THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2180/2003

In the matter between

CALSIMENT (PTY) LIMITED	Plaintiff
And	
NDUMISO NTSHANGASE	Defendant
Coram	Annandale, ACJ
For Plaintiff	Ms Kunene
For Defendant	Ms Zwane

JUDGMENT March, 2004

This is an opposed application for summary judgment wherein the plaintiff seeks payment of EI8 871-48 in respect of goods sold and delivered, with interest at 20% per annum from the 1st February 2003 to the 11th June, 2003 and 18,5% thereafter, with costs on attorney/client scale.

Over and above the usual course of events relating to the affidavits in support of and opposing the application, which I will revert to further down, there was also an opposed application for security for costs. This required of the plaintiff company, a peregrinus, to pay security in the amount of E15 000. Plaintiff disputed the amount only and invoked

Rule 47(2), calling upon the Registrar to determine the amount. The outcome thereof remains unknown to the Court. After the plaintiff set the matter down to hear the application for summary judgment, the defendant sought the application to be set aside under Rule 30, averring it to be an irregular step as the Rule 47(2) determination was still pending. The complaint of irregularity fell away as the Rule 30 notice was withdrawn, with costs tendered by the defendant. This pleading was negligently omitted from the Book of Pleadings prepared and filed by the plaintiff's attorneys. It does however seem as if the issue of security for costs was somehow resolved.

The cause of action against the defendant is stated in paragraph 5 of the particulars of claim. "Asibemunye Building Suppliers (Ebuhleni) - hereafter referred to as Asibemunye - has failed to pay the sum of E18 871.48 due and payable to the plaintiff for the goods delivered from 1st February 2003 as appears from copy of statement. " Although it omits to aver that the goods were sold and delivered, the point was not pursued and nothing further turns on it. The matter proceeded on the basis that the claim arises from goods sold and delivered, which was not paid.

A further defect in plaintiff's particulars of claim appears in paragraph 3.1 where it states that:-
"The agreed interest was prime which at present is 15.5%". This is at odds with prayer 2, where interest is sought to be ordered at:

"...the rate of 20% per annum calculated from 1st February 2003 to 11th June, 2003, and 18.5% per annum from 12th June 2003 to date of payment. "

The terms and conditions of agreement of sale and suretyship relating thereto, an integral part of the application for credit facilities from the plaintiff, records in paragraph 2

thereof that;-

"Interest at the prime rate of interest charged by the seller's bank, from time to time plus 5% (three percentum) shall be payable on all accounts 30 (thirty) days-after delivery of statement. "

This anomaly was also not pursued by the defendant, neither on the papers, nor argued in court There remains no allegation or proof of what rate of interest was charged by plaintiff's bank at the relevant times or on what basis the claimed rates of interest was founded and calculated.

At the hearing of argument none of the abovementioned anomalies were pursued but the defendant's attorney argued that the whole of the "agreement" was invalid and that in the event that the Court does not find the agreement to be null and void, the defendant "challenges costs and interest."

The argument did not take the issue any further or ventilate any reasons for this "challenge". No reasons were advanced as to why interest should not be as it was claimed, nor why costs should be on any particular scale, if at all, save for the bare and blanket assertion that the whole of the agreement in respect of the credit facilities, terms and conditions of sale and the suretyship itself is not worth the paper it is written on. The aspects of the rate of interest and scale of costs do indeed depend upon the validity or otherwise of the agreement and will be dealt with in fine of this judgment.

Before dealing with the essential merits of the opposition to the application, there is one further aspect, which relates to the question of whether indeed the goods were delivered to the defendant's company.

Initially it was disputed whether the delivery note or invoice correctly reflected that the goods were received by Asibemunye. The origin of the delivery note and whether the receiving entity signed for delivery was in issue, as was actual delivery and price. This question was settled prior to the hearing, at which Ms Zwane stated in Court that the

defendant does not anymore pursue the point of her client not having received the goods, as initially raised in the affidavit resisting summary judgment

I now turn to address the merits. From the papers filed herein, one of the former Skonkwane franchises (now in liquidation) traded as Asibetnunye (Building Suppliers, Ebuhleni Ltd). Represented by its director, Ndumiso Ntshangase (the defendant), the company applied for credit facilities with a supplier, Calsiment (Pty) Ltd, a company in Middelburg, South Africa. The application reflects some details of the applicant, including one of its two directors being the defendant. It is marked as "Annexure "A"".

On the second page of the "Application for Credit Facilities", following immediately after the applicant's details, the same document continues with a heading "Terms and Conditions of Agreement of Sale and Suretyship relating thereto, entered into by and between Calsiment (Pty) Ltd (the "seller") and (the "Applicant") referred to above, hereinafter called the "Purchaser" "

Under a subheading "It is agreed that", some 20 paragraphs which details the contractual relationship follows. I quote five of them.

"1. The invoice price reflected on the seller's invoice in respect of purchase shall be paid by the purchaser... "

"2. Interest at the prime rate of interest charged by the seller's bank, from time to time, plus 3% (three percentum) shall be payable on all accounts 30 (thirty) days after delivery of statement. "

"8 ...The purchaser agrees to be liable to the seller for all legal costs calculated as between attorney and own client and collection commission. "

"15. The person/persons who are appending their signatures hereunder on behalf of the purchaser, hereby bind himself/themselves as surety/ies and co-

principal debtor/s in solidum unto and in favour of the seller in respect of all the obligations of the purchaser in terms hereof and furthermore agree and undertake to be bound to the terms and conditions of this agreement, under remuneration (sic) of the benefits of excussion and division, the effect and working whereof they hereby declare themselves to be acquainted." (My emphasis)

16. A signed delivery note shall be prima facie proof that the goods have been duly delivered to and received by the purchaser in good condition, whether signed by the purchaser, an employee, an agent or representative

of the purchaser."

At the end of the 20 clauses, on page three of the document, the date and place of signature is inserted in manuscript and the signature of Ndumiso Ntshangase as director (of the applicant/purchaser/surety) is appended. Underneath the signature appears the printed words: "Who acknowledges that he has read and understands the entire contents hereof." These words are to a great extent a repetition of the last (underlined) words in clause 15, quoted above.

The language that is used to describe the contractual terms are as best as it can be in plain straightforward English, which is the lingua franca of the business world in Swaziland. Notably, clause 15 does not refer to a renunciation of the "beneficium ordinis seu excussionis", the legal term in generally incomprehensible Latin, but simply refers to "the benefits of excussion and division." This was twice acknowledged to be understood by the defendant, under his signature and immediately following these words in clause 15 of the contract.

There is one further aspect of the contract between the parties which I noted, but which was not pursued in either the papers or during argument. Clause 15 of the agreement, which deals with suretyship, contains provision for the renunciation of the benefits of the excussion and division. However, the word used in the text is not "renunciation" but

"remuneration". The reason for this incorrect choice of word is unknown, was not argued and was not pursued.

In my view, the use of this incorrect word, which has a totally different meaning to that which should have been used and which, judging from the context of the phrase and the clause itself, does not convey anything like the intended meaning, has no detrimental consequence. It is quite clear that "renunciation" was the intent, and not "remuneration."

From the defendant's affidavit, it does not seem that he had it otherwise either. Paragraph 6.1 reads that".. .and therefore renunciating the benefits..." He does not quote the word "remunerating" when he refers to the concepts that he says which were allegedly not explained to him, notarially so.

There is no prejudice to the plaintiff that was raised as issue and the Court regards the anomaly of word choice as non-determinative to the matter.

With all other relevant aspects of the application being equal, the only real point of contention that needs to be decided is whether the defendant is liable for the debt of the company, for the purposes of summary judgment.

In his affidavit resisting summary judgment, the defendant states that annexure "A" "is a meaningless document in that it purports to bind myself as co-principal debtor and surety, I am advised and submit that this is fraudulent in that the plaintiff ought to have notorially (sic) explained to myself the implications of signing the agreement as co-principal debtor/surety and therefore renunciating the benefits of excussion and division, which never happened in this case, "

Strong words indeed. In my version of the Concise Oxford Dictionary (7th edition, 1987) the word "fraudulent" is defined as : "adjective: guilty of, of the nature of, characterised or effected by, fraud",

which in turn is defined as: "criminal deception, use of false representations to gain unjust advantage; dishonest artifice or trick...deceitfulness."

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What the defendant effectively means to convey as defence to the claim is that through dishonest chicanery and trickery by the plaintiff, he was criminally and unjustly deceived by false pretences and representations, to gain an unfair disadvantage over him.

Since the time he signed the credit application, terms and conditions of sale and the suretyship, the defendant benefited from the credit granted to him by the plaintiff. From October 2001 until summary judgment summons was served on the 8th September 2003, some two years later, he was complacent and satisfied to have the available credit from one of his suppliers. When times became difficult and he or his company would soon not be able to continue to pay his supplier of goods to be used in bis trading business, he still placed a further order amounting to over E21 000 for 680 bags of cement. It was delivered to his business, but it could not be paid for as per bis credit arrangements with the supplier, the plaintiff company.

After summons was issued for payment, acting fully within his legal rights, he demanded security for his legal costs in the amount of E15 000, almost as much as his business was sued for. Again, acting fully within his legal rights, for which he again does not stand to be blamed for, he entered his opposition to resist summary judgment. His initial point of not having received the delivery note attached to the summons, fell by the wayside. So did his further initial point of denying the validity of the delivery note, and stating that he "never received delivery of the goods stated.", which was raised as a defence.

The last and final straw to which the defendant clutches against summary judgment is that it was not notarially explained to him what the meaning was of what he signed to, when applying for credit and binding himself as surety and co-principal debtor for the company on behalf of which he sought credit. He makes unfounded and vexatious accusations against his erstwhile benefactor by slandering it with accusations of fraud.

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This is based on his exception against the seller not notarially explaining to him, and certifying so, "the implications of signing the agreement as co-principal debtor/surety and therefore renunciating the benefits of excussion and division."

The daily and usual practice of credit applications is that some form of security is required. In the present matter, the plaintiff sought and obtained the defendant to be a surety for his company, Asibemunye. The defendant is not an illiterate "man from the street". He is a director of a company. When he applied on behalf of his company for credit from the plaintiff company, he did so knowingly what it was that he sought. He sought that goods be supplied against the terms and conditions that were part and parcel of the deal. Payment had to be effected thirty days after invoice. Delivery had to be acknowledged by his company against signature of its employee or representative. Interest had to be paid on accounts not settled within thirty days, and so on. Further, and most importantly, he stood surety for his company.
When the defendant signed the agreement, right underneath his signature, on the very next line, it is clearly printed on the document that he acknowledges and understands the entire contents of the agreement. The "fine print" of the terms and conditions of the credit application and suretyship is not printed in illegible tiny characters. It is readily readable. As a matter of course there were terms and conditions that were to be applied to the application for and granting of credit, one of them being that the defendant was to stand as surety and co-principal debtor for the potential debts of his business enterprise.

In NATIONAL AND OVERSEAS DISTRIBUTORS CORPORATION (PTY) LTD v POTATO BOARD, 1958(2) SA 473 (AD) at 479, Schreiner, J.A. said:-

"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any

misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if

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it exists at all. At least the mistake (error,) would have to be reasonable (Justus) and it would have to be pleaded."

Based on this statement of law, Miller, J in DIEDERICKS v MINISTER OF LANDS 1964(1) SA 49 (N), said that:

"Clearly, a mistaken belief of fact will not release a party from the consequences of an agreement which manifests his assent to the terms thereof unless it is a mistake of such a type or nature that it negativates consent; in other words, it must be shown that because he laboured under that mistake in concluding the agreement his consent to the terms thereof, although apparent, was not real. "

In the matter now before me, the defendant cries foul of the contract he entered into on the basis that the terms and conditions and the legalities of suretyship were not notarially explained to him. Most importantly to him is his assertion that he did not know what the renunciation of the benefits of excussion and division meant.

Quite correctly, when a surety binds himself or herself as surety and co-principal debtor, a defence of excussion and division can be pleaded. It cannot however be done if that has been renounced in the contract. See GERBER v WOLSON 1955(1) SA 158(A) and NEON & COLD STORAGE CATHODE ILLUMINATIONS (PTY) LTD v EPHRON 1978(1) SA463(A).

In the present matter, there are no co-sureties to share the burden. Division of the claim amongst them cannot be pleaded in this matter. As mentioned earlier in this judgment, the defendant's company, Asibemunye, has been placed under liquidation some time ago. It has not been pleaded, nor is it the case, that the plaintiff first had to sue the company, Asibemunye, before it could be allowed to proceed against the defendant qua surety and co-principal debtor. If that was the case, which it is not, the defendant would at least have had the benefit of a dilatory plea. See WORTHINGTON v WILSON, 1918 TPD 104 at 107.

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The benefit of excussion, or discussion as it is also sometimes called tbeneficium ordinis -seu excussionis), is the right of the surety against the creditor to have him proceed against the principal debtor with a view of obtaining payment from him, if necessary by execution upon his assets, before turning to the surety for payment of the debt or of so much of it as remains unpaid. This is in consonance with the principle of the nature of a contract of suretyship, that the surety guarantees performance of his obligation by the principal debtor, undertaking to pay if he does not do so. (See The Law of Suretyship in SA by the Hon. L.R. Caney, 2nd edition, 1970 page 101 et sequiter for a comprehensive exposition of the law in this regard.)
The defendant pleads in his affidavit resisting summary judgment, and his case was argued on that basis, that he disputes liability as a surety. As already said, his case is that the whole of the contract, the suretyship especially so, is invalid and that he denies the very existence thereof, said to have been "fraudulently" obtained. He did not plead non-excussion of the principal debtor, his company. His complaint is that the effect of renouncing the benefits of excussion and division was not explained to him, notarially so, and further, what is understood by being a surety and co-principal debtor.

A surety who does not have the benefit of excussion is in the same position as an ordinary debtor, and indeed as the principal debtor. He may be sued as soon as the principal debtor is in default, if payment of the debt is due and the principal debtor itself could be sued at the time. Where this benefit has not been renounced, the creditor would first have to exhaust his remedies against the principal debtor before turning to the surety.

I am not aware that the defendant might be a woman and it is not so pleaded either. This makes it difficult to understand why he would plead that renunciation of the benefits of excussion and division, and of what the implications of signing the contract as co-principal debtor/surety meant, having

perforce to have been explained notarially to him . In my view, such a situation would only arise if the surety was a married woman, and further, if she renounced the benefits of the Senatus Consultum Velleianum or the

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Authentica si qua mulier. The former prohibited, in A.D.46, every woman, married or not, from interceding in respect of the debt of any other person and "also prohibited the raising of loans for the benefit of others. (Justinian's Digest: 16.1.2.1; Johannes Voet's Commentaries on the Pandects : 16.1.1.). The latter is that when a woman has given her consent to a written instrument evidencing a debt of her own husband, or has signed the same, and encumbered her individual property for herself, it be rendered absolutely void, unless it was very clearly proved that the money was expended for the benefit of the woman herself. (Justinian's Codex 4.29.22; Justinian's Novels: 134.8; Johannes Voet Commentarius: 16.1.1.; van Leeuwen's Roman Dutch Law: 4.4.2).

Various (initially conflicting) decisions in South African Law dealt with these defences available to women about the details and effects of the Senatus Consultum and the Authentica, and whether it rendered their transactions void or voidable. It is not necessary to deal with the different views in any detail, as the aspect that impacts on the present matter is whether it can be renounced, and how it may be done.

In very broad and general terms, these defences can be renounced, leaving an onus upon the party who sets up a renunciation to prove so and also that all requirements have been met. Production of a document containing a renunciation proved or admitted to have been signed by a woman raises a presumption, by admission on her part, especially so if she made a statement that she is fully acquainted with its meaning and effect - See RANDLES BROS. & HUDSON v HUDSON (1908) 29 N.L.R.83. Older precedents like MARICO BOARD OF EXECUTORS v ALPORT (1899) 16 S.C. 317 and ALPORT'S EXECUTORS v ALPORT (1899) 16 S.C. 317 already settled that this is all the more so if it is accompanied by a certificate of a notary public to the effect that the required information was explained to her, because there is a presumption that what a notary public has certified is correct. A presumption only is created, and may be disproved, by extrinsic evidence, as was discussed in KNOCKER V STANDARD BANK OF SA LTD 1933 A.D. 128 21 P.H., F.55, which the plaintiff's attorney referred to. Therein, de Villiers JA held (at 131) that "The general rule is no doubt that a party alleging renunciation of beneficia by a woman is under the onus of proving that the

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renunciation was made with the knowledge of the nature of the beneficia". What the Court dealt with were the Senatus Consultum and Authentica and certification of the renunciation.

The legislature in South Africa requires renunciation of the benefits of the Senatus Consultum and Authentica to be notarially certified in certain specified cases, to a woman which is not the position in Swaziland, to my best knowledge. Even if my knowledge may be wrong, it still does not benefit the applicant, as he is a man and he has not renounced either of these two benefits which can only benefit a woman. All that notarial certification could have achieved, to his disadvantage, would have been to shift the onus on him to disprove what was certified by a notary public to have been explained to him.

As matters stand, where a person signs a document as a party thereto there is a presumption that he is acquainted with its contents. Save for a threadbare denial that he knew what he signed and basing it on the absence of notarial certification, which is not necessary at all in the present case, he has not made any effort at all to shift his onus away from him. The defendant cannot be heard to say that absence of notarial certification requires to have annexure "A" held meaningless. He accuses the plaintiff company of fraud, based on this incorrect assumption of the necessary requirement of a , notary public to explain to him what he signed.

The maxim of caveat subscriptor applies. The signed document, annexure "A", reflects, in the view of the Court, the real and true transaction between the parties. It is not a simulated transaction and does not purport to be anything else that it is held out to be -the agreed terms and conditions of the agreement of sale and the suretyship relating thereto. The defendant asked for credit on behalf of his

company, in his capacity as director. It was granted. In turn, the plaintiff company wanted a surety, and the defendant knowingly bound himself in that capacity. He appended his signature three or so millimetres above the clearly printed words: "who acknowledges that he has read and understands the entire contents hereof "

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There is no other finding that can be made to the contrary, The one and only defence that the defendant relies on is the absence of notarial explanation of the meaning and effect of what he signed to, which cannot be upheld.

For these reasons, the defendant's resistance to the application for summary judgment stands to be dismissed and it is ordered that Summary Judgment be entered against the defendant as prayed for in prayers 1,1 and 1.3 of the Notice of Application dated the 20th October 2003, namely E18 871-48 in respect of goods sold and delivered, with costs on the scale of attorney and client.

Interest is also ordered as prayed for in prayer 1.2, but shall be subject to filing with the Registrar, prior to mora interest being endorsed on the Writ, a letter by the plaintiff's bankers to certify the prime rates of interest it charged over the relevant periods, to which may be added 3% to bring it in line with the claimed rates of interest, and no more. The relevant interest is to accrue on all accounts after 30 days following delivery of statements, as provided for in clause 2 of the agreement.

ANNANDALE, ACJ