**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**MEDIA SUMMARY: JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

**FROM** The Registrar, Supreme Court of Appeal

**DATE** 16 April 2020

**STATUS** Immediate

*Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

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*Liberty Group Limited v Illman* (1334/2018) [2020] ZASCA 38 (16 April 2020)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal brought by the appellant, Liberty Life Limited, against a judgment of the Gauteng Cape Division of the High Court, Pretoria. The anterior issue in the appeal was whether a surety who also bind him or herself as co-principal debtor becomes a co-debtor with the principal debtor, and with other sureties. Ancillary thereto, was whether the service of a summons on any of the sureties interrupts the running of prescription in favour of the others. The appellant was a cessionary of rights from an agreement between Charter Life Insurance Company Ltd and an entity called ECE, which was subsequently de-registered. The respondent, Mr Warren Illman and seven others had signed as sureties and co-principal debtors for the liabilities of ECE.

On 22 September 2011, the appellant, as cessionary, issued summons against the respondent and other sureties for payment of an amount of R1 029 963.50 being monies owed by ECE to Charter Life. It was alleged that the agreement between the

parties was terminated on 14 March 2011. On 29 September 2011 the summons was served on one of the sureties, Mr Russel John September (Mr September), who was the seventh defendant. He failed to deliver a notice of intention to defend and default judgment was granted against him on 27 January 2012. Summons was served on the respondent approximately five years later, on 31 March 2016. The respondent raised a special plea of prescription to the appellant's claim as summons was served was served three years after cancellation of the agreement on 14 March 2011.

The appellant delivered a replication to the respondent's plea of prescription, the essence of which was that: as the appellant and Mr September had bound themselves to the appellant as sureties and co-principal debtors *in solidum* with ECE, they became 'co-debtors.' As service of the summons on Mr September was within the prescription period, the running of prescription in favour the respondent and all other sureties was interrupted. Accordingly, it was pleaded, the claim against the respondent had not prescribed. The high court upheld the respondent's special plea of prescription, holding that by signing as sureties and co-principal debtors with ECE, they did not become co-debtors and service on Mr September did not interrupt prescription running in favour of the respondent.

On appeal to the Supreme Court of Appeal, the appellant persisted with its argument that the respondent and Mr September were co-debtors, and that service of summons on Mr September served to interrupt the running of prescription in favour of the respondent. The appellant, however, recognised that its argument was contrary to the decisions of *Kilroe-Daley v Barclays National Bank* [1984] 2 All SA 551; 1984 (4) SA 609 (A) and *Neon and Cold Cathode Illuminations (Pty) v Ephron* [1978] 2 All SA 1; 1978 (1) SA 463 (A). In *Kilroe-Daley*, it was held that the addition of the words 'co-principal debtor' did not transform the contract into any contract other than one of suretyship. Consequently, if the principal debt became prescribed the surety's debt also became prescribed and ceased to exist. In *Neon* it was held that the sole consequence of a surety binding himself as a co-principal debtor is that, as regards the creditor, he renounces the benefits such as excussion and division available to him, and he becomes liable with the principal debtor jointly and severally. It did not make him a co-debtor. It was submitted on behalf of the appellant that to the extent

the two decisions concluded as summarised above, they were incorrectly decided and should be reversed.

Accordingly, the Supreme Court of Appeal rejected the appellant's argument and re-affirmed the correctness of its decisions in *Kilroe-Daley* and *Neon* and restated the law as follows: A surety and co-principal debtor does not undertake a separate independent liability as a principal debtor; the addition of the words 'co-principal debtor' does not transform his contract into any contract other than one of suretyship. The surety does not become a co-debtor with the principal debtor, nor does he become a co-debtor with any of the co-sureties and co-principal debtors, unless they have agreed to that effect.

Another basis of the appellant's case was Justinian's constitution. The effect of the constitution is that if a creditor, through the service of a process, claimed payment from one co-debtor who bound himself jointly and severally with others, the remaining co-debtors could not rely upon extinction of the debt by prescription. The principle was received into Roman-Dutch law. Voet extended this to sureties by adopting the view that interruption of prescription in respect of a principal debtor served to interrupt prescription in respect of a surety. The appellant urged the court to apply this principle to the converse situation. In other words, to concluded that the interruption of prescription in respect of a surety serves to interrupt prescription in respect of a principal debtor. Once so decided, the further logical extension of the principle would be that interruption of prescription in favour of a surety would also interrupt prescription in favour of a co-surety. The result would therefore be that service on Mr September interrupted prescription in favour of the respondent. The Supreme Court of Appeal declined the invitation to further extend the Justinian constitution on the basis that this would constitutes a substantial deviation of the common law principles on the law of suretyship, and there were no cogent reasons to do so.

In the circumstances, the Court (per Makgoka JA) with Swain, Mokgohloa and Nicholls JJA and Koen AJA concurring), dismissed the appeal with costs.

**END**