



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Reportable

Case No: 4343/08

In the matter between:

**MARLEE GRAHAM**

**APPLICANT**

and

**SANTOS PINTO CONSTRUCTION AND  
DEVELOPMENT (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**CELSO PINTO LAPIDOS DA GAMA**

**2<sup>ND</sup> RESPONDENT**

**Neutral citation: Marlee Graham and Santos Pinto Construction & Celso  
Pinto Lapidos Da Gama (4343/08) [2013] SZHC 23 (25<sup>TH</sup>  
FEBRUARY 2014)**

**Coram: MABUZA J**

**Heard: 7/8/2013**

**Delivered: 25/2/2014**

**Summary: The Applicant seeks to make an arbitration award against  
the principal debtor an order of this court and further  
seeks a declaratory order that the 2<sup>nd</sup> Respondent who is a  
surety and co-principal debtor be declared liable jointly  
and severally with the principal debtor to pay the award,  
arbitration costs and costs of this application.**

**Circumstances when liability of surety and co-principal  
debtor arise discussed. Application granted with costs.**

## JUDGMENT

### MABUZA –J

[1] The background hereto is that the Applicant, Marlee Graham and the 1<sup>st</sup> Respondent Santos Pinto Construction & Development (Pty) Ltd entered into a building contract whereby the 1<sup>st</sup> Respondent agreed to construct a house for the Applicant on Portion 89, (a portion of Portion 25 of Farm 11) in the Manzini District. The 1<sup>st</sup> Respondent company is owned by the 2<sup>nd</sup> Respondent, Celso Pinto Lapidos da Gama. Along the way and by mutual agreement the building contract was terminated; the terms and conditions of termination are recorded in a Termination Agreement signed by the parties on the 3<sup>rd</sup> October 2007 (Annexure “MG2”).

[2] Clause 4 of the aforesaid agreement in respect of damages states:

“4.1 The **Contractor** hereby agrees that it shall be liable for damages to the client in respect of the costs of remedying the defects in the building, costs associated with the delays including penalties as well as the difference between what the **Client** would have paid to complete the building and what she has to pay to another **Contractor** to complete the building”.

[3] In order to quantify the damages the Applicant referred the matter to an Arbitrator; Mr. John Resting who after hearing the matter made an award on the 22<sup>nd</sup> September 2008 in favour of the Applicant totalling an amount of E230,147.46 together with interest thereon at 9% per annum

effective from 4 April 2008 to date of final payment. Notably the 2<sup>nd</sup> Respondent did not form part of the arbitration hearing and the arbitration award was made against the 1<sup>st</sup> Respondent.

[4] The Applicant has instituted these proceedings against both Respondents seeking an order in the following terms:

1. Making an order of Court the arbitration award made on 22 September 2008 by Arbitrator John Resting in favour of the Applicant against the First Respondent in the sum of E230,147.46 and interest thereon at 9% per annum effective from 4 April 2008 to date of final payment.
2. Declaring that the Second Respondent is liable jointly and severally with the First Respondent for the payment to the Applicant of the said Arbitration award.
3. Directing the Respondents to pay the Applicant costs of the arbitration as the Arbitrator awards the Applicant in due course.
4. Directing the Respondents to pay the Applicant's costs of the application at Attorney-client scale.
5. Further and/or alternative relief.

[5] Clearly prayers 2, 3 and 4 as against the 2<sup>nd</sup> Respondent are premised on Clause (5) of the Termination agreement which deals with suretyship and states as follows:

“5. SURETYSHIP

5.1 Celso hereby agrees to bind himself to the Client as Surety for and Co-Principal Debtor with the Contractor for the due performance by the Contractor of its obligations to pay damages to the client arising out of this Termination Agreement.

5.2 To this end Celso agrees to pay on demand all damages due, owing and payable by the Contractor to the Client and his obligations in terms hereof shall only be discharged once the damages to the Client has been settled in full.

5.3 Celso can only be released from the Suretyship on the discharge of the obligation to pay damages to the client.

[6] On the 14<sup>th</sup> November 2008, the 2<sup>nd</sup> Respondent entered an appearance to oppose the matter.

[7] On the 21<sup>st</sup> November 2008 this Honourable Court granted an order by consent of the parties against the 1<sup>st</sup> Respondent namely prayers 1, 3 and

4, and ordered that the matter be postponed sine die against the 2<sup>nd</sup> Respondent and to follow its normal course.

[8] On the 27<sup>th</sup> November 2008, the 2<sup>nd</sup> Respondent filed a notice to raise a point of law which was served on the Applicant on the 3<sup>rd</sup> December 2008. The point of law was couched as follows:

“In as much as the application in casu is for the enforcement of an Arbitration award together with interest thereon such award together with interest thereon is not enforceable as against the 2<sup>nd</sup> Respondent in the following respects.

- 1.1 The 2<sup>nd</sup> Respondent was not a party to the reference for arbitration.; and
- 1.2 The 2<sup>nd</sup> Respondent was also not a party to the arbitration proceedings, the said proceedings being against the first Respondent.

The point of law was argued on the 2<sup>nd</sup> April 2013 before the Honourable Mamba J who dismissed same and ordered that costs be in the course of the application.

[9] Subsequent to the dismissal of the point of law, the 2<sup>nd</sup> Respondent served and filed his answering affidavit and likewise the Applicant her replying affidavit.

[10] In his answering affidavit the 2<sup>nd</sup> Respondent raised in limine that to the extent that the prayer 1 herein seeks relief against the 1<sup>st</sup> Respondent for the enforcement of the award it is clear that it does not directly concern him. The Applicant's complaint is that the 2<sup>nd</sup> Respondent is raising the same point of law that was dismissed by this Honourable Court.

[11] I am not privy to the reasons for dismissal and it would serve no purpose to speculate thereon as neither party requested same from the Honourable Judge before proceeding to exchange pleadings. That being the case I shall decide the matter on the papers before me.

[12] The document referred to as the arbitration award (Annexure "MG1") is between Marlee Graham and Santos Pinto Construction (Pty) Ltd (1<sup>st</sup> Respondent) and not the 2<sup>nd</sup> Respondent. To that end I agree with the 2<sup>nd</sup> Respondent, however this does not in my view absolve the 2<sup>nd</sup> Respondent from liability for the payment to the Applicant of the Arbitration Award.

[13] Justinian in his code defines suretyship “as a contract in terms of which one person (the surety) binds himself as debtor to the creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal debtor or and to the extent that the principal debtor fairly without lawful excuse, to render the performance himself”. Even though there is no universally accepted definition of a contract of suretyship, it is submitted, however, that the definition hereinabove correctly reflects the normal incidence of a contract of suretyship.

[14] Mr. Howe argued that in terms of the requirements of suretyship, the Applicant had to first excuss the principal debtor i.e. the 1<sup>st</sup> Respondent herein before enforcing the obligation arising from the suretyship agreement against the 2<sup>nd</sup> Respondent. The benefit of excussion (sometimes called the benefit of discussion) as a general rule entitles a surety to insist that the principal debtor be excussed before the obligation arising from the suretyship agreement is enforced against the surety. This benefit of excussion is a dilatory defence which the surety who intends to rely on it must first raise in *in iudicio* if he is sued by the creditor. After *litiscontestatio* he is no longer entitled to raise it.

[15] Even though the surety's debt often becomes enforceable only when the principal debtor has been excused, this does not mean that the obligation between the surety and the creditor is conditional upon the principal debtor being excused. The excussion of the principal debtor is a benefit which a surety may claim *in liminelitis* and if he fails to claim it, judgment will be given against him (see Joubert: The law of South Africa: Volume 26, page 134).

[16] The closest to pleading excussion of the 1<sup>st</sup> Respondent before him is found at paragraph 2.4.10 of his answering affidavit (page 38 of the Book of Pleadings) where he states:

“I am advised and verily believe it is my right as surety to challenge and raise any defence in regard to the Plaintiff's underlying claim giving rise to the Arbitration process and award and in that regard am entitled to rely on and plead any defence, whether *in rem* or *in presonam* generally available to a contracting party,”

The 2<sup>nd</sup> Respondent did not plead any of the defences that are available to him as surety in particular the failure of the Applicant to first excuss the 1<sup>st</sup> Respondent before holding him liable for the 1<sup>st</sup> Respondent's debt in terms of the Termination agreement.



[17] Furthermore, in terms of Clause 5 (1) of the suretyship agreement, the 2<sup>nd</sup> Respondent bound himself as surety and co-principal debtor with the 1<sup>st</sup> Respondent (Contractor) for the due performance of the latter's obligations to pay damages to the Applicant (client) arising out the termination agreement; and to that end in terms of Clause 5.2 agreed to pay on demand all damages owing and payable to the Applicant by the 1<sup>st</sup> Respondent.

[18] In terms of the law a surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship. The consequence of a surety also undertaking liability as a co-principal debtor is that he thereby renounces the benefits of excussion and that vis-à-vis the creditor he becomes liable jointly and severally with the principal debtor.

[19] In passant, the termination agreement does not make any reference to the benefit of excussion. A surety who has not renounced the benefits of excussion cannot rely on the defence if the principal debtor is insolvent that is, in the sense of being unable to pay the debt, as clearly is the case in casu. (see footnote 12 page 147: Joubert: The law of South Africa: Vol. 26)

[20] If a surety is not entitled to claim that the principal debtor be excused, his own debt becomes enforceable as soon as the principal debtor is in default or where he has bound himself as co-principal debtor, as soon as the principal debt becomes enforceable. (see Joubert: The law of South Africa: Volume 26 note 161).

[21] The damages were computed in his presence as he represented the 1<sup>st</sup> Respondent at the arbitration hearing. The arbitration hearing took place after the termination agreement had been signed wherein he bound himself as surety and co-principal debtor.

[22] With regard to the costs of the arbitration hearing, the court would not normally grant these where they are unknown. Initially when the proceedings herein were launched the amount of the costs were not known but have since become known and appear on Annexure “SD3” on pages 56,57 and 58 of the Book of Pleadings. It would serve no purpose for me to ignore them and order that the Applicant launch separate and fresh proceedings strictly to claim these. Mr. Resting made the following award therein:

“I thus award the following.

- 1) Interest. Interest shall be paid by the defendant on the award at a rate of 9% from the date of the initial entering into the Arbitration, until the date of payment.
- 2) Costs. The cost of the additional abortive hearing shall be borne by the defendant.

These costs shall be:

- (i) The claimant's attorney costs.
  - (ii) The claimant's travelling costs to the arbitration meeting.
  - (iii) The cost of hiring of the venue of E120.48
  - (iv) The arbitration costs of 2 hours @ E750.00= E1500.00  
Add GST @ 14% E 210.00  
**E1,8230.48**
- 3) The cost of the claimant shall be paid by the defendant on a party and party basis.
  - 4) The costs of the arbitration shall be paid by the defendant. The actual costs of the arbitration are given on the attached schedule.

The costs shall be taxed by the Taxing Master of the High Court.”

[23] The award as to costs appears to be fair and reasonable to me particularly as Mr. Resting ordered that they be taxed by the Taxing Master of the High Court. I believe that I may exercise my discretion under prayer (5) which is further and or alternative relief and admit the costs as awarded by the arbitrator as as part of these proceedings which I hereby do. There

is no prejudice to the Respondents as these costs shall be taxed by the Master of the High Court and the 2<sup>nd</sup> Respondent is entitled to contest same at the taxation thereof.

[24] In the event I make the following order:

- (1) The arbitration award made on the 22<sup>nd</sup> September 2008 by Arbitrator John Resting in favour of the Applicant against the 1<sup>st</sup> Respondent in the sum of E230,147.46 (Two hundred and thirty thousand one hundred and forty seven and forty six cents) and interest thereon at 9% per annum effective from 4<sup>th</sup> April 2008 to date of final payment is hereby made an order of this Court.
- (2) The 2<sup>nd</sup> Respondent is hereby declared liable jointly and severally with the 1<sup>st</sup> Respondent for the payment to the Applicant of the said arbitration award.
- (3) The Respondents are hereby directed to pay to the Applicant the costs of arbitration as awarded by the arbitrator and confirmed by this judgment at paragraph 22 hereinabove.

(4) That the Respondents pay costs hereof on the ordinary scale.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Applicant : Mr. S. Dlamini

For the 2<sup>nd</sup> Respondent : Mr. L. Howe