original and underlying credit agreements. Daffue J held that there was no indication that GWK, in pursuing an action based on the AOD, abandoned its other remedies. Dealing with res judicata and issue estoppel, Daffue J noted that neither the Trust nor Henque had been cited as a party in the 2009 action and that the same relief on the same ground had not been finally adjudicated by Kruger J. The high court per Daffue J found that GWK was not asserting the same subject matter as a basis for holding onto its security, under the guise of a different cause of action. The court a quo found further that the deregistration of Karob however, did not prevent GWK, as creditor, from proceeding with an action against the Trust, on the underlying credit agreements.

On appeal, the SCA held that it was clear that GWK's claim in the action was founded on the AOD, and then only for payment of the arrears. The SCA found that the contention by the Trust that GWK elected to sue on the AOD to its detriment, was both opportunistic and wrong. The execution of the AOD, the breach of which created a distinct cause of action, did not extinguish the principal agreements between the parties. These agreements retained their independent existence after the conclusion of the AOD. Even if the action based on the AOD, which was restricted to claiming the arrears, was not successful, nothing precluded GWK from resorting to the causes of action in terms of the original principal agreements. It expressly reserved the right to do so in clause 11.1 of the AOD. And there was nothing to suggest that GWK waived this right.

The SCA concluded that, from the surety bond, it was clear that the Trust remained bound as surety to GWK in respect of Wilke's and Henque's indebtedness to it, regardless of whether Karob's registration as a company would be restored.