

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2013/2008

SWAZI WIRE INDUSTRIES

Plaintiff

And

CRESTA CONSULTANCY (PTY) LTD

1st Defendant

NKOSINGIPHILE DLAMINI

2nd Defendant

Coram: S.B, MAPHALALA - J

For the Plaintiff: MR. N. PILISO

For the Defendant: MR. N. NKOMONDZE

JUDGMENT

5th March 2009

[1] This is an application for summary judgment against the Defendant's jointly and severally for payment of the amount of E4, 296-50 being in respect of goods sold and delivered to the First Defendant by Plaintiff at his own special instance and request and such monies albeit due owing and payable remain unpaid, and Second Defendant bound himself as surety and co-principal debtor to the First Defendant thus is jointly liable with First Defendant from the said amount.

[2] The Defendants' have filed a Notice of intention to defend and later on an affidavit resisting summary judgment. The crux of the opposition is that at no point was the Defendants taken before a Notary Public where he officially renounced the exceptions referred to in Clause 10 of the suretyship, nor is there, on the face of the suretyship or annexed thereto, a certificate by a Notary Public to attest that such exceptions were actually renounced by him.

[3] The Defendants has taken the position that the non-renunciation of the exceptions before a notary public render the suretyship null and void and therefore of no force or effect hence Defendants cannot be held bound thereby.

[4] Clause 10 of the surety bond states the following:

"I renounce the benefit of excisions division cession of action, *senatus*

consultant uelleiunmi, authethicassiqumsief.

[5] The Plaintiff contends that the First Defendant does not resist summary judgment and accordingly Plaintiff is entitled to summary judgment against it.

[6] The Plaintiff further contends that the defence by the Second Respondent that a Deed of Suretyship has been done before Notary Public has no basis in law. In this regard the court was referred to the cases of *Mutton vs Die Mynwesilesunie 1977 (1) S.A. 119 A*, *Neo and Colo Cathode Illuminations (Ply) Ltd vs Ephron 1978 (1) S.A. 463 (A)* and that of *Kilroe-daley Barclays National Bank Ltd 1984 (4) S.A. 609 (A)*.

[7] The court was also referred to the case of *Northern Cape Co-op Livestock Agency Ltd vs John Roderick & Co. Ltd 1965 (2) S.A. 64 (O)* where De Villiers J held:

"That if a written document contains all the essential elements of a contract of suretyship, namely; the identity of the parties, name of the principal debtor and the nature of the debt guarantee it is valid despite the omission of other material terms".

[8] The Plaintiff contends that the benefit of excursion provided by Clause 10 is a right of surety against the creditor to have him proceed first against the principal debtor with a view of obtaining payment from him, is 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.

[9] The Second Defendant relies on the principle of law that *senatus consultum velleianum* which prohibits every woman, married or not, from interceding in respect of the debt of any other person. In this regard the court was referred to the textbook by *Caney L.R. Law of Surety, 2nd Edition (1970)* page 167 to the principle that a woman cannot obligate herself for any suretyship, unless by an instrument publicly executed and signed by three witnesses, for then will only be bound where she has complied with all the formalities provided by the law.

[10] The case of *Caney (supra)* provides that if, however, a woman becomes surety in violation of the requirements stipulated by law, any document designed for that purpose shall be void as never drawn up or executed and if no transaction of this kind had ever taken place.

[11] In this regard the court was referred to the case of *Van Rensburg vs Minnie 1942 O.P.D. 257 at 262* where Van Per Heever stated the following:

"... in expectation, at least, the women's obligation is merely contingent upon another's - in essence if not in form. She is protected, therefore, against her optimism in cases where, to the knowledge of the creditor, she pledges her credit or her property in the expectation that the other will either pay the creditor or pay her so that she can pay her creditor."

[12] The Defendant further referred the court to the cases of *African Guarantee and Indemnity Co. Ltd Rabinowitz* 1934 WLD 151 at 157, *Eastern Province Building Society vs Hunter* 1965 (3) S.A. 485 at 486, *S.A. Milling Co. Ltd vs Burger* 1921, CPD 328, *Whitnail vs Goldschmidt* (1884) 3 EDC 319, *Zeederberg vs Union Bank* (1885) 3 S.C 290 and that of *Papa Georgion vs Kondakis and Others* 1968 (1) S.A. (O).

[13] Having considered the able arguments of the parties I am inclined to rule in favour of the Plaintiff on the facts of the matter. I say so because *senatis consultum velleinum* is a benefit in terms of which women were prohibited from interceding in respect of a debt of another person. There are certain exceptions however in respect of which this benefit cannot be claimed. Where the intercession was to the advantage of the women (for example, where she receives a record from the transaction) the benefit could not be claimed. Also she could not benefit where she was or had fraudulent regard to the transaction. See *C.F. Forsyth & JT Pretorious, Caney's Law of Suretyship in South Africa, 5th Edition* at page 24 and the case of *National Industrial Credit Corporation Ltd vs Zachareas* 1949 (4) S.A. 790 (W).

[14] In the instant case the Second Defendant was a Managing

Director and shareholder of the transaction with the Plaintiff which was to her company's advantage thus the benefit of *sanatis consultum velleinum* cannot be available to her.

[15] For the afore-going reasons and the fact that the Second Defendant has not shown that she has a *bona fide* defence to the Plaintiffs claim in that even if the exception referred to above had not been renounced by her. The facts of the matter are such that she cannot avail herself of any of the benefits and neither has any of the benefits been claimed by her save to say that their non-renunciation before a Notary Public renders the contract of suretyship null and void which has no

[16] In the result, the application for summary judgment in terms of prayers 1.1, 1.2, 1.3, 1.4 is granted and costs in prayer 1.3 to be ordinary costs.

S.B. MAPHALALA

PRINCIPAL JUDGE