

Supreme Court of Appeal of South Africa

MEDIA SUMMARY

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Ekkehard Creutzburg and Another v Commercial Bank of Namibia Ltd

The Supreme Court of Appeal today (1 December 2004) handed down judgment in the matter of E Creutzburg and Another v Commercial Bank of Namibia. In this case the two appellants, on 22 and 25 May respectively, signed a deed of suretyship in Swakopmund, Namibia, in terms of which they bound themselves as sureties and co-principal debtors with a Namibian Company, Pacific Best Namibia (Pty) Ltd for the latter's indebtedness to the Commercial Bank of Namibia. The second appellant, however, terminated his suretyship on 14 October 1996. Upon the winding up of Pacific Best in 1998 the bank instituted action in the Cape High Court against the appellants, who are resident in Cape Town, for payment of the sum of R663 152.27 being what was allegedly due by Pacific Best to it.

It was common cause that the deed of suretyship, although validly executed in Namibia, would be invalid in South Africa for lack of compliance with the provisions of Section 6 of the General Law Amendment Act 50 of 1956, in that upon signature of the document the identity of the bank as creditor was not reflected thereon.

The appellants defended the action on the basis that the validity of the deed of suretyship had to be determined in terms of South African law, the bank having chosen to institute action in a South African court. The deed of suretyship provided that the suretyship shall in all the respects be governed by the law of South Africa and/or Namibia. The second appellant had raised two further defences which were that his liability on the suretyship agreement had been discharged by payments made by the principal debtor since termination of his suretyship or, if not, then the bank's claim against him had become prescribed.

The Cape High Court found against both appellants on all the issues and ordered the appellants to pay to the bank amounts agreed between the parties, the second appellant's liability being limited to the principal debtor's indebtedness at the date of determination of his suretyship.

The Supreme Court of Appeal partially confirmed the Cape High Court's order. It found that the validity of the deed of suretyship had to be determined by reference to the general rule, which is that the formalities of a contract are determined by the law of the country where the contract was entered into. It accordingly held that the suretyship agreement was valid. The first appellant's appeal was accordingly dismissed.

As to the second appellant the Supreme Court of Appeal held that his liability had been discharged by the principal debtor's payments on account since the date of determination of the suretyship. The

second appellant's appeal was accordingly upheld with the result that in his case the bank's claim was dismissed.

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