IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 1163/11

In the matter between:

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| IVOR CHARLES STRATFORD | 1st Applicant |
| SHEILA MARGARET STRATFORD | 2nd Applicant |

and

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| ASHLEY WAYNE STONE | 1st Respondent |
| ASHLEY WAYNE STONE, N.O. | 2nd Respondent |
| BRENT STUART N.O. | 3rd Respondent |
| CHARLES STUART MACKAY-DAVIDSON, N.O. | 4th Respondent |
| THE SHERIFF OF THE HIGH COURT, WYNBERG NORTH | 5th Respondent |

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JUDGMENT : 15 MARCH 2011

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**TRAVERSO, DJP :**

**[1]** This is an application to set aside writs of execution issued by this Court on 17 November 2010 and 1 December 2010 respectively. Pursuant to those writs the respondents have attached a Mercedes Benz and an immovable property situated in Hout Bay, which falls within the applicants' joint estate. These writs were issued pursuant to a Court order obtained on 12 November 2009. The Court order incorporated an arbitral award which in turn incorporated a settlement agreement. The applicants contend that although the first applicant ("*Stratford*") is a party to the settlement agreement which was made a Court order, he was not a party to the arbitral proceedings and that accordingly there is no Court order against him. Mr. Manca, for the respondents, argued that Stratford was in fact a party to the settlement order.

**[2]** The applicants seek final relief on notice, and accordingly a final order can only be granted if the facts averred in the applicants'

affidavit, which have been admitted by the respondents together with the facts alleged by the latter, justify such an order. It is therefore necessary to first analyse the facts.

**[3]** It is common cause that there were arbitration proceedings pending before Advocate S.F. Burger, SC . Ultimately the parties came to an agreement, and by agreement between the parties the settlement agreement in the arbitration proceedings was made an order of Court. The parties to the settlement agreement, and ultimately the Court order, were the first to fourth respondents in this matter and Pinnacle Point Investments (Pty) Limited ("*PPI*") as first respondent and Pinnacle Point Holdings (Pty) Limited ("*PPH*") as the second respondent. Stratford was not a party to this settlement agreement, although clause 11 of the settlement agreement provides:

> ***"Ivor Stratford hereby stands surety for the obligations of, and becomes co-principal debtor with, the second respondent renouncing the benefits of division, excussion, errore calculi and non numeratae pecunia."***

Clause 15 provides:

> ***"This settlement agreement shall be made an award of the arbitrator, and such award, in turn, an order of court."***

Clause 16 provides:

> ***"In signing this agreement, Mr. Ivor Stratford warrants that he is authorised to do so on behalf of the second respondent. A resolution by the second respondent to this effect shall be furnished by Mr. Stratford to the claimants within 7 days of signature hereof. ..."***

**[4]** It is quite clear that Stratford in many ways indicated that he regarded himself bound by the agreement and that he accepted that he had an obligation to pay should PPI or PPH not meet their obligations in terms of the arbitration award. That is however irrelevant for purposes of deciding the legal position.

**[5]** It is *trite* that when an agreement is made an order of Court the only merit in making such an agreement is to cut the necessity for

instituting action and to enable the obligee to proceed direct to execution "*when, therefore the Court is asked to make an agreement an order of Court it must, in my opinion look at the agreement and ask itself the question: 'Is this the sort of agreement on which the obligee (normally the plaintiff) can proceed direct to execution'*[1]*."*

**[6]** On behalf of Stratford the only argument put forward was that because he was not a party to the arbitration and not cited in the application to have the award made an order of Court, he is not bound by their terms. Stratford contends that the first to fourth respondents should have instituted action against him which they did not do.

**[7]** Mr. Manca on the other hand contended that Stratford consented in his personal capacity to the settlement agreement in terms whereof he held himself liable as a co-principal debtor for the

[1] Mansell v. Mansell, 1953 (3) SA 716 (N) at 721 B - F

obligations of PPH under the agreement to be made an order of Court, and further argued that in so consenting, Stratford agreed that, in the event of default, the respondents would not have to institute fresh proceedings against him but could levy execution. Mr. Manca argued that in fact Stratford was a party to the settlement agreement and consented to the arbitral award being made an order of Court and that the very essence of having the agreement made an order of Court was to eliminate the necessity of having to sue therein if a party is in default.

**[8]** If one had regard to the wording of the arbitral award, it was argued by Mr. Manca that clause 11 makes it clear that Stratford consented to the agreement being made an order of Court, and that although he was not a party to the arbitration proceedings, he was in fact a party to the arbitration award and signed the arbitration award as such. However, a closer analysis of the arbitral award makes it clear that the order was not against Stratford. Clause 11 in my view is no more than a recordal of the

fact that Stratford is a surety and co-principal debtor for the obligations of PPI and PPH. His signature to the agreement signifies no more than the fact that he acknowledges that he is a surety and co-principal debtor for the obligations of PPI and PPH. It is well established that a contract of suretyship is separate and distinct from the "*main agreement*". Although it is accessory, and although Stratford bound himself not only as surety, but also as co-principal debtor, that does not render him liable to the respondents in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor.[2]

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[2] Neon & Cold Cathode Illuminations v. Ephron, 1978 (1) SA 463 (AD) 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-á-vis the creditor he thereby tacitly renounces the orindary benefits available to a surety, such as those of excussios 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 Menz. 466; In re Deneys, 3 Menz. 309; Business Buying and Investment Co. Ltd. v. Linaae, 1959 (3) 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 as co-lessee with Benam. As Burge on Law of Suretyship says of co-obligators liable in solidum (correi debendi) at p. 394:*

*'It is necessary that the obligation of each of the obligants should be principal obligations, and not the one accessory to the other. In this respect a debtor in solido is distinguished from a surety.' "*

**[9]** In the circumstances, and even though it is apparent that Stratford accepts that he will ultimately be held responsible to pay the indebtedness of the principal debtor, the judgment was not taken against him and accordingly the warrants should not have been issued. In the circumstances I make the following order:

1. The warrants of execution issued by this Court on 17 November 2010 and 1 December 2010 against the first applicant under Case Number 23604/2009, are hereby set aside;

2. All the property of the applicants attached pursuant to the aforesaid warrants must be released forthwith by the Sheriff;

3. The first to fourth respondents are ordered to pay the costs of this application.

**JHM TRAVERSO**
**Deputy Judge President**