CASE NO.312/97 & 523/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

TESVEN CC FIRST APPELLANT

MARGARET MURIEL GAGANAKIS SECOND APPELLANT

AND

SOUTH AFRICAN BANK OF ATHENS RESPONDENT

BEFORE: MAHOMED CJ, VAN HEERDEN DCJ, SMALBERGER, HOWIE JJA AND FARLAM AJA.

HEARD: 6 SEPTEMBER 1999

DELIVERED: 28 SEPTEMBER 1999

Contract - Rectification - Common error as to effect of words used in document. Civil Procedure - Summary judgment - Court's discretion to refuse where opposing affidavit does not strictly comply with Rule 32 (3).

FARLAM AJA

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J U D G M E N T

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FARLAM AJA:

[1] This is an appeal, by leave of this court, against a decision by Nugent J given in the Witwatersrand Local Division, whereby he ordered summary judgment against first and second appellants (defendants in the court below) in the sum of R500 000, together with interest and costs, and declared Erf 898, Parkwood Township, Registration Division 1 R Transvaal, which is registered in the name of first appellant, to be specially executable. The order was granted at the instance of the respondent bank (plaintiff in the court below). For convenience I shall continue to refer to the parties as plaintiff and first and second defendants.

[2] One of Plaintiff's claims against first defendant, a close corporation of which second defendant is the sole member, was based on a deed of suretyship signed by second defendant on its behalf on 13 January 1995, in which it bound itself as surety and co-principal debtor with one Michael Gaganakis, who is second defendant's husband and whose estate was provisionally sequestrated on 16 January 1996 and finally sequestrated on 20 February 1996. The deed of suretyship provided, *inter alia*, that the first defendant bound itself as surety and co-principal debtor with the second defendant's husband for payment by him to the plaintiff of all obligations owed, owing, or to be owed by him to the plaintiff arising from any cause of indebtedness whatsoever, but that the amount recoverable thereunder from first defendant would not exceed R500 000, plus interest and costs.

[3] Plaintiff also relied as against first defendant on a covering mortgage bond registered on 11 January 1995, i.e., two days before the deed of suretyship referred to above was executed, in terms of which first defendant hypothecated in favour of

the plaintiff the erf already referred to as a continuing covering security for any indebtedness owing by it to the plaintiff.

[4] The plaintiff's claim against second defendant was based on a deed of suretyship signed by second defendant on 29 September 1994 in which she bound herself as surety and co-principal debtor with her husband. This deed of suretyship also provided that second defendant's liability thereunder would extend to all obligations of her husband arising from any cause of indebtedness whatsoever but would be limited to R500 000 together with interest and costs.

[5] Plaintiff alleged in its particulars of claim that the second defendant's husband was indebted to it in an amount of R237 772-28, with interest thereon at the rate of 20.5% per annum from 1 June 1996, in terms of an acknowledgment of debt he had signed in its favour on 15 November 1991 and that he was indebted to it in a further amount of R1 363 021-81, with interest at the rate of 20.5% per annum from 1 June 1996, being the overdrawn balance as at 31 May 1996 on the banking account he

had operated at the plaintiff's Johannesburg branch from about March 1984.

[6] Affidavits deposed to by second defendant resisting summary judgment were filed on behalf of both defendants. Annexed to second defendant's affidavits were affidavits by her husband confirming as true and correct the contents of his wife's affidavits in so far as they related to him.

[7] In her affidavits second defendant said that both of the deeds of suretyship and the mortgage bond sued on by plaintiff had to be rectified so as to reflect the common continuing intention of the parties. She ascribed the failure of the documents in question to reflect the common continuing intention of the parties to the fact that standard form documents were used which were not adapted to record correctly what had been orally agreed before they were completed.

[8] So far as the deeds of suretyship were concerned second defendant said that it had been orally agreed between the plaintiff's representative and herself, as represented by her husband, that the two deeds of suretyship would only come into

operation if the principal debtor, i.e. her husband, were to become liable to plaintiff in respect of a guarantee for R500 000 which plaintiff undertook to issue on her husband's behalf to a company known as Rothsay Property Holdings (Pty) Ltd or its nominee, as part of an effort to settle a dispute regarding fees allegedly owed to her husband by some of his clients, the principal one of which was Rothsay Property Holdings (Pty) Ltd. Second defendant also stated that plaintiff never issued the guarantee referred to, with the result that the liability in respect of which the deeds of suretyship were to operate never came into existence.

[9] As far as the covering mortgage bond was concerned second defendant stated that it had been orally agreed between plaintiff's representative and first defendant, as represented by her husband, that first defendant's liability under the mortgage bond was to be limited to securing the balance outstanding from time to time on an amount of R720 000 advanced by plaintiff to second defendant in respect of what was described as a home loan, which enabled her to purchase the member's interest

in first defendant, the registered owner of the erf over which the bond was passed and on which was erected the home occupied by second defendant and her husband.

[10] In his judgment in the court below Nugent J held that the facts alleged by the defendants did not entitle them to rectification of the deeds of suretyship or to rectification of the mortgage bond and that in the circumstances the defendants had not disclosed any defence to the claims of the plaintiff, which was accordingly entitled to summary judgment.

[11] The learned judge said:

> "The prior oral agreements sought to be relied upon are self-evidently in conflict with the written memorial of the various transactions. That seems to me to be classically the situation in which proof of the prior oral agreements is precluded by the parol evidence rule. . . .
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> It [i.e., the remedy of rectification] has no application where the document correctly reflects the words which the parties intended to record, but the words so used do not correctly reflect the parties' prior agreement or common intention. The parol evidence rule precludes proof of such prior agreement or common intention if its effect would be to vary or alter the

memorial of the transaction. . . .

There is no suggestion by the deponent in the present case that she was under any misapprehension as to what was recorded in each of the documents at the time she signed them. There is no suggestion either that she expected the documents to contain words, having the effect now contended for, or that she expected a covering letter of any kind to be placed on the document having that effect. The alleged mistake, in her own words, was merely in believing that the prior oral agreements would prevail over the writing which was in conflict therewith."

[12] In support of this conclusion he relied on the decisions in *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T), *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T) and in *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W), which were all, in his view, indistinguishable in principle from this case.

He also held that the decision of this court in *Mouton v Hanekom* 1959 (3) SA 35 (A), on which the defendant's counsel strongly relied, was distinguishable because, so he said, there was no suggestion that the defendants were misled by the plaintiff in the present case.

[13] Counsel for the defendants contended that the learned judge erred in holding that rectification was precluded by the parol evidence rule. In this regard he submitted that the learned judge fell into error because the parol evidence rule does not exclude evidence of a prior oral agreement or a common continuing intention which a party seeks to lead in support of a claim for rectification: see *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 327, to quote but one of the many authorities on the point.

[14] In my opinion this criticism is clearly justified.

[15] The learned judge's view that for a claim for rectification to be competent the mistake relied on must relate to the writing in the document and that a court cannot have regard to any other kind of mistake is not supported by authority nor is there any reason based on principle that can be relied on in support of it: see, e.g., *Offit Enterprises (Pty) Ltd & Others v Knysna Development Co (Pty) Ltd & Others* 1987 (4) SA 24 (C) at 27 D-E

[16] To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result.

[17] I am also of the view that *Mouton v Hanekom, supra,* is not distinguishable in this matter and that the *ratio* thereof is directly contrary to the conclusion to which Nugent J came.

In *Mouton v Hanekom, supra,* the parties entered into a written contract of sale and an oral *pactum de retrovendendo* which they agreed would not be incorporated into their written contract. Despite the fact that the terms of the oral agreement were intentionally omitted from the written contract rectification was allowed . This court assumed that parol evidence of the oral *pactum* would contradict the written contract but held that it was admissible to rectify the latter because of the parties' mistake, not as to what was recorded, but as to its effect,

which was to prevent their oral agreement from operating with their written contract: see at 39 H- 40 A and the comment by Trollip J in *Von Ziegler's* case at 411 A - D.

[18] In the present matter also the signatories were not mistaken as to what was contained in the documents signed by second defendant. The mistake which she says she and the plaintiff made was in thinking that despite the contents of those documents, the preceding oral agreements would still be operative. This mistake was clearly capable of rectification on the strength of the principle affirmed in *Mouton v Hanekom*.

[19] Counsel for the plaintiff contended in this court that, even if Nugent J's approach was wrong in law, as I have found it was, the order he made was correct because the second defendant's affidavits did not establish that she and the first defendant had *bona fide* defences to the plaintiff's claims. They referred to various respects in which the allegations made by the second defendant were said to be

vague, unclear and confusing.

[20] It is correct that no particularity was furnished as to the arrangement under which her husband had to provide a guarantee for R500 000 to his clients as part of an effort to settle a dispute regarding fees allegedly owed by his clients to him. It was not at all clear how such a dispute could be resolved on the basis that he owed money to his clients so that they wanted a guarantee which they could "cash", as the second defendant put it, if the dispute was resolved in their favour.

[21] Counsel for the plaintiff also pointed out that in her second affidavit the second defendant referred to *her* alleged belief and the mistake *she* made. This, it was said, was indicative rather of unilateral error on her part than of common error by both parties.

[22] In my view these contentions cannot be upheld. It has to be remembered that the relief sought by the plaintiff in this matter is summary judgment. In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423 F - G, Corbett JA referred

to the "extraordinary and drastic nature" of the remedy of summary judgment and said that "the grant of the remedy is based upon the supposition that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad in law."

Later (at 426 A - 426 E) Corbett JA said the following:

> "[O]ne of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide

whether the affidavit discloses a *bona fide* defence. (See generally, *Herb Dyers (Pty.) Ltd. v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N), *Arend and Another v Astra Furnishers (Pty) Ltd*, [1974 (1) SA 298 (C)] at pp. 303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See *Estate Potgieter v Elliot*, 1948 (1) SA 1084 (C) at p. 1087; *Herb Dyers* case, *supra* at p. 32.)"

(See also *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227 G to 228 F.)

[23] Describing the defendant's affidavit as not "a wholly satisfactory document" the learned judge of appeal said that it did, nevertheless, "appear to disclose a defence which seems, on the face of it, to be *bona fide*" and concluded (at 428 C) as follows:

> "Viewing the affidavit as a whole, in the context of the claim set forth in plaintiff's summons, I am of the view that it does appear to raise a *bona fide* defence and that it has disclosed this defence and the material facts upon which it is founded with just - and only just - sufficient particularity and completeness in order to comply with Rule 32 (3) (b)."

[24] The second defendant has said that the deeds of suretyship she signed in favour of the plaintiff in her personal capacity and on behalf of first defendant were only intended to be in respect of her husband's conditional liability to the plaintiff under the guarantee the plaintiff was to issue to Rothsay Property Holdings (Pty) Ltd or its nominee. The plaintiff never issued the guarantee and so her husband never became liable in respect of payments made thereunder. Initially she only signed a deed of suretyship in her personal capacity, which was "backed", as it were, by a bond limited to an amount of R500 000, passed over the property she then owned at Forest Town. When her Forest Town property was sold and she acquired the member's interest in first defendant, which owned the Parkwood property, she was persuaded, in view of the fact that the bond over the Forest Town property was to be cancelled, to replace it by a deed of suretyship given on behalf of first defendant. Both deeds of suretyship were given only in respect of her husband's conditional liability. Some credence is lent to this version by the fact that her husband was

already indebted to the plaintiff under the acknowledgement of debt signed by him in November 1991 and had been operating a current bank account with the plaintiff since 1984. We do not know what the balance on his overdraft was when the deeds of suretyship were signed but we are told that his estate was provisionally sequestrated on 16 January 1996 and that as at 31 May 1996 his overdrawn bank balance stood at R1 363 021-81. In the circumstances it is not unlikely that when the deeds of suretyship were signed the total amount he owed to the plaintiff was substantially in excess of R500 000, which is the limit in both deeds of suretyship and is the principal sum referred to in the bond over the Forest Town property in respect of which a power of attorney to pass a bond was signed on the same day as the deed of suretyship signed by the second defendant in her personal capacity. If a guarantee for

R500 000 was to be issued by the plaintiff in favour of Rothsay Property Holdings (Pty) Ltd or its nominee at that time then the clauses limiting the liability of the first

and second defendants in their deeds of suretyship to that amount would tend to support the second defendant's allegations in this regard. As far as the bond passed over the Parkwood property is concerned, the principal sum stated in the bond, viz. R750 000-00, which is the amount referred to as the amount of the bond to be passed over the property in the home loan letter sent by the plaintiff to the second defendant in January 1995, supports the second defendant's allegation that the bond sued on by the plaintiff is what can be described as the home loan bond. The home loan letter sent by the plaintiff to the second defendant also refers to the proceeds of the sale of the Forest Town property, which confirms the second defendant's allegations that that property had been sold and replaced, as it were, by the property owned by the first defendant of which the second defendant had become the sole member.

[25] The allegations relating to the common continuing intention of the parties and the error made by the plaintiff and herself are in my view just enough to comply with

the requirements of Rule 32 (3) with regard to the nature and grounds of the defence raised. The difficulty remains relating to the lack of particularity regarding all material facts relied upon, more especially the arrangement under which the plaintiff was to issue a guarantee on behalf of second defendant's husband. In this respect the affidavits fall short of what is required by Rule 32 (3) to enable the court to assess the defendant's *bona fides.*

[26] That is not the end of the matter because, as was pointed out in *Maharaj's* case at 425 H (see also *Arend and Another v Astra FurnishersPty Ltd* 1974 (1) SA 298 (C) at 304 F - 305 H), the court still has a discretion in such a case to refuse summary judgment. In *Arend's* case and the cases quoted in it, it is stated that the discretion may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is a good one. I have already given reasons for holding that the defence raised in this matter is not bad in law. There is, in addition, sufficient

evidentiary material in the second defendant's affidavits to lead me to believe that the plaintiff's case may not be unanswerable and in the circumstances I am satisfied that this is one of those exceptional cases in which the exercise of the court's discretion to refuse summary judgment is appropriate.

[27] It follows in my view that the defendants should have been given leave to defend.

[28] When the appeal was argued counsel for the defendants asked for an order condoning their failure to file the record timeously. It appears from an affidavit deposed to by their Bloemfontein attorney that the reason that the record was filed late was that portions of the original record, which was filed in time, had to be retyped to comply with requirements imposed by the registrar of this court, relating in the main to the format of certain pages. The plaintiff's attorneys, when requested by defendant's attorneys for an extension of time for filing the record, refused to agree. In my view the request for an extension in this case was reasonable and the

refusal was unreasonable and the plaintiff should pay the costs occasioned thereby.

[29] The record as filed contains the application to this Court for leave to appeal, which clearly should not have been included. The costs occasioned by the inclusion of this part of the record should accordingly be disallowed.

[30] The following order is made:

1. Appellant's failure to file the record of appeal timeously is condoned.

2. Respondent is ordered to pay the costs of the application for condonation of the late filing of the appeal record.

3. The appeal is allowed with costs.

4. The costs of including the application for leave to appeal in the appeal record are disallowed.

5. The order of the trial court is set aside and there is substituted an order in the following terms:

"Summary judgment is refused and defendants are granted leave to

defend the action. The costs of the application for summary judgment are left over for decision by the trial court."

I G FARLAM
ACTING JUDGE OF APPEAL

CONCUR:
MAHOMED CJ
VAN HEERDEN DCJ
SMALBERGER JA
HOWIE JA