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

**JUDGMENT**

**Reportable**

Case no: 673/2018

In the matter between:

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| **EDMUND HAROLD MOSS** | **FIRST APPELLANT** |
| **FRANCOIS DE LANGE** | **SECOND APPELLANT** |

and

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| **KMSA DISTRIBUTORS (PTY) LTD** | **RESPONDENT** |

**Neutral citation:** *Moss & another v KMSA Distributors* (673/2018) [2019] ZASCA 81 (31May 2019)

**Coram:** Wallis, Dambuza and Makgoka JJA and Plasket and Weiner AJJA

**Heard:** 16 May 2019

**Delivered:** 31 May 2019

**Summary:** Suretyship – interpretation – principles relating to interpretation of contracts apply – agreement comprising more than one document – all documents must be considered.

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**ORDER**

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**On appeal from**: Gauteng Division of the High Court, Pretoria (Khumalo J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and is replaced with the following order:

'The application is dismissed with costs.'

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**JUDGMENT**

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**Dambuza JA (Wallis and Makgoka JJA and Plasket and Weiner AJJA concurring):**

[1] The two appellants, Mr Edmund Harold Moss and Mr Francois De Lange appeal against a judgment of the Gauteng Division of the High Court, Pretoria (Khumalo J) in terms of which they were ordered to pay the respondent, KMSA Distributors (Pty) Ltd (KSMA), an amount of R3 million based on a suretyship they had executed in favour of KMSA. At the heart of the proceedings, in both the high court and this court, was the issue whether the suretyship covered liabilities arising under two agreements, a sale agreement and a dealership (dealer) agreement, which KMSA had concluded with Express Motor Trading 284 (Pty) Ltd (EMT), or it was limited to the dealer agreement. The appeal is with leave of the high court.

**Background**

[2] In an agreement of sale concluded on 17 October 2011, KMSA sold to EMT, a business known as the 'Mean Machines', which dealt in the sale, repair and maintenance of motorcycles, and accessories. About nine months thereafter, on 27 July 2012, the two

companies concluded a second agreement, the dealer agreement, in terms of which KMSA, as the distributor, appointed EMT (the dealer), as an independent retail outlet of its products.[1] Five documents were annexed to the dealer agreement – a 'dealer information' sheet, a pro-forma extract of minutes of a meeting of directors of the dealer, a list of suppliers, the deed of suretyship executed by the appellants in favour of KMSA, and a document which embodied the terms and conditions of payment. The deed of suretyship was annexure 4 to the dealer agreement.

**The dispute**

[3] In April 2013 KMSA instituted arbitration proceedings against EMT through the Arbitration Foundation of Southern Africa, claiming an amount of R11 824 221.60 which consisted of various amounts relating to unpaid rental in respect of the premises from which the business to which the sale agreement related, was conducted. Whilst the arbitration proceedings were pending, on 10 December 2013, EMT was placed under voluntary liquidation at the instance of the appellants. By this time the amount claimed had been reduced to R5 004 059.71. Nevertheless, the arbitration proceedings continued. A year later, on 10 December 2014, the claim in the arbitration proceedings was settled, with the liquidators of EMT admitting liability in the amount of R3 million. An arbitration award was made accordingly on 24 December 2014. Four months thereafter, that award was made an order of court.

**The high court proceedings**

[4] On 10 July 2015, KMSA launched an application in the high court against the appellants for payment of the amount of R3 million in terms of the deed of suretyship. It is against this background that the high court granted the judgment against the appellants. The high court rejected the appellants' attempt to challenge the existence and enforceability of the principal debt against them. It found that that the issue was res judicata. In their opposition to the application the appellants had contended that it remained open to them to challenge the enforceability of the principal debt as they were

[1] Clause 1 (the definitions section) of the Dealer agreement defines 'products' as 'the authentic products and product range which the Distributor (KMSA) may from time to time distribute on behalf of any Manufacturer or Supplier, and which the Distributor will make available to the Dealer'.

never party to the arbitration proceedings and were therefore not bound by the settlement agreement concluded between KMSA and EMT's liquidators. The high court also rejected the appellants' contention that the suretyship related only to the sale agreement and not the dealer agreement and thus did not cover the debt. In this regard, the appellants had argued that, on a proper interpretation of the suretyship, its operation was restricted to the dealer agreement of which it was part. The high court found that although 'the genesis of the suretyship may have been the dealer agreement …the ultimate …nature and extent of [the appellants'] obligations [was] to be read from the undertaking or ascertained from the surety agreement.'

**Submissions on appeal**

[5] The defences raised by the appellants in the high court formed the basis of their appeal. Regarding the non-enforceability of the principal debt against them, it was submitted on their behalf that, on the common cause evidence, the sale agreement from which the debt allegedly originated, did not come into existence because none of the suspensive conditions therein were ever fulfilled.[2] They contended that they were not precluded from challenging the principal indebtedness, as the judgment did not result in a new cause of action or novation of the original sale agreement; it was merely an enforcement of rights in terms thereof. Further, the suretyship had to be interpreted as part of the dealer agreement, of which it was part. It was also submitted on behalf of the appellants that any conflict between the deed of suretyship and clause 17 of the dealer agreement should have been resolved as provided in clause 2.1.17 of that agreement.

[6] As to the appellants' right to challenge the principal debt, the respondent contended that in terms of the suretyship the appellants bound themselves as sureties for debts other than the original debts, including performance under settlement agreements, arbitration awards, and court orders. Regarding the issue whether the suretyship covered obligations

[2] Clause 2 of the sale agreement provided for suspensive conditions. In terms thereof the agreement was subject to approval thereof by the boards of directors of the purchaser, the seller, and Associated Motor Holdings (Proprietary) Limited. It was also subject to the seller obtaining the written consent of the lessor of the leased premises to the cession of the lease agreement to the purchaser. That clause also provided that in the event of the conditions precedent not being fulfilled by the completion date or such later date as the parties might agree to in writing, the provisions of the agreement would automatically lapse and be of no further force and effect.

arising from the sale agreement, the respondent contended that the dealer agreement and the deed of suretyship should be interpreted as two independent contracts. The terms of the suretyship were sufficiently wide to include liability under the sale agreement. Moreover, the provisions of clause 17 of the dealer agreement were legally otiose. Furthermore there was no privity of contract between the appellants and KMSA in relation to the dealer agreement.

**Discussion**

[7] It is proper to first determine the issue whether the suretyship covered obligations arising under the sale agreement. This is because the suretyship was the only basis for the claim against the appellants. If it did not cover obligations arising under the sale agreement (including the principal debt), that was the end of the matter. The issue requires interpretation of the suretyship to ascertain whether it covered both the dealer and the sale agreements or only one of them.

[8] It is trite that the exercise of interpreting a suretyship contract invokes the application of the same principles relating to interpretation of contracts.[3] Those principles are well established. In *Bekker NO v Total South Africa (Pty) Ltd*[4] Kriegler J described them as follows:

'The interpretation of a written document is not an exercise in the arcane. It is a logical process in which the interpreter seeks the intention of the draftsman as embodied in the instrument. The mutual intention of the parties to a bilateral contract is, of course, an abstraction. The primary method to find out what the abstraction was is to ask: What did the parties say? That does not mean picking away at words like a guinea-fowl down a row of maize seed. One looks at the language used with both sense and perspective.'

[9] In *SA General Electric Co (Pty) Ltd v Sharfam & others NNO*[5] the court held that:

'The ordinary suretyship is usually in respect of a particular debt or obligation. It is accessory to the transaction that creates the obligation of the principal debtor. . . The duration of the surety's liability

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[3] Forsyth CF & Pretorius JT; *Caney's The Law of Suretyship*; 5th ed; at 82.
[4] *Bekker NO v Total South Africa (Pty) Ltd* 1990 (3) SA 159 (T) at 170G-H. See also *Airports Company South Africa v Big Five Duty Free (Pty) Ltd & others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC) para 29.
[5] *SA General Electric Co (Pty) Ltd v Sharfam & others NNO* 1981 (1) SA 592 (W) at 595.

depends upon the terms of the deed of suretyship. Some suretyships are intended to cover a single credit and transaction only, while others, called continuing guarantees, are framed so as to apply to a series of credits and transactions. In the case of a single credit and transaction the surety's liability extends only to one credit or transaction agreed upon, while in the case of a continuing guarantee the liability endures until the credits and transactions contemplated by the parties, and covered by the guarantee, have been exhausted or until the guarantee itself has been revoked.'

[10] In *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd*[6] this court held that when construing an agreement comprising more than one document, one must consider all the terms used by the parties in all the documents to determine the meaning thereof. Terms in a subsidiary document can prescribe how the terms in the main document are to be construed. In this case, that principle was embodied in the dealer agreement under clause 2.1.7 in the following terms:

'Annexures to this agreement [form] part of the agreement and will not be interpreted in a separate manner or be separated from this agreement for construction of a different meaning.'

[11] As annexure 4 to the dealer agreement the deed of suretyship was, in express terms, part of the composite dealer agreement. In it the appellants gave undertakings as follows:

'SURETIES

We the undersigned, (Sureties") each bind ourselves jointly and severally to the Creditor (KMSA) as sureties for and co-principal debtors jointly and severally with each and every one of the other Sureties, in relation to each of the undertakings as surety and co-principal debtor *for the performance on demand of all obligations of whatsoever nature and howsoever arising (whether in contract or delict or any other cause whatsoever) which the Dealer ("the Debtor") may presently or in the future owe to the Creditor whether jointly or severally or to their successors in title or assigns.*' (My emphasis)

[12] Clause 17 of the main dealer agreement incorporated the deed of suretyship into the principal contract as follows:

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[6] *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) paras 22 and 23.

'SURETYSHIP

The sureties as set out in Annexure 4 hereto do thereby interpose and bind ourselves as Sureties and Co-Principal Debtors, jointly and severally and each in solidum to KSMA DISTRIBUTORS (PTY) LTD T/A KAWASAKI MOTORS SOUTH AFRICA it[s] order or assigns for fulfilment of any of the Dealer['s] obligations or duties *under this agreement.*' (My emphasis)

[13] It was in as far as the appellants bound themselves for the performance 'of all obligations of whatsoever nature and howsoever arising…' that KMSA contended, and the high court held them liable for obligations arising from the sale agreement. To reach this conclusion the high court did not interpret the deed of suretyship as annexure 4 of the dealer contract. It found it to be 'separate from the principal agreement.' This was contrary to the principles of interpretation set out above – that a contract must be interpreted comprehensively, giving effect to the words used by the parties in all the documents.

[14] The interpretation of the high court ignored clause 17 of the principal contract, which expressed the clear intention of the parties in relation to the suretyship. It isolated the deed of suretyship, treating the undertakings given thereunder as independent commitments that were enforceable, either on their own or by being attached to any transaction between the parties. This was untenable. A suretyship is, by its nature, an accessory contract.[7] For there to be a valid suretyship there has to be a valid principal agreement.[8] The suretyship in this case could therefore not be independent of the dealer agreement. The interpretive exercise only entailed identifying from the wording of the composite agreement the principal obligations to which the suretyship related.

[15] The words 'under this agreement' in clause 17 of the agreement were a clear expression of the parties' intention to limit the application of the suretyship to any indebtedness arising under the dealer agreement. The reference to 'obligations of whatever nature…' in the deed of suretyship were simply intended to refer to such obligations in as far as they arose from the dealer agreement. The description of KMSA as the 'creditor' and reference to the 'dealer' in the deed of suretyship are consistent with the interpretation that the parties had in mind the dealer agreement when the suretyship was

[7] *Kilroe-Daley v Barclays National Bank Limited* 1984 (4) SA 609 (A) at 623I-624G.
[8] Caney supra at 28.

executed. Clause 1.1.15 of the dealer agreement clearly states that all annexures (and thus the suretyship) are included in the definition of the agreement and accordingly form part of the agreement. Although the deed of suretyship is undated, one can only infer from the documents that it was executed at the same time as the dealer agreement, at least nine months after the conclusion of the sale agreement. Such timing also supported the interpretation that it was only intended to cover obligations that would arise from the dealer agreement. In as far as it was intended to be a continuing suretyship such enduring nature was limited to obligations that related to the dealer agreement.

[16] Contrary to the submission on behalf of KMSA that clause 17 was otiose, careful consideration of that clause together with the deed of suretyship revealed the specific reason for its inclusion in the principal agreement. Careful consideration of the two documents also showed that there was no conflict between clause 17 and the deed of suretyship. Even if there was, the relevant principle of interpretation is that where a contract is contained in more than one document and an inconsistency arises between them such inconsistency must be reconciled, as would inconsistency within a single document. Inconsistencies may be resolved in different ways; for example, the contract may set out the priority of the documents or oral evidence may be led to explain certain terms.[9] Again clause 2.1.17 of the dealer agreement is instructive.

[17] The fact that the appellants were not party to the dealer agreement was irrelevant to the interpretation of the suretyship. They did assume obligations under the dealer agreement in terms of the suretyship.

[18] Given the conclusion that the suretyship only covered obligations arising under the dealer agreement, it is unnecessary to deal with the rest of the arguments made on appeal.[10]

[19] Consequently the following order is made:

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[9] Bradfield GB; *Christie's Law of Contract*; 7th ed; at 252.

[10] These arguments concerned the effect of the judgment on the arbitration award and relied on *Bulsara v Jordan and Co Limited (Conshu Limited)* 1996 (1) SA 805 (A).

1 The appeal is upheld with costs.

2 The order of the high court is set aside and is replaced with the following order:

'The application is dismissed with costs.'

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N Dambuza

Judge of Appeal

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