REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

4/11/16

CASE NO: 14356/2016

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

26/10/16
DATE

SIGNATURE

In the matter between:

DRIVE CONTROL CORPORATION (PTY) LTD Applicant

and

DELTROSYS (PTY) LTD First Respondent

ROBERT PAUL WEIMAR Second Respondent

JUDGMENT

SUMMARY

Application for summary judgment.

Defences:- no agreement because applicant had not signed acceptance – quasi-mutual assent. First respondent's and applicant's conduct constituting consent.

Surety:- applicant supplying goods in excess of value provided for on credit application. Principal debtor not disputing liability in respect of excess.

- Surety cannot rely on same for release.

Interest:- *mora* interest where no contractual interest provided for.

WEINER, J:

1. The applicant (Drive Control) applies for summary judgment against the first and second respondents (Deltrosys and Weimar). The claim against Deltrosys is for payment for goods sold and delivered. The claim against Weimar is in respect of a written suretyship signed by Weimar.

2. Drive Control alleges that, on or about the 18th August 2015, Deltrosys represented by Weimar (who is a director of the first respondent) concluded a written agreement styled "*Application for Dealership (including Application for Credit Facilities and Sureties)*" with Drive Control, represented by one De Jager (the dealership agreement).

3. The dealership agreement consisted of the application form completed by Weimar on behalf of Deltrosys to which was attached a document setting out the terms and conditions of sale. It is not disputed by the respondents that the application was signed by Weimar as director of Deltrosys.

4. It is also not disputed by Weimar that, subsequent to the signing of the dealership agreement, Deltrosys placed orders on Drive Control during August and September 2015 to the value of R2 123 204,40 which orders, despite delivery, and the lapse of the requisite 60 day period, have not

been paid for by Deltrosys. The monthly purchase limit was R1 250 000,00.

5. It is further not disputed by Weimar that the dealership agreement contains a separately demarcated area headed "*Suretyship*". He does not dispute that he signed the terms and conditions of sale and the suretyship on the 18th August 2015.

RESPONDENTS' DEFENCES

NO AGREEMENT

6. Weimar does not deny that he signed and initialled the documents comprising the original dealership agreement nor does he deny that his signature and handwriting appear on the copies sought to be relied upon by Drive Control. The copies attached to the particulars of claim are of the original agreement accompanied by a lost document affidavit.

7. The respondents rely on the alleged failure of Drive Control in not signing the application for credit. Thus, they contend that no contract was concluded between the parties. They do not allege that there was an obligation on Drive Control to countersign the application for credit facilities in order to conclude a contract between the parties. The place for signature for Drive Control appears in a separately demarcated area "*for office use only*". The internal issues referred to under this heading do not form part of the contractual terms of the application. Drive Control

contends that this defence must fail as no method of acceptance was prescribed and therefore the communication of acceptance can take any form. It can be done by conduct indicating acceptance of the offer as well as by words expressing it. See *Driftwood Properties (Pty) Ltd v McLean*[1].

8. Drive Control submits that it accepted the offer conduct in receiving the Deltrosys' order for goods and supplying the goods on the terms set out in the annexure to the dealership application. Drive Control states that, even if the dealership application constituted an offer, which required countersignature by two directors of Drive Control in order for acceptance to take place, if this does not occur, this does not mean that a contract does not come into existence. Drive Control refers to the doctrine of *quasi*-mutual assent and refers to *Pillay and Another v Shaik and Others*[2]. In that case, the sellers had drawn up standard form agreements for completion by buyers of the member's interest in close corporations, which were developing properties. Buyers who wished to buy into the development, signed the standard form agreements making offers to purchase. The buyers paid the deposits and the receipt was acknowledged. The buyers also furnished guarantees. All of the above acts took place without the buyers being aware that the sellers had not yet signed the agreements. The sellers thereafter denied the existence of the alleged agreement on that basis. The SCA held that when an agreement does not have to be in writing, such an agreement will have binding force, unless the parties agree beforehand that writing constitutes a formality.

[1] 1971 (3) SA 591 (A)
[2] 2009 (4) SA 74 (SCA)

9. The SCA held further that the critical question was whether the party's actual intention, which did not conform to the declared intention, led the other party, as a reasonable man, to believe that its declared intention represented its actual intention.[3]

> *"[55] The approach to be adopted in a case such as this was set out in Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis, supra, at 239F to 240 B, as follows:*
> *'If regard is had to the authorities referred to by the learned Judges ....I venture to suggest that what they did was to adapt, for the purposes of the facts in their respective cases, the well-known dictum of Blackburn J in Smith v Hughes (1871) LR 6 QB 597 at 607, namely:*
>
> > *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*

10. Drive Control contends that the same reasoning applies to the facts of the present case. Deltrosys (whose intention now does not appear to conform to their declared intention in the dealership application) has, by its conduct in placing orders with Drive Control, arranging for a courier to collect same, accepting delivery and taking possession of the goods, misrepresented its actual intention and led Drive Control, as a reasonable

[3] Supra fn2 at paragraph 55

person, to believe that Deltrosys' declared intention in the dealership agreement represented its actual intention.

AGENCY

11. The respondents also seek to raise a defence that Deltrosys' intention was to act as an agent for a third party (referred to as "Richard Cape") and is therefore not liable for payment of certain of the goods referred to in certain of the annexures. However, Weimar stated in the affidavit resisting summary judgment "*having been under the mistaken impression that an agreement had come to being, Deltrosys believed that it was liable for orders placed by Richard Cape*". Accordingly, the respondents are, in effect, conceding that, if an agreement is found to have come into being, it follows that Deltrosys believed itself to be liable for the orders placed by this third party, which it alleges was the principal on whose behalf it was acting.

12. Drive Control contends that this defence of agency is set out in a manner which is bald, vague and sketchy and does not therefore constitute a *bona fide* defence. See *Breytenbach v Fiat SA (Edms) Bpk*[4] where Colman held the following:

> "*What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly, bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides.*"

[4] 1976 (2) SA 226 at 228

13. Drive Control contends that the respondents do not set out who the principal was for whom Deltrosys acted as agent. The respondents refer to a cross border guarantee by Rich Rewards Distribution (Pty) Ltd ("Richard Rewards Distribution") for the debts of Deltrosys. Nothing is contained in such guarantee that refers to an agency agreement. No mention is made of Deltrosys acting as Rich Rewards Distribution's agent in placing orders with Drive Control. Secondly, the terms of the agency agreement are not disclosed. The cross-border guarantee records that the orders were placed at Deltrosys' special instance and request and that an agreement was concluded between Deltrosys and Drive Control and that monies are payable by Deltrosys to Drive Control in terms of that agreement. No-one on behalf of Rich Rewards Distribution, or any other person who apparently acted as principal, confirms the allegations of the respondents.

14. Although the respondents alleged that Drive Control knew that Deltrosys was acting as an agent when placing orders for goods it is not explained how and what Drive Control knew.

15. Accordingly, the defences of Deltrosys that no agreement came into existence or that it was acting as an agent, cannot succeed.

THE SURETYSHIP

16. The question then arises as to whether or not Weimar has been released from the suretyship because of the conduct of Drive Control.

17. The monthly purchase limit of R1 250 000,00 was exceeded for the month of September 2015 by an amount of R381 721,90 (the excess amount).

Weimar contends that, as the purchase limit was exceeded, he is released as surety as a result of the prejudicial conduct of Drive Control in allowing the purchase limit to be exceeded. The respondents do not argue that Deltrosys (the principal debtor) is not liable for payment of the excess amount. It is only in relation to Weimar, in his capacity as surety, that this argument is raised. In *Nedbank Ltd v Puricare CC and Others*[5] the court held as follows:

> *"[39] Recent judgments of the Supreme Court of Appeal indicate that there is no general principle that a surety is discharged from liability because the creditor has behaved in a manner prejudicial to the surety's interests. In Absa Bank Ltd v Davidson 2000 (1) SA 1117 (SCA) Olivier JA said that '[a]s 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' (para 19)...*
>
> *[40] ....*
>
> *[41] The onus of proving prejudicial conduct rests on the surety; and it seems that the surety is also required to prove the financial extent of the prejudice so as to establish whether his release is partial or complete (see also Khula Enterprise Finance Limited v Geldenhuys & another [2012] ZASCA 165 para 6), ...".*

[18] Based upon the aforesaid authority, if the prejudice defence is good in law, Weimar might only be entitled to a partial release from the suretyship in respect of the excess amount.

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[5] (18922/2010) [2014] ZAWCHC 17 (18 February 2014) at paragraph 39-41

[19] In dealing with whether Weimar is, in fact, prejudiced, reference can be made to *Nedbank Ltd v Puricare CC and Others*[6] *(Supra)* in which the court held the following, in relation to a bank debiting the defendant's account with amounts for which no overdraft facility existed:

> *[47] I return now to why it does not matter that no approved facilities were in place at the time of the transfers. A facility agreement simply means that the bank is bound to honour debits to the amount of the agreed facility until the agreement is validly terminated or lapses with the effluxion of time. The fact that a facility agreement is not in place does not mean that a bank is not entitled, in its discretion, to honour a customer's debit requests. The debits of which the Dominick defendants complain, namely those of 17 March 2010 and 30 April 2010, were made pursuant to the request of its customer, Puricare. Nedbank was not obliged to honour those requests; but if the requests were authorised by Puricare (and there is no suggestion that they were not, and all indications are that they were), Puricare could not complain if the bank chose to meet the requests. The position was stated thus by Zulman JA in Absa Bank Ltd v IW Blumberg and Wilkinson [1997] ZASCA 15; 1997 (3) SA 669 (SCA) at 675H-676D:*
>
> *'The fact that the appellant [a bank] might have permitted the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondent in law from liability to make payment to the appellant. ..... It would be strange indeed if it were permissible for a customer of a bank to draw a cheque, on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to then plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence this is precisely what the respondent is contending for. It hardly lies in the*

[6] Supra fn 5 at [44] to [48]

mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This cannot be so...

[48] I thus conclude that, insofar as the principal debt is concerned, Puricare was liable for the full amount owing on the overdraft account, including the indebtedness arising from the transfers of 17 March 2010 and 30 April 2010... An argument by a surety which focuses on non-compliance by the creditor with the contract between itself and the principal debtor is really an argument that the surety is not liable because the principal debtor itself is not liable. Once it is accepted that the principal debtor is liable to the creditor for the amount claimed from the surety, the focus switches to the suretyship, i.e. to the question whether the suretyship itself covers that particular indebtedness or whether there was a violation of any other term of the suretyship."

18. Drive Control contends that the monthly purchase limit was for the benefit of Drive Control and Deltrosys. The person now objecting to the monthly purchase limit is a stranger to the dealership agreement. Neither of the parties to the dealership agreement have taken the point that the monthly limit for September 2013 was exceeded and that Deltrosys is not liable for the excess.

19. It is submitted by Drive Control that Deltrosys, in placing the orders itself and in regarding itself as liable for such orders despite the fact that the monthly limit was exceeded, cannot claim that it is not liable for such orders. In fact, Deltrosys does not dispute liability on this basis.

20. Weimar's argument can only succeed if liability of the principal debtor is successfully disputed. Once it is held that the principal debtor is liable for the full amount the surety is also liable for such amount.

21. The suretyship covers "*the due and punctual payment by the principal debtor (Deltrosys) to the credit grantor (Drive Control) of any amount which is now or may hereafter become owing by the principal debtor to the credit grantor from any cause of indebtedness however arising*". (emphasis added). This covers the indebtedness in question. Drive Control accordingly contends that there is no prejudice to Weimar entitling him to a partial or complete release from the suretyship. Weimar contends that he completed the application and suretyship which was contained in one document and that the requested purchase limit per month was completed by Weimar on behalf of Deltrosys. He thus contends that the limit requested was not for the benefit of Drive Control but for the benefit of the surety. This, they submit, can only be dealt with at a trial. This argument is unsustainable.

22. The final issue is that of the *mora* interest claimed by Drive Control. It is submitted that there is no principle that stands in the way of a finding that, in the absence of an agreement in respect of interest, a creditor should be compensated by an award of *mora* interest for the loss suffered as a result of not receiving the agreed payment on time. See *Land and Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Others*[7].

[7] 2013 (6) SA 319 (SCA) at paragraph[9]

23. Drive Control does not claim contractual interest on any monies that are past due date, which is provided for in terms of clause 8 of the dealership agreement. Such clause states that interest shall be payable at the maximum interest rate prescribed in terms of the Usury Act. Drive Control accepts that, since the Usury Act has been repealed, it cannot demonstrate an entitlement to contractual interest. Drive Control refers to *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others*[8] where the court held:

> *"[14] Even in the absence of a contractual obligation to pay interest, where a debtor is in mora in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date. Centlivres CJ made that plain in Linton v Corser supra (at 695G-696A), when he stated:*
> *'The old authorities regarded interest a tempore morae as "poenaal ende odieus", vide Utrechtsche Consultatien, 3, 63, p. 288. Such interest is not in these modern times regarded in that light. To-day interest is the life-blood of finance, and there is no reason to distinguish between interest ex contractu and interest ex mora. Milner's case is, as far as I have been able to ascertain, the only case which applied the old authorities, and in Johnston v Harrison, 1946 N.P.D. 239 at p. 251, the Court was not slow in distinguishing that case. The question that now arises is whether we should apply the old Roman-Dutch Law to modern conditions where finance plays an entirely different role. I do not think we should. I think that we should take a more realistic view than in a matter such as this to have recourse to the old authorities."*

[8] 2013 (2) SA 259 (SCA) at paragraph 14

24. Drive Control refers to *Land and Agricultural Development Bank of South Africa v Ryton Estates*[9] *(Supra)* which provide as follows:

> "*[20] Section 1(1) of the Prescribed Rate of Interest Act 55 of 1975 provides as follows:*
> *'If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection 2 as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.'*
> *In terms of s 1(2) the Minister of Justice prescribed the rate of interest at 15,5 per cent per annum for the purpose of s 1(1).*
>
> *[21] As mora interest represents damages, the rate thereof is not governed by agreement or in any other manner. It follows that mora interest is payable at the prescribed rate.*"

25. Drive Control accordingly submits that it is entitled to mora interest in terms of the Prescribed Rate of Interest Act at the applicable rate of 9 per cent per annum.

26. It is not disputed that in terms of the dealership agreement payment was due within 60 days. Accordingly, Drive Control contends that the amount of R491 482,50 became due and payable on the 30th October 2015 while the amount of R809 963,16 and R821 758,74 became payable on the 30th November 2015. Drive Control contends that it is entitled to *mora* interest from the day after the due date.

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[9] Supra fn 7 at paragraph 20-21

27. The respondents contend that the plaintiff cannot claim *mora* interest because clause 8 of the agreement provides for the payment of interest based upon the Usury Act. Therefore, section 1(1) of the Prescribed Rate of Interest Act is not applicable.

28. Drive Control, as stated above, has argued that it cannot show its entitlement to contractual interest by virtue of the repeal of the Usury Act. It is accordingly entitled to the lesser award of *mora* interest.

29. This interest is based simply on the delay or default of the respondent. "*The purpose of mora interest is therefore to place the creditor in the position that he or she would have been in had the debtor performed in terms of the undertaking*". See *Crookes Brothers v Regional Land Claims Commission (Supra)*[10] .

> "*[17] The term mora simply means delay or default. When the contract fixes the time for performance, mora (mora ex re) arises from the contract itself... The purpose of mora interest is therefore to place the creditor in the position that he or she would have been in had the debtor performed in terms of the undertaking*".

30. The respondents' submissions in this regard are without merit. Accordingly both the defences of the respondents and their submissions in regard to interest must be rejected.

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[10] Supra fn8 at paragraph 17

31. Accordingly, the following order is granted:

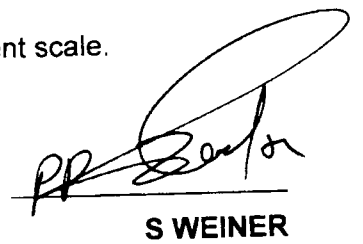
31.1. Summary judgment is granted against the defendants jointly and severally for:-

31.1.1. Payment of the sum of R2 123 204,40;

31.1.2. Interest on the sum of R491 482,50 at the rate of 9 per cent *per annum a tempora morae* from 31 October 2015 to date of payment in full;

31.1.3. Interest on the sum of R1 631 721,90 at the rate of 9 per cent *per annum a tempora morae* from 1 December 2015 to date of payment in full;

31.1.4. costs of suit on the attorney and client scale.



S WEINER
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

For the Plaintiff: Advocate A L Roeloffze

Instructed by: Hooker attorneys

For the First and Second Defendant: Advocate G Naude SC

Instructed by: S C Vercueil Attorneys

Date of hearing: 2 August 2016

Date of Argument: 2 August 2016

Date of Judgment: 25 October 2016