Banking, Finance & Projects and Dispute Resolution

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SOUTH AFRICA

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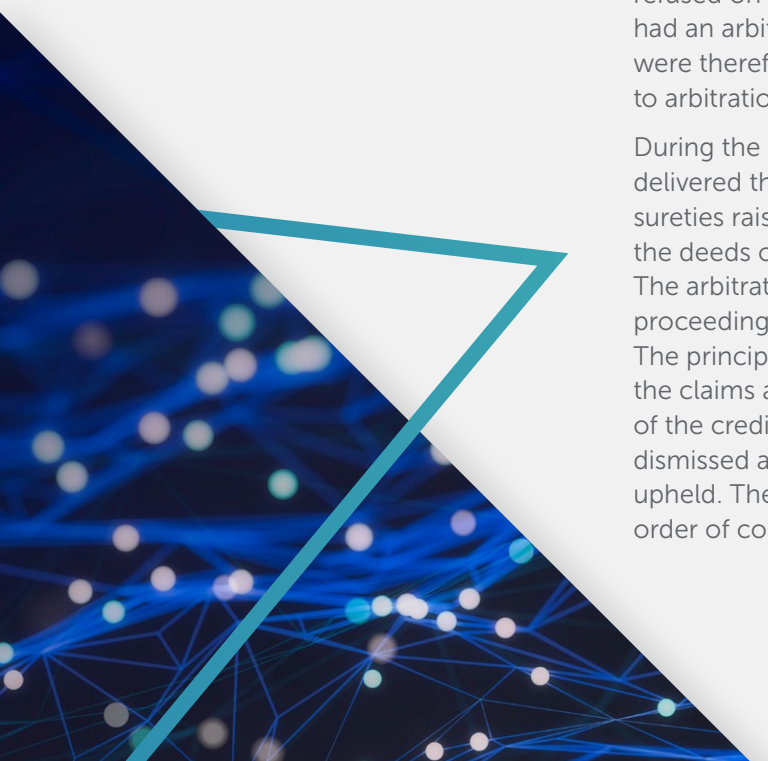
BANKING, FINANCE & PROJECTS AND DISPUTE RESOLUTION ALERT

The effect of the accessorial principle on prescription, *res judicata*, and estoppel



In the matter of *Estelle Le Roux and Another v Dielemaar Holdings (Cape) Pty Ltd and Another* (414/2023) [2024] ZASCA 118, three lease agreements were concluded between a close corporation as the principal debtor and the respondents (creditors), with the applicants as sureties and co-principal debtors. The principal debtor fell in arrears in the amount of R1,035,406.63 in respect of the three leases.

The creditors instituted three separate actions that were ultimately consolidated in the regional court. The principal debtor and sureties defended these proceedings and also lodged counterclaims against the creditors. The creditors applied for summary judgment, which the regional court refused on the grounds that the third lease agreement had an arbitration clause. The actions in the regional court were therefore stayed pending a referral of the matters to arbitration.

During the arbitration, the sureties and principal debtor delivered their plea and a counterclaim. Thereafter, the sureties raised the arbitrator's lack of jurisdiction, as the deeds of suretyship did not provide for arbitration. The arbitrator discharged the sureties from the arbitration proceedings, and continued with the principal debtor. The principal debtor then elected to no longer oppose the claims and an arbitration award was granted in favour of the creditors in terms of which the counterclaim was dismissed and the claims against the principal debtor were upheld. Thereafter, the arbitration award was made an order of court.

The *court a quo*

Following the arbitration, the creditors instituted action against the sureties in the High Court. The sureties raised the defence of estoppel and again delivered a counterclaim, based on damages arising from the lease agreement. The creditors raised the defences of *res judicata* and issue estoppel.

The sureties argued that the prescription period commenced when the principal debtor fell in arrears, and was interrupted by the service of summons, but lapsed when the matter was not successfully prosecuted to final judgment in the regional court. Therefore, in terms of section 15(2) of the Prescription Act 68 of 1969 (Prescription Act), the interruption of the running of prescription (being the service of summons) is deemed not to have occurred. The court a quo found against the sureties. The sureties were also unsuccessful with an application for leave to appeal.

Supreme Court of Appeal

The Supreme Court of Appeal (SCA) found that, after the regional court refused the summary judgment application, the actions were submitted to arbitration and the arbitrator was appointed before the completion of the three-year period of prescription in terms of section 11(d) of the Prescription Act. Section 13(1)(f) of the Prescription Act provides that the completion of prescription is delayed when the debt is the object of a dispute subjected to arbitration.

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The SCA further found that at the conclusion of the arbitration, the merits of the actions instituted against the principal debtor had been adjudicated and the final award was made an order of court. Therefore, there would be no need for a repeat of the adjudication of the actions in the regional court. The regional court proceedings were found to be stayed in terms of the Arbitration Act 42 of 1965, and not abandoned, as argued by the sureties. The creditors were free to elect to proceed in the High Court against the sureties, as they had.

The sureties, at their own request, were excused from participating in the arbitration as the deeds of suretyship did not provide for arbitration and, therefore, the arbitrator lacked jurisdiction. That said, the principal debtor remained bound by the arbitration clause in the lease agreement – which interrupted the running of prescription until the final award was made. The SCA held that the issue to be determined was whether by being excused from the arbitration, the running of prescription on the debt of the sureties continued, independent of the principal debtor.

Does an interruption or delay in the running of prescription in favour of the principal debtor interrupt or delay that of the surety?

The SCA, referring to *Jans v Nedcor Bank* [2003] (6) SA 646 (SCA), held that "an interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of the surety".

The principles articulated in Jans were confirmed in *Eley (formerly Memmel) v Lynn & Main Inc* [2008] (2) SA 151 (SCA), which found that if the principal debt is kept alive by a judgment, the surety's accessory obligation by common law continues to exist.

As such, the running or interruption of prescription on a principal debtor's debt, cannot be separated from the running or interruption of prescription of the same debt on the surety. Therefore, the withdrawal of the sureties from the arbitration did not interrupt the running of prescription of the debt in terms of section 13(1)(f) of the Prescription Act.

The creditors' defence of *res judicata* or issue estoppel

The creditors' defence to the counterclaim was *res judicata*, which requires that the judgment in the prior proceedings was granted between the same parties, based on the same cause of action, with respect to the same subject matter.

The SCA held that, notwithstanding the fact that the relationship between the creditors and the principal debtor (lease agreement) and the principal debtor and the sureties (deed of suretyship) differed, it is clear that the counterclaim comprised of damages arising from the lease agreement and not the deed of suretyship.

The principal debtor raised the counterclaim in the arbitration, but was in default of appearance to prosecute it. The SCA had regard to *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* [2013] (6) SA 499 (SCA) which held that the requirement of "*same party*" regarding the defence of *res judicata* is

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not interpreted narrowly. The SCA also referred to *Aon South Africa (Pty) Ltd v Van Den Heever NO and Others* [2018] (6) SA 38 (SCA), which held that:

> *"Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party."*

As such, the SCA found that because the sureties failed to prosecute the counterclaim in the arbitration, where it was ultimately dismissed, the sureties were thus estopped from raising the counterclaim in the High Court.

The SCA therefore upheld the creditors' defence of *res judicata* and dismissed the sureties' application for leave to appeal.

Suretyships generally

The principles of suretyship are well established in our law and it is trite that the contract of suretyship is ancillary to a valid primary obligation. The surety secures the obligations of the principal debtor, by binding themselves to the creditor. The effect of a contract of suretyship is that if the principal debtor fails, without lawful reason, to fulfil its obligations to the creditor, the surety will be bound to fulfil such obligations. The accessory nature of the contract of suretyship has long been established in our law but has been emphasised by the Constitutional Court, in *Shabangu v Land and Agricultural Development Bank of South Africa and Others* [2020] (1) SA 305 (CC), where the court held that a suretyship cannot survive where the underlying obligation is invalid.

Notwithstanding the market practice that the surety binds itself to creditors as both surety and co-principal debtor, the obligations of the surety remain accessory to those of the principal debtor. Consequently, although the surety will have bound themself as a co-principal debtor, the liability of a surety still emanates from the contract of suretyship and not the underlying contract. The effect of entering into the contract as a co-principal debtor is that the surety renounces the common law benefits of excussion and division, and they become jointly and severally liable for the obligations of the principal debtor. In addition, the surety becomes entitled to the defences attaching to the principal obligation itself. This was confirmed in *Liberty Group Ltd v Illman* [2020] (5) SA 397 (SCA), where the court found that in resisting a claim by the creditor, a surety may rely on all the defences available to the principal debtor save for those that are purely personal, such as insolvency.

The established principles of suretyship set out above indicate that the effect of a surety binding themselves as a co-principal debtor is not to render them liable to the creditor in any capacity other than the accessory obligation of a surety. As such, the running of prescription on a principal debtor cannot be de-linked from that of the surety.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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