THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 745/11

Reportable

In the matter between:

KHULA ENTERPRISE FINANCE LIMITED **APPELLANT**

and

LEON GELDENHUYS **FIRST RESPONDENT**

ANTON JAN ERASMUS **SECOND RESPONDENT**

Neutral citation: *Khula Enterprise Finance Ltd v Geldenhuys* (745/11) [2012] ZASCA 165 (21 November 2012).

Coram: **Mthiyane DP, Navsa, Heher, Cachalia and Petse JJA**
Heard: **14 September 2012**
Delivered: **21 November 2012**

Summary: Principal and surety – discharge of surety from obligations undertaken under suretyship – prejudice to surety – not established that the prejudice complained of caused by conduct of creditor.
Contract – breach – interpretation of contract – requirement to afford principal debtor opportunity to remedy breach overridden by cross-default acceleration clause which operates in respect of multiple agreements.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Botha J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel, on the attorney and client scale, which shall be borne by the respondents jointly and severally the one paying the other to be absolved.

2 The order of the high court is set aside and in its place is substituted the following order:

'(a) Judgment is granted in favour of the appellant against the respondents jointly and severally as follows:

(aa) as against the first respondent, payment of the sums of R912 388.10, R500 000 and R675 000 together with interest at a rate of 2 per cent per annum above the prime rate charged by Standard Bank of South Africa Limited in respect of overdraft facilities to its prime customers from 2 August 2007 to the date of payment.

(bb) as against the first and second respondents, jointly and severally, payment of the sum of R789 700.74 together with interest at a rate of 2 per cent per annum above the prime rate charged by Standard Bank of South Africa Limited in respect of overdraft facilities to its prime customers from 2 August 2007 to the date of payment.

(b) The costs of the action on the attorney and client scale shall be borne by the respondents jointly and severally the one paying the other to be absolved.'

JUDGMENT

PETSE JA (Mthiyane DP, Navsa, Heher and Cachalia JJA concurring):

[1] The appellant, as plaintiff, sued the first and second respondents as fourth and fifth defendants respectively in the North Gauteng High Court, based on deeds of suretyship, for amounts owed by the principal debtor, Amavulandlela Convenience Stores (Pty) Limited (Amavulandlela) to the appellant Khula Enterprise Finance Limited (Khula) which is wholly owned and funded by the Department of Trade and Industry. Amavulandlela went into liquidation on 2 August 2007.

[2] The first respondent was sued on the basis of his suretyship in respect of the first loan agreement for three amounts totalling R2 087 388.10, and his suretyship in respect of the second loan agreement for R789 700.74. The second respondent was sued on the basis of his suretyship in respect of the second loan agreement for R789 700.74. The respondents admitted having signed the deeds of suretyship upon which they were sued, and in essence admitted the loan agreements.

[3] The respondents pleaded certain defences in respect of which they attracted the onus. In this appeal we are concerned with only two of these defences: first, the appellant's action in respect of the second loan agreement was instituted prematurely and is therefore unenforceable; second, the conduct of the appellant prejudiced the respondents as sureties and they were therefore released.

[4] The high court upheld the first defence and it was therefore unnecessary to decide the second. The appeal to this court against that order is with leave of the court below.

[5] It is convenient to deal with the second defence first. The respondents pleaded in paras 17, 18 and 19 of their plea that:

(a) On 4 April 2007, Khula had frozen Amavulandlela's bank account with Standard Bank;

(b) Khula colluded with renegade directors of Amavulandlela, Messrs Zulu and Kok, and on 6 June 2007 instructed Amavulandlela to transfer an amount of R4 173 299.26 from the bank account of Amavulandlela to itself when Khula had no authority to do so and when the amount of R4 173 299.26 was not due and payable; and

(c) the conduct of Khula rendered it impossible for Amavulandlela to conduct its business and pay its creditors in the normal course of business resulting in Amavulandlela being liquidated on 2 August 2007.

[6] Accordingly in the instant case, in order for the respondents to successfully rely on Khula's conduct in its dealings with Amavulandlela, which has the effect of prejudicing them, they bore the onus of proving the prejudice upon which they sought to base their case for them to be released, whether wholly or partially, from their contractual obligations as sureties. (See *ABSA Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA); *Bock & others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) and *Bilsbury v Standard Bank of SA Ltd (Stannic Division)* 2006 (3) SA 60 (E).)

[7] In argument before us the respondents persisted that the freezing of the bank account was instigated by Khula. The foundation for this argument was the content of a letter dated 2 April 2007 addressed to Khula by Amavulandlela (at the instance of Zulu and Kok) in which Amavulandlela, inter alia, advised Khula that Zulu and Kok had a meeting with Mr Johann of Standard Bank at which they requested him to 'freeze' Amavulandlela's bank account at Standard Bank until further notice pending the outcome of discussions with Khula. On 4 April 2007 Khula wrote a letter to Amavulandlela, following a meeting held on 3 April 2007 between Zulu and Kok representing Amavulandlela, and Khula, advising that it was 'in support of the decision to freeze the Standard Bank account'. The second respondent sought to argue that by placing the word 'freeze' in quotation marks the implication was that Zulu and Kok had at that stage merely expressed a desire to freeze the account and thus sought Khula's permission to do so, and

that the account would be frozen only if Khula had consented thereto. In my view, the construction sought to be placed on the word 'freeze' in Amavulandlela's letter dated 2 April 2007 is, in the context, both artificial and strained. Read as a whole, the sentence leaves no room for any doubt of what it conveyed to Khula ie that Amavulandlela had requested Standard Bank to freeze its account and further that it would discuss the frozen status of the account with Khula. In the interim the account was to remain frozen.

[8] With respect to the payment of the amount of R4 173 299.26 to Khula, the respondents, in this court, limited their case to the assertion that Khula colluded with Zulu and Kok and instructed Standard Bank to pay this amount to itself. This it did despite the fact that it had no authority to do so, especially since the amount of R4 173 299.26 was not due and payable by Amavulandlela, and its conduct placed Amavulandlela in dire financial straits. These contentions are, however, not borne out by the evidence. On the contrary, the evidence establishes that the payment was effected pursuant to a proposal made by Zulu to Khula, which the latter accepted by letter dated 4 June 2007 written by Ms Maggie Mazzullo, Khula's Loss Control Manager, to Zulu. In the same letter Mazzullo furnished Zulu with Khula's account details to which the transfer should be effected. That Khula readily accepted such an offer is perfectly understandable, for at that stage it was apparent that there was dissension amongst Amavulandlela's directors. The directors were divided into two opposing factions. All of this occurred when Khula had lent and advanced substantial amounts of money to Amavulandlela, thus placing Khula's financial interests in jeopardy.

[9] The respondents further argued that Samaf, a separate legal entity from Khula albeit also a financier of small business enterprises under the auspices of the Department of Trade and Industry, should not have lent and advanced moneys to Vusisizwe Retailer Development (Pty) Ltd, a company, of which Zulu and Kok were directors, in competition with Amavulandlela. To my mind this

argument need not be explored for two fundamental reasons. First, Samaf is a separate legal entity and its dealings with Vusisizwe, complained of by the respondents, were with a legal entity distinct from Amavulandlela. That Zulu and Kok were directors of Vusisizwe was, in my view, of no consequence to the contractual relationship between Khula and Amavulandlela. Second, the case belatedly advanced in oral argument in this regard was not pleaded and does not avail the respondents so late in the day.

[10] It appears from the record that the respondents may well have had a legitimate grievance against Zulu and Kok. That in itself is, however, no basis for them to complain against Khula and to contend that they ought to be released from the contractual obligations undertaken in terms of the suretyship agreements that they concluded with Khula. In summary, the respondents did not establish at the trial that Khula instigated the freezing of Amavulandlela's bank account. On the contrary, the evidence established that this occurred at the instance of Zulu and Kok. Nor did Khula instruct Standard Bank to pay to itself the amount of R4 173 299.26 which Khula could not have done as it was not a party to the banker and customer contractual relationship between Standard Bank and Amavulandlela. What Khula did was merely to accept the offer made to it by Zulu and Kok to repay the amount concerned. Consequently the defence founded on prejudice is without merit and must fail.

[11] I turn to consider the second defence which the high court upheld on the basis of its interpretation of two clauses in the loan agreements, namely 14.1 and 15. They read as follows:

'14.1 In the event of the Debtor failing to comply with its obligations in terms of clause 9 above, Khula may, subject to clause 14.3, require the Debtor by written notice addressed to the Debtor to remedy such breach within 15 (fifteen) Business Days of the date of such notice, failing which all amounts outstanding may, at the option of Khula, immediately become payable in full and Khula may, without detracting from any other rights which it may have in law or under this Agreement: ─

. . .

15 CROSS DEFAULT

In the event that the Debtor also avails of any other Khula facility, or is a Party to any other agreement entered into with Khula, in terms of which funds are advanced, or a credit guarantee is provided to the Debtor, it is agreed that an event of default in respect of anyone of the facilities and/or agreements, will also automatically constitute an event of default and breach in respect of the remaining facilities and/or agreements, and that the total cumulative outstanding balance in respect of all facilities and/or agreements, together with the accrued interest will immediately become payable, notwithstanding that the due date therefore may not have arrived.'

[12] The questions to be decided regarding this defence are: (a) whether the terms of clause 15 found in each of the two agreements override the terms of clause 14.1, and (b) if so, whether it was obligatory for Khula, as the court a quo found, to first send a written notice ─ as provided for in clause 14.1 ─ to Amavulandlela to remedy the breach within fifteen days of the date of such notice before Khula could sue Amavulandlela and the respondents for all amounts outstanding at the time of the breach.

[13] The high court took the view that clause 14.1 of the loan agreements should be the focus of the enquiry as it was dispositive of the dispute between the parties. After having considered the evidence and submissions on the point, it found in favour of the respondents. It went on to say that:

'[I]t is immediately clear that the plaintiff never gave Amavula [Amavulandlela] an opportunity to rectify the default alleged in paragraph 12 of the particulars of claim. The letter of 26 June 2007 simply claimed the full balance owing in respect of all three claims. It is true that in terms of section 15 a default in respect of one agreement would also constitute a default in terms of the other agreements, but the default that Amavula was entitled to rectify within 15 days was the default in respect of the first business loan. . . . the failure to afford Amavula an opportunity to purge its default is a fatal defect in plaintiff's claim.'

It concluded that the letter of 26 June 2007, which purported to be a written notice in terms of clause 14.1, did not constitute a proper demand in terms of

clause 14.1 as it 'did not require Amavula [Amavulandlela] to purge its default in respect of arrear payments on the first loan'.

[14] In this court counsel for Khula was constrained to concede that the letter of 26 June 2007 written on behalf of Khula to Amavulandlela was not a proper demand as contemplated in clause 14.1 of the loan agreement. Nevertheless, counsel argued, that as Amavulandlela was in default of its repayment obligations in relation to the first loan agreement (not having paid the instalments due in March and April 2007), such default triggered the terms of clause 15 of the loan agreements and the full balance then outstanding immediately became due, owing and payable. This was so, continued the argument, because clause 15 negates the need for Khula first to place Amavulandlela *in mora* or to comply with the notice requirements of clause 14.1.

[15] Counsel for Khula pointed out that:

(a) the terms of the loan agreements were in substance admitted by the respondents;

(b) the dates upon which repayment of the loans were to be effected by Amavulandlela were not in dispute; and

(c) on the evidence accepted by the court a quo the repayments in respect of the first loan were in arrears as at 22 April 2007.

Consequently, concluded the argument, Khula was justified in invoking the terms of clause 15 of the loan agreements.

[16] It is opportune now to return to the construction of the words of clause 15 of the loan agreements. In *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) Jansen JA said:[1]

'The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties. Very few words, however, bear a single meaning, and the "ordinary" meaning of words appearing in a contract will necessarily depend upon

[1] At 646A-D.

the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract. It may, for example, be quite plain from reading the contract as a whole that a certain word or words are not used in their popular everyday meaning, but are employed in a somewhat exceptional, or even technical sense. The meaning of a contract is, therefore, not necessarily determined by merely taking each individual word and applying to it one of its ordinary meanings.' (Citations omitted.)

[17] This theme was taken further by Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) as follows:[2]

'According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.' (Citations omitted.)

Later on the learned judge said:[3]

'The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself . . . The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract . . .;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted . . .;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

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[2] At 767E-F.
[3] At 767H-768D.

[18] Most recently in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 Wallis JA said the following concerning interpretation of documents:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

At para 19 the learned judge continued:

'. . . from the outset one considers the context and the language together, with neither predominating over the other.'

[19] The meaning of clause 15 of the loan agreements is clear. Its terms provide that where Khula and Amavulandlela are parties to more than one loan agreement, which is the case in this appeal, and Amavulandlela defaults in its repayment in respect of any one of the agreements, the cumulative outstanding balance in respect of all agreements will immediately become payable despite the fact that the due date for any repayment may not have arrived. The clear implication of this is that the terms of clause 14.1 have to yield to those of clause 15.

[20] At first I had considerable difficulty with accepting the notion that in this case the terms of clause 15 superseded those of clause 14.1 whenever the principal debtor defaults in respect of any one of the several agreements when there is more than one agreement. It appeared to me then that the terms of clause 15 were onerous. But my uneasiness was dispelled when a member of the court enquired of counsel for the appellant, during argument, as to what the justification for the case advanced on behalf of the appellants in relation to clause

15 would be. Counsel's response was that in circumstances where there is more than one loan agreement the attendant risks for Khula were greater and that clause 15 was thus inserted to safeguard Khula's interests and to minimise its exposure to its debtor. This justification is compelling. Viewed from that perspective it is thus not hard to understand why there is this differentiation between a situation where there is a single loan agreement and one where there are several agreements. In the latter situation the intention of the parties must surely have been to ensure that Khula was, given its extensive exposure, not hamstrung by the constraints inherent in the terms of clause 14.1. Thus, the counter-argument advanced by counsel for the respondents in their supplementary heads of argument is untenable.

[21] Admittedly, there is a potential conflict between clause 14.1 on the one hand and clause 15 on the other. The former contemplates an absolute obligation on Khula ─ if it desired to claim the full outstanding balance on default as opposed to limiting its claim to the arrear amount only ─ to require Amavulandlela, by written notice, to remedy the breach (in this instance by paying the arrear amount) within 15 days from the date of demand failing which the full balance outstanding would immediately become due and payable. But clause 15 provides ─ in instances where there is more than one loan agreement in place ─ that on default of payment in respect of any one loan agreement the full outstanding balance in respect of all loan agreements becomes immediately due and payable. The obvious way to resolve this potential conflict between these two clauses is to interpret clause 15 in the manner contended for on behalf of Khula for the reasons already explained.

[22] It follows, for all the aforegoing reasons, that the court a quo erred in its conclusion that '. . . the fact that repayments had to be made on specified dates does not detract from the fact that the full balance of the loan could only be claimed during the existence of the loan agreement if Amavula [Amavulandlela]

had been given written notice in terms of clause 14.1 to remedy its default within 15 days and if it had failed to do so'.

[23] In this appeal evidence adduced at the trial clearly established that Amavulandlela had, at least, fallen into arrears with its repayments in respect of the first loan agreement. Accordingly, the legal proceedings instituted against the respondents to recover the full outstanding balance were not instituted prematurely.

[24] With respect to interest, it was argued on behalf of Khula that it would ordinarily have been entitled to interest on the capital amounts from the date of service of the summons on the respondents. However, the sheriff's returns of service of the summons on the respondents were not part of the record. Accordingly counsel for Khula argued that it would content itself with interest running from 2 August 2007, this being the date on which appearance to defend was delivered on behalf of the respondents. The respondents did not advance any counter argument on this score, and I see no reason not to accept Khula's submission.

[25] It follows that the appeal must be allowed. The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel, on the attorney and client scale, which shall be borne by the respondents jointly and severally the one paying the other to be absolved.

2 The order of the high court is set aside and in its place is substituted the following order:

'(a) Judgment is granted in favour of the appellant against the respondents jointly and severally as follows:

(aa) as against the first respondent, payment of the sums of R912 388.10, R500 000 and R675 000 together with interest at a rate of 2 per cent per annum above the prime rate charged by Standard Bank of South Africa Limited in respect of overdraft facilities to its prime customers from 2 August 2007 to the date of payment.

(bb) as against the first and second respondents, jointly and severally, payment of the sum of R789 700.74 together with interest at a rate of 2 per cent per annum above the prime rate charged by Standard Bank of South Africa Limited in respect of overdraft facilities to its prime customers from 2 August 2007 to the date of payment.

(b) The costs of the action on the attorney and client scale shall be borne by the respondents jointly and severally the one paying the other to be absolved.'

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JUDGE OF APPEAL

Appearances:

Appellant:	André Gautschi SC (with Lara Grenfell) Instructed by: D'Amico Incorporated, Johannesburg Lovius Block, Bloemfontein
Respondents:	In person