

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NUMBER: 12145/08**

In the matter between:

**TENTE CASTORS SA (PROPRIETARY) LIMITED**

Plaintiff

and

**JACOBUS JOHANNES LOMBAARD**

First Defendant

**DIRK JOHANNES BRINK**

Second Defendant

---

**JUDGMENT HANDED DOWN ON 4 NOVEMBER 2011**

---

**ASSHETON-SMITH, AJ**

- 1 The Plaintiff instituted action against the First and Second Defendant for payment of the sum of R841 284.85 based on a suretyship executed on 17 April 2008 in terms whereof the Defendants' bound themselves as surety and co-principal debtors with Meditek-Hemco (Proprietary) Limited ("**Meditek**") to the Plaintiff.
- 2 I was advised by counsel for the parties at the outset of the matter that *quantum* of the Plaintiff's claim had been agreed to amount to R707 252.52 plus *mora* interest thereon from 17 July 2008.
- 3 It is common cause between the parties that:

- 3.1 a suretyship was in fact signed in the form that it appears at Annexure "B" to the Plaintiff's Particulars of Claim, and that the suretyship was qualified by a document dated 17 April 2008 addressed to the Plaintiff and signed by the First Defendant and the Second Defendant and which accompanies the suretyship which document reads as follows:

*"We refer to the attached surety as discussed.*

*It is the understanding that SAPO Castor will be released today after receiving the surety. Should this not happen the surety from J J Lombaard and D J Brink will be seen as nil and void (of no value)."*

As the parties referred to this document as the "Addendum" I will also do so in this judgement: and

- 3.2 the Addendum qualified the Suretyship.

- 4 The *lis* between the parties thus pertains to the meaning of the words contained in the Addendum being "*that SAPO Castor will be released today after receiving the surety*". These words are clearly ambiguous *ex facie* the Addendum. It is not apparent what SAPO castor was required to be released that day in order for the condition contained in the Addendum to be fulfilled.
- 5 It is the Plaintiff's position that this wording related to the release of certain castors that were held by the Plaintiff's agent, Cargo Works in Cape Town. As the castors had been released from Cargo Works to Meditek on 17 April 2008 ( being the date upon which the surety was delivered) the condition contained in the Addendum was complied with, and thus the suretyship is of full force and effect.
- 6 On the other hand, the Defendants contend that these words meant that the suretyship would only be of full force and effect in the event of the Plaintiff delivering the balance of the castors that were due to it by the Plaintiff , being 1216 sets of castors in order for Meditek to complete production of certain

rolltainers due under a contract with the Post Office. It is contended by the Defendants that they would not have bound themselves as surety and co-principal debtors to Meditek in respect of the indebtedness to the Plaintiff if the balance of the castors to enable Meditek to complete delivery of the remaining rolltainers for delivery to the Post Office.

7 A summary of the facts and evidence in this matter appear below.

8 Meditek was a company that was engaged in the manufacture of medical and other goods. Its parent company, called Premquip, was awarded a contract to supply certain rolltainers to the Post Office following a tender process. Premquip in effect subcontracted most of the manufacturing of the rolltainers to Medi-Tek. The rolltainers themselves required castors to be fitted to them. These castors are in essence wheels. A set of castors comprise of 4 castors: 2 of which are fixed, and 2 which swivel. Medi-Tek placed orders for 30 000 castors with the Plaintiff at the beginning of July 2007. It was envisaged that production of the rolltainers for the Post Office would be completed by December 2007, but ultimately this envisaged delivery date did not occur.

9 Towards the end of March 2008, all but 4864 castors (1216 sets of castors) had been delivered by the Plaintiff to Meditek. At that stage, Meditek owed the Plaintiff an amount in excess of R1 250 000.00.

10 On 25 March 2008, Mr Don Lane (the Managing Director of the Plaintiff at the time) sent on e-mail on to Mr Kobus Lombaard (the Chief Operating Officer of Medi-Tek at the time) and copied to Mr Jan Brink (the General Manager of Medi-Tek at the time) in which he says that Mr Lombaard had confirmed to him that the Plaintiff could expect payment by the weekend, and that the Plaintiff was still to deliver castors for 1216 rolltainers. He confirmed that the castors had been manufactured and packed and would be dispatched as soon as the payment had been made.

- 11 On 28 March 2008 Mr Lane addressed a further e-mail to Mr Lombaard and copied Mr Brink recording that 300 sets of Post Office castors would be despatched that day for delivery to Meditek on the Monday, provided that the Plaintiff received commitments that the outstanding accounts would be settled in full, in terms of an acceptable payment schedule, by either Meditek or its holding company Premquip, by no later than 25 April 2008. The fact that Meditek was experiencing payment difficulties is acknowledged by Mr Lane and he advised that if Meditek were unable to meet the payment deadlines that the Plaintiff would consider extending the date subject to receipt of written guarantees from either the Post Office, the directors of Meditek and Premquip or the shareholders in their personal capacities. He requested them to respond by 08h30 on 31 March 2008 so that the appropriate instructions could be given.
- 12 On 30 March 2008, pursuant to the e-mail of 28 March 2008 aforesaid Meditek provided an undertaking to the Plaintiff that it would pay at least 50% of the outstanding amounts by 25 April 2008, and the rest of the amounts by the second week of May 2008. This document was signed by Mr Lombaard and Mr Brink on behalf of Meditek.
- 13 On 1 April 2008 Mr Lane addressed an e-mail to Mr Lombaard and copied Mr Brink wherein he thanked Meditek for the undertaking provided, and acknowledged that Meditek needed a further 1216 sets of castors to complete the Post Office contract. He advised further that this would increase the total amount outstanding by Meditek to the Plaintiff by over R500 000.00 to approximately R1 700 000.00. He confirmed that the Plaintiff had manufactured and assembled the stock but would not release it until the Plaintiff's account was paid up to date. He presented two other options, if Meditek required more time to pay, being: personal guarantees be furnished, or the Post Office debt be ceded to the Plaintiff. He then requested that they deal with Mr Gerhard Pretorius (the Financial Manager of the Plaintiff at the time and now its Financial Director) so he could arrange the appropriate documents. Mr Pretorius had been copied in on all the e-mails sent by Mr Lane to referred to above.

- 14 On 9 April 2008 Mr Pretorius, after having consulted with the Plaintiff's attorneys, in an e mail addressed to the Defendants provided them with a personal suretyship as an attachment and instructed them on the manner of signature thereof. He states in his mail "*I have attached the personal suretyship agreement as agreed*". Mr Pretorius testified that he had held a discussion with Mr Brink between 1 and 9 April 2008 when a suretyship to secure the debt due by Meditek to the Plaintiff was discussed, and that he had told Mr Brink that following receipt of the suretyship, castors that were held in Cape Town with Cargo Works would be released to Meditek. Under cross examination he reiterated that this was his understanding. Mr Brink testified that he only contacted Mr Pretorius to request him to send the documents, and that nothing else was discussed according to him. Furthermore, he testified that he was surprised to see his name in the suretyship when it was sent to him as he was neither a director nor shareholder of Meditek, but that after discussion with Mr Lombaard (who he had worked with for a long time) he signed the suretyship. Neither Mr Lane nor Mr Lombaard who both testified, were actually involved in discussions regarding this aspect and thus could not clarify this matter any further.
- 15 It is common cause that on 17 April 2008, at 09h45 the Suretyship and the Addendum were faxed to the Plaintiff. As the suretyship was not signed on the first page thereof, Mr Pretorius addressed an e-mail to Mr Lombaard and Mr Brink at 11h59 on 17 April 2008 requesting them to sign the first page and to fax it urgently and to courier the duly signed original to the Plaintiff. He informed the Defendants that a request had been given to Cargo Works in Cape Town to release the goods held by them for delivery. He also informed them that "*your Addendum to the surety agreement is therefore not acceptable by Tente Castors*". He also reminded them of their undertaking to pay 50% of the current outstanding amount by mid May 2008. In evidence Mr Pretorius explained that his statement that the Addendum to the Suretyship agreement was not acceptable meant that because he had already instructed Cargo Works to release the castors, the Addendum was really meaningless. He confirmed he was, however, unaware of the actual number of castors held by Cargo Works. In fact, Mr Brink, Mr Lombaard, Mr Lane and Mr Joshua (Sales Representative of the Plaintiff) were

unable to state that they knew how many castors were held by Cargo Works at the time. Mr Brink and Mr Lombaard gave evidence that it was their understanding based on the previous e-mails sent by Mr Lane that as against delivery of the suretyship the balance of the castors (i.e. 1 216 sets) would be released that day.

- 16 Mr Lombaard confirmed that he had drafted the Addendum based on Mr Lane's e-mails. He testified that the words "*as discussed*" in the Addendum was a reference to Mr Lane's previous e-mails and that the reference to "SAPO castor" was to the remaining 1 216 sets of castors referred to in Mr Lane's e-mails. He testified that the basis upon which he and Mr Brink signed the suretyships was to obtain delivery of the balance of the castors to complete the Post Office contract. He had no previous personal exposure for the debt of Medi-Tek to the Plaintiff, and would not have signed the suretyship if all of the stock was not to be released by the Plaintiff to Meditek.
- 17 Mr Lombaard confirmed he did not react to Mr Pretorius's e-mail of 17 April 2011 as he believed all the castors were to be released. He was asked what he understood by the words "*released today*" and he said he understood this to be that the remaining castors would be released that day by Plaintiff failing which the suretyship would lapse. When pressed in cross examination as to exactly when the suretyship lapsed, he could not answer.. Mr Brink in his evidence, however, testified that what was meant by "*released today*" was that Plaintiff could deliver in a couple of days.
- 18 It was common cause that the Plaintiff delivered 1 500 castors to Meditek on 17 April 2008 and 1 500 castors to Medi-Tek on 7 May 2008. Both Mr Brink and Mr Lombaard confirmed in their evidence that they did not contact the Plaintiff at all to complain of the fact that all of the 1216 sets of castors had not been delivered by the Plaintiff. In fact Mr Brink's secretary had been instructed to send the original suretyship to Mr Pretorius on 20 April 2008 following an e-mail from him to the Defendants that day. Mr Brink testified that he knew that 375 sets of castors (1 500) had been delivered to Meditek on 17 April 2008. Despite Meditek

not having received all of the 1 216 sets of castors from Plaintiff the original suretyship was however sent to the Plaintiff.

- 19 On 30 April 2011 payment of R534 000 was made by Meditek to the Plaintiff, but there was no word of the fact that delivery of castors had not been made by the Plaintiff, or that the suretyship was invalid arising therefrom. Further small payments were made by Meditek to the Plaintiff over the period 30 May 2008 to 19 June 2008.
- 20 It is common cause that the full amount of the castors required by Meditek in order to complete the Post Office contract were not delivered by the Plaintiff.
- 21 In an e-mail sent by Mr Lane to Mr Brink and copied to Mr Lombaard on 6 June 2008 he advises that as no further payments had been received from Meditek at that point in time and by virtue of the fact that certain messages that had been left Mr Pretorius had not been returned, that the Plaintiff would hold back the castors that were promised to be dispatched to Meditek that day.
- 22 Meditek was provisionally wound up on 27 June 2008 and at that stage 1 864 castors had not been delivered.
- 23 On the facts and the evidence before me, it is clear that the Plaintiff knew that Meditek required 1216 sets of castors in order to complete the Post Office contract. The e-mails of Mr Lane of 25 March 2008 and 1 April 2008 where he acknowledges that 1216 sets of castors are outstanding makes this clear.
- 24 The point of reference for the provision of the suretyship are the e-mails of Mr Lane of 25 March 2008 and 1 April 2008. However, the suretyship itself and all dealings with respect thereto thereafter took place between Mr Pretorius and Mr Brink. Mr Brink denies he held a discussion with Mr Pretorius but merely asked him to send the document.

25 Mr Pretorius was adamant that what he discussed with Mr Brink was that the castors in Cape Town would be delivered upon receipt of the suretyship. Mr Lane said this was his understanding as well but clearly he had no personal knowledge of this.

26 Although Mr Brink denied having had any discussion with Mr Pretorius, paragraph 7.1 of the Defendants' Plea as amended reads as follows:

*"On or about 9 April 2008, Defendants duly represented by First Defendant, concluded a further oral agreement with Plaintiff, duly represented by Gerry Pretorius, in terms whereof Defendants agreed to bind themselves as sureties for the indebtedness of Medi-Tek to the Plaintiff provided that upon conclusion thereof, all the goods required for the SAPO contract would be released immediately upon the Plaintiff receiving such suretyship."*

27 It was agreed between Counsel for the parties that the reference to First Defendant in paragraph 7.1 of the Defendants' amended plea was an error and it should have been a reference to Second Defendant. Paragraph 7.1 of the Plea is however at odds with Mr Brink's evidence.

28 Despite the importance of obtaining delivery of all the remaining castors neither of the Defendants ever complained about the fact that there had been short delivery.

29 Despite short delivery, the Defendants submitted the original suretyship to the Plaintiff and Meditek made further payments to the Plaintiff despite such short delivery. This is inconsistent with the alleged condition of the suretyship that all 1 216 castors were required to be delivered.

30 I am required in this matter to determine what the meaning of the ambiguous words in the Addendum are. In order to do so, I need to have regard to "surrounding circumstances" in order to give meaning to otherwise unclear and ambiguous words (*Glen Brothers v Commercial General Agency Company Limited* 1905 TS 737; Caney's *The Law of Suretyship* Fifth Edition pp 84-85).



- 31 What one is faced with two irreconcilable versions, as I am in this matter the technique set out in *Stellenbosch Farmer's Winery Group Limited and Another v Martell ETGE and Others* 2003(1) SA 11(SCA) is to be applied. Each of the witnesses that were called to give evidence were in my view credible and reliable. Only Mr Pretorius and Mr Brink could given evidence on what was discussed prior to Mr Pretorius sending the suretyship document to Mr Brink and Mr Loubscher. Mr Brink's evidence on the discussion with Mr Pretorius contradicts what is set forth in paragraph 7.1 of Defendants' Plea as amended. On the other hand, Mr Pretorius did not know how many castors were held by Cargo Works in Cape Town. Mr Laubscher who drafted the Addendum said the wording referred to the 1 216 castors as referred to in Mr Lane's e-mails of 28 March 2008 and 1 April 2008 and this was his point of reference for doing so. However, he did not hold discussions with Mr Pretorius. Whilst it is also improbable that the Defendants would have signed a suretyship unless Medi-Tek received all 1 216 castors, the fact that they never complained about the short delivery, contradicts the Defendants' requirement that 1 216 castors had to be delivered.
- 32 Given the above I am unable to make a clear finding on the credibility and probability of the evidence presented by witnesses for the Plaintiff and the witnesses for the Defendant clearly one way or the other in order to resolve the ambiguity of the words in the Addendum.
- 33 Accordingly in these circumstances the ambiguity can only then be resolved through the application of the *contra preferentem* rule.
- 34 As Mr Laubscher drafted the Addendum the *contra preferentem* rule is applied against the Defendants.
- 35 As regards costs, the scale of costs is prescribed in the suretyship as costs on an attorney and own client scale. Although it was submitted that the Plaintiff ought not to have proceeded with summary judgement proceedings and thus ought not to be granted to the Plaintiff. As the Plaintiff is the successful party in these

proceedings the costs of the summary judgement proceedings should in my view follow the result together with the other costs.

Judgment is granted against the Defendants jointly and severally in favour of the Plaintiff for:

- 1 payment of the sum of R707 252.22;
- 2 interest on the above amount *a tempore morae* from 17 July 2008;
- 3 the costs of suit on a scale as between attorney and client.



ASSHETON-SMITH, AJ