Republic of South Africa

In the High Court of South Africa
Western Cape High Court, Cape Town

CASE NO: 2043/09

In the matter between

MARTHINUS JOHAN DEYZEL Plaintiff

and

FASTPULSE TRADING 461 (PTY) LTD First Defendant
RAYMOND PAUL SEARRA Second Defendant

Judgment delivered: 8 February 2010

S. OLIVIER AJ

1. This is a provisional sentence application against the Second Defendant, Mr Raymond Paul Searra, provisional sentence having been granted against the First Defendant on 3 March 2009 at which stage the application, as regards the Second Defendant, was postponed.

2. Mr Searra was in default of appearing. I am satisfied that sufficient notice had been given to him of the hearing on 2 February 2010. Mr Hugo, who appeared for the Plaintiff, handed up the original cheque and then addressed me on the merits of his client's claim and the defences raised on affidavit by Mr Searra.

3. The provisional sentence application is based upon a cash cheque, dated 1 June 2008, drawn by the First Defendant, Fastpulse Trading 461 (Pty) Ltd, trading as One Media Solutions "(*One Media*)", on Nedbank for an amount of R228 000,00, dated 1 June 2008. The cheque was signed by Mr Searra and, it is common cause, he later again appended his signature to the face (and not the back) of the cheque. Next to his second signature appear the words *"as surety"*. Mr Searra, however, denies that those words appeared on the cheque when he appended his second signature thereto.

4. Mr Searra, states in his affidavit, that

   (a) he appended his second signature to the cheque as he was told that if the cheque was presented and dishonoured he would be locked up.

   (b) he thus signed the cheque a second time.

   (c) and he further denies that the words *"as surety"* appeared on the cheque at the time he signed it. Those words were not in his handwriting and were not placed on the cheque by him - *"(t)hey must have been added later"*.

(d) He had not intended to bind himself as a surety.

5. Section 62(1) of the Bills of Exchange Act, 34 of 1964, provides as follows:

> *"If a bill or an acceptance is materially altered, the liability of all parties who were parties to the bill at the date of alteration and who did not assent to it, must be regarded as if the alteration had not been made, but any party who has himself made, authorised or assented to the alteration, and all subsequent endorsers are liable on the bill as altered."*

6. Though some instances of material alterations are given in section 62(2), it must be so that the insertion of the words *"as surety"* would constitute, at least, a material alteration. The defence that the cheque was altered in the manner suggested after he signed it, would be subject to a possible qualification to be considered below, a complete defence to the claim made.

7. Mr Searra did not deny that it was his signature that appeared for the second time on the front of the cheque. He also did not seek to deny his signature linking it to the words *"as surety"*, as the defendant sought to do in the case of *Finansbank Bpk v Klopper* 1981(1) SA 106 (T). There the defendant denied his signature linking it to the wording *"as surety and co-principal debtor in solidum"*, which was denied as having appeared on the cheque at the time of signature (at 113H).

8. It would therefore seem to me that the Plaintiff has discharged the onus of proving the signature of Mr Searra. Mr Searra bears the onus in respect of all other issues and also has to prove that the probabilities of success in the principal case are against the Plaintiff. This onus can only be discharged upon facts raised on affidavit and not on inferences to be drawn from the facts. *(Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE) at 286.)

9. Mr Hugo, argued that the second signature by Mr Searra *"as surety"* constitutes Mr Searra as an *aval*. The contract of aval is basically a contract of suretyship. No formalities are necessary for the contract of aval. All that is required is that the guarantor should sufficiently indicate his intention, ex facie the bill or note, to guarantee payment thereof. The unqualified signature of a stranger on a negotiable instrument" *[is] prima facie deemed to be that of the signer of an aval*".[1]

10. FR Malan, AN Oelofse, W le R de Vos, JT Pretorius & C J Nagel Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes (l986) 203ff ('Malan et al Provisional Sentence') point out that the liability of an aval is one of the few branches of the law of negotiable instruments where Roman Dutch wisselrecht may still be

[1] Cowen, The Law of Negotiable Instruments in South Africa (3rd Edition), p. 196

relevant, that the precise extent of the liability is uncertain and requires recourse to both the common law and statute.

11. Mr Hugo contended that the effect of the introduction of section 54A[2] to the Bills of Exchange Act, 34 of 1964, by Act 56 of 2000, was that the *beneficium excussionis* was no longer available to an *aval* as his liability was no longer illiquid since he is deemed to have waived the common law benefits of a surety. In terms of section 54A(4) *"the signer of an aval is liable jointly and severally with and as surety for, the party for whom he has signed his aval or is deemed to have given his aval".*

12. It is important to note that, at common law, the difference between the *aval* and the surety binding himself on a separate instrument is that the *aval* is deprived of the *beneficia excussionis et divisionis* customary to the suretyship. The *aval* is accordingly a surety who has

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[2] *This section provides as follows:*

Liability of signer of aval

(1) The liabilities of the parties to a bill or note may be secured by an aval.

(2) A person signs a bill or note as the signer of an aval where he signs the bill or note, and by words such as 'as aval', 'as surety' or 'as guarantor' expressly indicates that he is a surety: Provided that the unqualified signature of a person other than the drawer, maker, drawee or payee made on the back of the bill or note payable to order before indorsement by the payee shall be sufficient for such indication.

(3) The signer of an aval may specify in the bill or note the party for whom he has given his aval and if he does not so specify, he shall be deemed to have given his aval for the drawer or maker, as the case may be: Provided that, if a bill has been accepted, whether before or after the signing of the aval, the signer of that aval shall be deemed to have given his aval for the acceptor.

(4) The signer of an aval is liable jointly and severally with and as surety for, the party for whom he has given his aval or is deemed to have given his aval.

(5) Where the signer of an aval pays the bill or note, he acquires the rights arising out of the bill or note against the person for whom he has given his aval or is deemed to have given his aval and against all parties liable to that person.

[S. 54A inserted by s. 17 of Act 56 of 2000.]

tacitly renounced the *beneficia*.[3] This common law perspective Mr Hugo had elaborated on in 1996 in his contributing chapter "Negotiable Instruments" to Reinhart Zimmerman & Daniel Visser's, Southern Cross, Civil Law and Common Law in South Africa.[4]

13. Mr Hugo, in his able argument, pointed out that as a result of an incorrect interpretation of our common law, it was held that an *aval* was entitled to raise the normal defences available to a surety, including the *beneficium excussionis*, and that this destroyed the liquidity of the document (see *Moti & Co v Cassiem's Trustee* 1924 AD 720 at 726 *et seq*; Zimmermann & Visser, Southern Cross, Civil Law and Common Law in South Africa (1996) 495-7; Forsyth & Pretorius, Caney's The Law of Suretyship in South Africa, 5th edition, 126-7; Malan, Pretorius & Du Toit, Malan on Bills of Exchange, Cheques and Promissory Notes, 5th edition, para 153).

14. In Dickinson v South African General Electric Co (Pty) Ltd 1973 (2) SA 620 (A) Trollip JA confirmed the approach that provisional sentence cannot be taken against the giver of an aval:

> "*(T)he liability of a person signing a promissory note as a surety without renouncing the beneficium excussionis is illiquid, precluding the grant of provisional sentence thereon. The manifest reason is that extrinsic evidence is required to prove the excussion of the principal debtor or exemption therefrom .... Putting it in another way more germane to the*

[3] Malan et al Provisional Sentence, supra at p 204

[4] At 496

present case: once the surety raises the beneficium excussionis, the liquidity of his liability is destroyed.

15. If, however, where the signer of an aval has bound himself as surety and co-principal debtor, he is regarded as having renounced the beneficia excussionis (ordinis) and divisionis, and provisional sentence may be taken against him (Wiehahn v Wouda 1957 (4) SA 724 (W) at 725; and see also Malan et al Provisional Sentence at 206).

16. Though JT Pretorius points in the 2000 Annual Survey of the SA Law, in the Chapter "Law of Negotiable Instruments" to the various proponents for amending the act,[5] Malan *et al* Provisional Sentence, in 1986, already proposed nearly the exact wording we now find in section 54A. As Malan *et al* Provisional Sentence observes with regard to the extent of the surety's liability in footnote 107 at p 222:

"But in the interests of commerce and, one may add, in order to revive the very good principles of our common law, the signer of an aval should be liable as a surety and co-principal debtor. "

17. Pretorius concludes as follows at p 566-7

It is submitted that, by providing that the liability of the aval is joint and several, the courts will in future revive Roman-

[5] Which includes those made by JR Malan, AN Oelofse & JT Pretorius Proposals for Reform of the Bills of Exchange Act, 1964 (1988), also published as Working Paper 22 of 1988 under the auspices of the South African Law Commission.

Dutch law and regard the aval as having renounced the common-law benefits so that an action for provisional sentence would be available against the aval (Malan Proposals 319-20)."

18. Although there is no case law on section 54A, the writers are unanimous in their views that the introduction of section 54A results in the *aval* being liable *in solidum* and that this liability is no longer illiquid. Forsyth & Pretorius, Caney's The Law of Suretyship in South Africa, 5th edition, 129-30.

19. Gering, Handbook on the Law of Negotiable Instruments, 3rd edition, 313-4 points out

"Accordingly, and by virtue of the provisions of section 54A(4), these common law benefits are no longer available to a signer of an aval who signs a bill of exchange, cheque or promissory note, provisional sentence may now be granted against the signatory".

20. Malan, Pretorius & Du Toit, Malan on Bills of Exchange, Cheques and Promissory Notes, 5th edition, para 153 at footnote 123 and para 155; points out:

"Section 54A(4) provides for the liability of the signer of the aval to be joint and several with that of the person for whom he has given his aval ... Where he is surety for the acceptor his liability is co-extensive with that of the acceptor, the main or principal debtor on the instrument. Because he is liable in solidum with the principal debtor, his liability is no longer illiquid since, following the older

jurisprudence, he is deemed to have waived the common-law benefits of the surety."

21. I am satisfied that under section 54A the liability of Mr Serrea is in solidum with the First Defendant, his liability is no longer illiquid, and that provisional sentence may be taken against him.

22. The cheque, in the instant case, is not payable to order, and Mr Searra's second signature does not appear on the back of the cheque. I debated with Mr Hugo whether, if one were to ignore the words *"as surety"*, whether the mere fact that Mr Searra had signed the cheque for a second time, would result in him being liable as an *aval.*

23. Section 54A(2) provides that *"a person signed a bill or note as the signer of an aval where he signs the bill or note, and by the words such as 'aval', 'as surety' or 'as guarantor', expressly indicates that he is a surety: provided that the unqualified signature of a person other than the drawer, maker, or drawee or payee made on the back of the bill or note payable to order before endorsement by the payee shall be sufficient for such indication."*

24. In view of the proviso to section 54A(2) it seems to me that Mr Searra's liability as an *aval* can only arise if the words *"as surety"* were appended at the time that he signed the cheque for the second time – as the Plaintiff contends is indeed the case – and not if it was added later – as, indeed, Mr Searra contended. Put differently, I cannot hold

Mr Searra liable as an aval merely by virtue of him having signed the cheque, on the face of it, a second time.

25. The defence raised by Mr Searra is that he did not intend to bind himself as surety. If the Plaintiff's version is accepted, namely that it is Mr Searra's signature and his own handwriting *"as surety"* which follows upon his signature, then that evidence will be dispositive of the defence raised by Mr Searra. On affidavit both Mr Deyzel and Mr Marchand de Kok stated unequivocally that Mr Searra was advised of the consequences of signing as surety, and under his own hand, had added the words "*as surety*".

26. Mr Deyzel states as follows in his affidavit at paragraph 14.5:

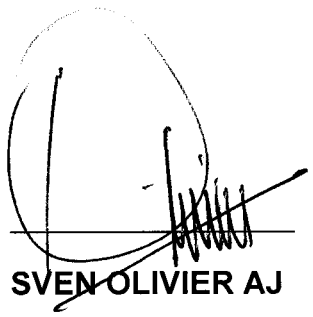
> *"Ek het egter wel van Searra vereis dat hy die tjek in sy persoonlike hoedanigheid as borg moes teken, as voorwaarde vir die soeke na 'n oplossing by wyse van verdere onderhandelinge. De Kok het by hierdie geleentheid die konsep van aanspreeklikheid as borg op 'n tjek aan Searra verduidelik waarna Searra die tjek as borg geteken het, en inderdaad ook die woorde 'as surety op die tjek geskryf het. Hierdie woorde is dus wel deur Searra op die tjek geskryf en met die volle bewussyn van die implikasie daarvan. Hy het dit gedoen in my en De Kok se teenwoordigheid."*

27. Mr Hugo accepted that I could take judicial notice of the fact that Mr de Kok is now deceased and that only Mr Deyzel would be available

to testify at the trial. Leaving aside questions of the admissibility of Mr de Kok's affidavit, I am satisfied that, on a proper preponderance of probabilities, the defence raised by Mr Searra will not succeed.

28. In the premises I am satisfied that a proper case is made out for the grant of provisional sentence against the Second Defendant and I order as follows:

> Provisional sentence is granted against the Second Defendant in the amount of R228 000,00 together with interest at 15,5% per annum to run with effect from 12 November 2008 to date of payment, together with costs.



SVEN OLIVIER AJ

Acting Judge of the High Court