

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3678/2013

In the matter between:

DEVELOPMENT BANK OF NAMIBIA PLAINTIFF

and

**KEYSTONE TECHNOLOGY SOLUTION
EDWINA TITI TUYENI HASHIKUTUVA
NAAVEYO SALOM WILSON SHIKONGO**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Neutral Citation: *Development Bank of Namibia v Keystone Technology Solution* (I 3678-2013) [2018] NAHCMD 295 (19 September 2018)

CORAM: PRINSLOO J

Heard: 06 August 2018

Delivered: 19 September 2018

Flynotes: Practice — Judgments and orders — Stated case in terms of Rule 63 of Rules of Court — Liquidated claim — Deed of suretyship required to secure loan — Suretyship cession of life cover and cession agreement wherein first defendant ceased monies entitled to it from the Ministry of Safety and Security to the plaintiff formed part of security set — Plaintiff failed to execute on the cession in respect of the Ministry of Safety and Security — The questions of law to be decided in stated case — Did plaintiff's breach its duty towards third defendant, as surety, such that he is released of his obligations under Suretyship — Did conduct of plaintiff amount to a prejudicial act which releases third defendant from liability.

Summary: The parties in this matter entered into a bridging finance loan agreement in terms of whereof an amount of N\$ 900, 000 was lent and advanced to the first defendant by the plaintiff. As one of the conditions to secure the loan, the defendants had to provide security wherein the second and third defendants would enter into an unlimited suretyship agreement with the plaintiff and the first defendant would enter into a cession of contract monies due to him from the Ministry of Safety and Security valued at N\$ 900,000 to the plaintiff.

As the plaintiff did not received the funds as per the cession of monies agreement entered into with the first defendant, the plaintiff instituted summary judgment proceedings against all the defendants jointly and severally. Being opposed, the court now had to determine the effect of the cession of monies agreement as entered into between the plaintiff and the first defendant had on the suretyship agreement as entered into between the plaintiff and the second and third defendants.

The plaintiff submitted that it had no duty towards the third defendant to take cession of contract monies due to the first defendant from the Ministry and further that its rights, duties and obligations towards the third defendant are derived from the suretyship. The plaintiff further submitted that the cession of monies agreement did not form any duty undertaken in the Suretyship and it did not form a condition upon which basis the third party undertook his obligations.

The third defendant was however of the view that plaintiff's failure to take cession of the money from the Ministry of Safety and Security as provided for in terms of the Cession Agreement constituted a prejudicial act, which in law had the consequence of releasing the third defendant from the obligations of suretyship.

Held – There is no principle in our law that states that should a creditor's actions in respect of the principal debtor prejudice a surety, the surety can be released from its obligations under the deed of suretyship. The only instance where a surety can be released (totally or partially) is where there has been a breach of a legal duty or obligation by the creditor that was required from the creditor in terms of the principal agreement or deed of suretyship.

Held further – Prejudice to a surety will only release the surety from liability if the prejudice is the result of a breach of a legal duty or obligation owed by the creditor. If the prejudice complained of results from conduct falling within the terms of the principal agreement or the deed of suretyship, the surety could not rely upon such prejudice in order to escape liability.

ORDER

Judgment is granted in favor of the plaintiff against the third defendant (jointly and severally with the first and second defendant as per judgment granted on 31 January 2014), in the following terms:

- a) Payment in the amount of N\$ 1,093,086.15;
- b) Interest on the aforesaid amount calculated on the basis of the prime lending rate generally charged by First National Bank of Namibia Ltd to its prime customers in the private sector as certified by any manager of that bank whose designation need not be proved, plus 2% per annum on the aforesaid amount or any balance

thereof outstanding from time to time and calculated daily and compounded monthly;

- c) Cost of suits on the scale as between attorney and own client.

JUDGMENT

PRINSLOO, J:

[1] The parties before me are Development Bank of Namibia, a public company with share capital and limited liability established in accordance with section 2 of the Development Bank of Namibia Act, Act 8 of 2002 and Naaveyo Salom Wilson Shikongo, a major male domiciled in Windhoek. Mr Shikongo is the third defendant in this matter.

[2] During October 2013, the plaintiff instituted action against first, second and third defendants (“defendants”) for payment of an amount N\$ 103,086,15, plus interest at First National Bank’s prime lending rate plus 2% per annum on the aforesaid amount calculated daily and compounded monthly and costs.

[3] The third defendant is cited as surety and co-principal debtor with Keystone Technology Solutions CC and the second defendant by virtue of the deed of suretyship, incorporating cessions of loan funds, in terms of which he bound himself with the first and second defendants *in solidum* for the due payment of any amounts which may become due and payable to DBN by the first defendant, Keystone. In terms of the suretyship, the liability of third defendants was unlimited.

[4] The recent history of this matter is that at the case management conference on 26 April 2018, and pursuant to the parties’ joint case management report dated 24 April 2018 it was ordered that the parties formulate a stated case in terms of Rule 63¹ of the

¹ Special case and adjudication upon points of law and facts.

Rules of Court for purposes of determining the legal issue raised by the third defendant in his plea.

[5] The more detailed background history of this matter will become clear from the agreed facts as discussed hereunder.

Agreed facts

[6] The agreed facts between the parties are as follows:²

6.1. During September 2011 and at Windhoek, the plaintiff, Development Bank of Namibia (DBN) and first defendant entered into a bridging finance facility agreement in terms of whereof an amount of N\$ 900 000 was lent and advanced to the first defendant by the plaintiff.

6.2 In order to secure the loan under the finance agreement, the plaintiff and the first defendant agreed under clause 3 of the Finance Agreement on three (3) legal instruments of security, quoted verbatim as follows:

"3. SECURITY

3.1 Unlimited Suretyship by Mrs. Edwina Tuyeni Hashikutuva and Mr. Salom Wilson Shikongo in favour of DBN for the liabilities of Keystone Technology Solutions CC-Supported by.

3.2 Cession of Life Cover with Death Benefit/physical impairment of N\$ 900,000 each by Mrs. Edwina Tuyeni Hashikutuva and Mr. Salom Wilson Shikongo.

3.3 Cession of Contract Monies due from the Ministry of Safety and Security valued at N\$ 900,000."

6.3 The security instrument in terms of sub-clause 3.1 (Unlimited Suretyship) of the Finance Agreement was signed by the second defendant on 14 September 2011.

63. (1) The parties to a dispute may, after institution of proceedings, agree on a written statement of facts in the form of a special case for adjudication by the managing judge.

² Any omissions or insertions was mine.

6.4 In terms of sub-clause 3.2 (Cession of Live Cover) the Finance Agreement, a general cession agreement was concluded between the plaintiff and second defendant as well as plaintiff and third defendant during October 2011.

6.5 The security instrument in terms of sub-clause 3.3 (Cession of Contract Monies) of the Finance Agreement was concluded on 30 September 2011 by the plaintiff, first defendant and the Ministry of Safety and Security.

6.6 In terms of the Cession Agreement, first defendant ceded and transferred to the plaintiff all its rights, title and interest in and to an amount of N\$ 937, 951.72, which were monies due to the first defendant from the Ministry.

6.7 During September 2011 and at Windhoek, third defendant executed a written deed of suretyship in favour of plaintiff and bound himself as surety and co-principal debtor with first defendant for and in respect of the due and punctual performance and discharge by first defendant of any contract or agreement entered into by first defendant with plaintiff.

6.8 The plaintiff did not receive the funds (the rights in respect of which were ceded from first defendant to plaintiff) alternatively the plaintiff did not claim the money from the Ministry in terms of the Cession Agreement.

6.9 First defendant breached the Finance Agreement in that it failed to repay the loan or interest thereon as agreed between the parties.

6.10 As a result of the first defendant's breach, plaintiff instituted action against the first, second and third defendants during 2013 for payment, jointly and severally, the amount of N\$ 1, 103, 086.15 together with ancillary relief as set out in the prayers to the particulars of claim.

6.11 On 18 November 2013, the first, second and third defendant entered a Notice to Defend and the plaintiff, during January 2014, applied for summary judgment against all three defendants.

6.12 On 29 January 2014, the third defendant entered a Notice to Oppose summary judgment and simultaneously filed an affidavit opposing the summary judgment application.

6.13 On 31 January 2014, this court awarded the plaintiff summary judgment against the first and second defendants. .

6.14 Hereafter the matter was referred to a Case Planning Conference.'

Questions of law in dispute

[7] It was agreed between the parties that the following questions of law is in dispute:

'7.1 If the plaintiff is found to be in breach of a duty towards third defendant, whether plaintiff's breach has the effect of prejudicing the third defendant, as surety, such that he is released of his obligations under the Suretyship;

7.2 Whether the conduct of the plaintiff in regards to the Cession Agreement amounts to a prejudicial act which releases the third defendant from liability under the Suretyship.'

Contentions of the parties

On behalf of the Plaintiff:

[8] On behalf of the plaintiff it was argued that the plaintiff had no duty towards the third defendant to take cession of contract monies due to the first defendant from the Ministry.

[9] The plaintiff further contended that its rights, duties and obligations towards the third defendant are derived from the suretyship, in terms of which:

9.1 The Suretyship is to be an addition to and without prejudice to any other security or suretyship then held or to be held thereafter from or on behalf of the first defendant;

9.2 The Suretyship is unconditional;

9.3 The third defendant shall only be released from his obligations upon plaintiff having advised him in writing that he is released from the Suretyship.

[10] Plaintiff further contends that the taking of securities in the Finance agreement (including the cession of contract monies) did not form any duty undertaken in the Suretyship and it did not form a condition upon which basis the third party undertook his obligations and was for the sole benefit of the plaintiff.

[11] In conclusion the plaintiff contends that the third defendant has not been prejudiced by the conduct of the plaintiff as alleged, and insofar as the alleged prejudicial conduct, if any, is authorised by the Suretyship. The third defendant therefor remains liable to the plaintiff to make payment in the particulars of claim.

On behalf of the Defendant:

[12] On behalf of the defendant it was conceded that he signed the Suretyship but it is denied that he is indebted to the plaintiff on account of the prejudicial conduct of the plaintiff.

[13] It was further maintained that the Cession Agreement is concluded in fulfilment of the terms of the Financial Agreement. It is therefore the third defendant's case that the plaintiff's failure to take cession of the money from the Ministry as provided for in terms of the Cession Agreement constitutes a prejudicial act, which in law has as a consequence the total release of the third defendant from the obligations of suretyship.

[14] It was further argued on behalf of the third defendant that he was fully aware of the existence of three forms of security and when he concluded the suretyship agreement. Therefore, when the third defendant bound himself to the suretyship he knew that the suretyship was but one of the three forms of security in place.

The law applicable and application to the facts

[15] The primary issue is whether the plaintiff had a legal duty or obligation towards the third defendant as surety. A related issue is whether the plaintiff's conduct has caused prejudice to the third defendant such that, in law, the third defendant should be released of his obligation as surety. The alleged prejudicial conduct complained of was that DBN did not comply with clause 3.3³ of the financial agreement, more in particular that the plaintiff failed, neglected or otherwise waived its obligation to take cession of a contract to receive money due from the Ministry of Safety and Security.

[16] In *Caney's The Law of Suretyship*⁴ the learned authors identified two major categories and several sub-categories relating to discharge of the surety. The major categories are defined by whether the defence relates to the principal obligation or whether the defence relates to the surety's own obligations under the contract of suretyship. Extinction of the principal obligation is not applicable to the facts before me. Defences derived from the surety's own contract is applicable to the matter *in casu*.

[17] Discharge of the surety by virtue of his contract is enumerated as follows:

17.1 Payment of the principal debt by the surety;⁵

17.2 Effluxion of time;⁶

17.3 Prejudice through a material alteration in the principal debt;⁷

17.4 Prejudice through an extension of time;⁸

17.5 Breach of contract with the surety.⁹

³ Supra paragraph 2.2.

⁴ 5th Ed by C F Forsyth & J T Pretorius pages 185-214.

⁵ Supra page 204.

⁶ Supra page 204.

⁷ Supra page 205.

⁸ Supra page 207.

⁹ Supra page 209.

[18] In respect of breach of contract with surety the surety is released because the creditor is in breach of a duty undertaken either expressly or impliedly in the suretyship, and that the duty formed a condition upon which basis the surety has undertaken his obligations.¹⁰

[19] There is no principle in our law that states that should a creditor's actions in respect of the principal debtor prejudice a surety, the surety can be released from its obligations under the deed of suretyship. The only instance where a surety can be released (totally or partially) is where there has been a breach of a legal duty or obligation by the creditor that was required from the creditor in terms of the principal agreement (e.g. loan agreement) and/or the deed of suretyship.

[20] The issue relating to the release of a surety as a result of prejudice caused to him or her by the actions of the creditor was set out as follows by this court (per Olivier JA) in *Absa Bank Ltd v Davidson* [1999] ZASCA 94; 2000 (1) SA 1117 (SCA) para 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 suretyship¹¹. If . . . 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. . . .'¹²

[20] Prejudice to a surety will only release the surety from liability if the prejudice is the result of a breach of a legal duty or obligation owed by the creditor. The primary sources of a creditor's duties and obligations are the principal agreement and the suretyship. If the prejudice complained of results from conduct falling within the terms of

¹⁰ Supra page 209.

¹¹ Cited with approval in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Mega Built v Kurz* 2008 (2) NR 775 (SC) at 788.

¹² See also *Bock & Others v Duburoro Investments (Pty) Ltd* [2003] ZASCA 94; 2004 (2) SA 242 (SCA) paras 18 to 21.

the principal agreement or the deed of suretyship, the surety could not rely upon such prejudice in order to escape liability.

[21] In terms of clause 1 of the Suretyship, the third defendant bound himself, 'jointly and severally, as surety and co-principal debtor in *solidum* (which means, where there are several sureties, each is liable in full), for the repayment on demand of all amounts which the principal debtor may now or at any time hereafter owe or be indebted to the Bank.

[22] Clause 2 of the Suretyship further provides that:

'[i] is further agreed and declared that it shall always be in the discretion of the Bank to determine the extent, nature and duration of the facilities to be allowed the Debtor,...that the Bank shall be entitled without prejudice to its rights hereunder to give time to, compound with, release from liability, discharge or make any other arrangements with the Debtor or any one or more of the undersigned, or any person who is surety for and/co-principal Debtor with the Debtor in respect of his indebtedness to the Bank, and to release in whole or in part any security given to the Bank by any person and held by the Bank in respect of the indebtedness of the Debtor and my indebtedness hereunder and/or the indebtedness of any other who is surety for and co-principal Debtor with the Debtor, and in the event of the Bank so acting in respect to any one of us or in respect of any security given to it by any one of us such action shall not exonerate any other/s of us in respect from our liabilities hereunder.....'

[23] Of further importance is clause 5 which reads as follows:

'I renounce the benefits of excussion and division...and declare that this suretyship is to be in addition to and without prejudice to any other security or suretyship (including any surety signed by the undersigned) now held or hereafter to be held from or on behalf of the Debtor and is to be a continuing security.....'

[24] Ordinarily a surety would be entitled to require the creditor to realize any real security, which he may have for his debt before turning to the surety for payment of the

debt or of so much of it as remains unpaid. However this benefit does not apply to a security who bound himself a co-principal debtor or has expressly renounced the benefit of excussion (*beneficium ordinis sive excussionis*).

[25] In *Caney's The Law of Suretyship*¹³ learned authors state clearly there that a surety is entitled to demand that the principal debtor be first excused, by which is simply meant that the creditor must, before suing the surety, exhaust his legal remedies against the principal debtor for performance and payment. This he can do, the author continues, only where he enjoys the benefit of excussion and not where he has renounced, or otherwise does not enjoy, that benefit.

[26] The distinction between liability as a 'surety' and liability as a 'surety and co-principal debtor' was clarified in *Neon and Cold Cathode Illumination (Pty) Ltd v Ephron* 1978 (1) SA 463 (A). The following was held at at 471 C - 472 E and more particularly the following *dictum* of Trollip. JA at 472 B – E:

"From the above and other authorities it appears that generally the only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that *vis-a-vis* the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussions and division, and he becomes liable jointly and severally with the principal debtor (see. for example. *Caney. Law of Suretyship*. 2nd ed. p. 51; *Wessels on Contract*, 2nd ed, paras. 4087, 4088, and 4124: *Voet*, 46.1.16 and 24 (*Gane's trans.*, vol. 7, pp. 38-9, 48-9): *Pothier on Obligations*, paras. 408, 416 (*Evans' trans.*, pp. 330. 335-6)). However, he retains the right, on paying the creditor, to obtain a cession of the latter's rights and securities in order to recover the full amount from the principal debtor (*Caney, supra* at p. 52: *Kotze v. Meyer*. 1 Men.: 466: *In re Deneys*, 3 Menz.: 309: *Business Buying and Investment Co. Ltd. v. Linaae*. 1959 13) S.A. 93 (T) at p. 96). It follows, I think, that in the present case respondent, by also signing as a co-principal debtor, did not transform his accessory obligation as a surety into a joint principal obligation a co-lessee with Benam. As *Burge on Law of Suretyship* says of co-obligators liable *in solidum* (*correi debendii*) at p. 394:

"It is necessary that the obligation of each of the obligants should be principal obligations,

¹³ *Supra* page 119.

and not the one accessory to the other. In this respect a debtor *in solido* is distinguished from a surety.”

[27] It therefore appears that there is very little difference, if any, between liability as a 'co-principal debtor' and liability as a 'surety' who has renounced the benefits of excussion and division. Thus when a surety has executed such nature of deed, as the third defendant has done in the instant case, he is, to the same degree, just as liable to the creditor as the principal debtor and the creditor is entitled to proceed against him even without proceeding against the principal debtor, and unless he can show that he has been discharged from liability he cannot stop any action against him by the creditor.

[28] He, however, retains the right, on paying the creditor, to obtain a cession of the latter's rights and securities in order to recover the full amount from the principal debtor.

[29] The creditor (plaintiff) is full within its rights to proceed against the third defendant. The question remaining is then if there was an obligation on the plaintiff to first execute the other securities before pursuing the sureties, as was argued by the third defendant?

[30] From my reading of the papers before me there does appear to be any obligation owed by the plaintiff to the third defendant. There are no conditions attached to the liability of the third defendant under the Suretyship.

[31] As correctly pointed out on behalf of the plaintiff the terms of the Suretyship, which governs the relationship between the plaintiff and the third defendant, allows that:

31.1 any securities held by the Bank;

31.2 may be released or discharged by the Bank;

31.3 without prejudice to its rights under the Suretyship, and

31.4 without exonerating any surety, including the third defendant, from their liabilities under the Suretyship.

[32] The Suretyship expressly authorized the alleged prejudicial conduct of the plaintiff and therefore whatever prejudice the third defendant suffered is prejudice which he undertook to suffer.

[33] The third defendant in this case has failed to show that the plaintiff was in breach of any duty towards him or that the conduct of the plaintiff was prejudicial in not executing on the cession in respect of the Ministry first. The plaintiff is entitled to proceed against third defendant in the way it has done and he has no defence whatsoever against the actions of the plaintiff.

[34] The third defendant will remain liable for payment of the principal debt and this court orders as follows:

Judgment is granted in favor of the plaintiff against the third defendant (jointly and severally with the first and second defendant as per judgment granted on 31 January 2014), in the following terms:

- a) Payment in the amount of N\$ 1,093,086.15;
- b) Interest on the aforesaid amount calculated on the basis of the prime lending rate generally charged by First National Bank of Namibia Ltd to its prime customers in the private sector as certified by any manager of that bank whose designation need not be proved, plus 2% per annum on the aforesaid amount or any balance thereof outstanding from time to time and calculated daily and compounded monthly;
- c) Cost of suits on the scale as between attorney and own client.

J S Prinsloo
Judge

APPEARANCE

For the plaintiff:

K Klaasen

of Ellis Shilengudwa Incorporated Legal Practitioners

For the defendant:

A Kamanya

of Amupanda Kamanja Incorporated