THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 414/2023

In the matter between:

ESTELLE LE ROUX	**FIRST APPLICANT**
MARTHINUS VAN DER SPUY LE ROUX	**SECOND APPLICANT**

and

DIELEMAAR HOLDINGS (CAPE) PTY LTD	**FIRST RESPONDENT**
IPIC PROPERTIES (PTY) LTD	**SECOND RESPONDENT**

Neutral Citation: *Estelle Le Roux and Another v Dielemaar Holdings (Cape) Pty Ltd and Another* (414/2023) [2024] ZASCA 118 (25 July 2024)

Coram: MOTHLE, MEYER and KGOELE JJA and TOLMAY and MBHELE AJJA

Heard: 13 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 25 July 2024 at 11h00.

Summary: Contract law – contractual claim involving issues of suretyships – special plea of prescription and *res judicata* – whether the claim in the high court against the applicants had prescribed – whether the reliance of a surety on a counterclaim of the principal debtor is available despite prescription and *res judicata* – whether leave ought to be granted to the applicants.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hockey AJ sitting as court of first instance):

The application for leave to appeal is dismissed with costs.

JUDGMENT

Mothle JA (Meyer and Kgoele JJA and Tolmay and Mbhele AJJA concurring)

[1] This is an application for leave to appeal the judgment and order of 25 November 2022, delivered in the Western Cape Division of the High Court, Cape Town (high court). In an action instituted by Dielemaar Holdings (Cape) (Pty) Ltd (first respondent) and IPIC Properties (Pty) Limited (second respondent), jointly referred to in this judgment as 'the respondents', the high court found against the applicants Ms Estelle le Roux (first applicant) and Mr Marthinus van der Spuy le Roux (second applicant), jointly referred to in this judgment as the applicants. The applicants were sued in their capacities as sureties and co-principal debtors *in solidum* with a close corporation known as Be Positive Trading (principal debtor), in terms of deeds of suretyship, for debts arising out of lease agreements concluded between the principal debtor and the respondents.

[2] The high court refused to grant the applicants leave to appeal against the judgment and order. The applicants turned to this Court on petition, which was referred to oral hearing in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act). The order of this Court stated further that the parties should also be prepared to address this Court on the merits, if called upon to do so.

[3] The background facts are largely common cause. Between 2008 and 2011, the respondents and the principal debtor concluded three commercial property tenancy lease agreements, with the applicants standing surety for the debts of the principal debtor, arising out of the lease agreements, in favour of the respondents. The applicants provided surety in terms of four deeds of suretyship. The lease agreements and the deeds of suretyship, were concluded as follows:

(a) On 30 September 2008, the first respondent concluded the first lease agreement (first lease) with the principal debtor, for the rental of shops 3, 7 and 8 at IPIC Shopping Centre, Kenridge, Durbanville. The second applicant bound himself as surety for and co-principal debtor, in favour of the first respondent.
(b) On 15 September 2010, the second respondent concluded the second lease agreement (second lease) with the principal debtor for the rental of shop 23 at IPIC Shopping Centre, Aurora, Durbanville. The first applicant bound herself as surety for and co-principal debtor, in favour of the second respondent; and
(c) On 3 August 2011, the second respondent concluded a third lease agreement (third lease) for the rental of shops 7 and 8 at IPIC Shopping Centre, Kenridge, Durbanville, with the principal debtor. This lease agreement is an extension of the first one. Both the first and the second applicants bound themselves, each in a separate deed of suretyship, as surety for and co-principal debtors, in favour of the second respondent.

[4] Therefore, each of the first two lease agreements, had a deed of surety, and the third lease agreement had two deeds of surety. In terms of the

suretyships, the applicants bound themselves as ‘surety and co-principal debtor *in solidum*, in favour of the respondents as creditors, for payment on demand, of all sums of money which the principal debtor then and from time to time thereafter, may owe or be indebted to the respondents under or arising out of the lease agreements, including damages, legal costs, interest, discount or other charges and in relation to any immovable property, any imposts of whatever nature’.

[5] The principal debtor fell into arrears in respect of the rental payments of all three leases, in the amounts of R32 782.75, R198 782.59 and R803 841.29, respectively. On demand for payment, the principal debtor was unable to pay. The respondents instituted three actions, arising out of the lease agreements against the principal debtor and the sureties. The two actions for the first and second leases were instituted in the magistrate court, and the third action for the extension of the first lease, in the regional court. Eventually all three actions were consolidated and set down for hearing in the regional court. The applicants and the principal debtor defended the actions and also lodged a Claim in Reconvention (counterclaim) against the respondents. The respondents applied for summary judgment, which the regional court refused, on the grounds that the third lease had an arbitration clause. The actions in the regional court were therefore stayed pending a referral of the cases to arbitration.

[6] On 5 December 2013, Mr Andrew Brown SC was appointed as arbitrator by the Cape Bar Council, pursuant to clause 21 of the third lease agreement. The parties agreed that the arbitration would also include the adjudication of the two actions instituted in terms of the first and second lease agreements. At the arbitration hearing, the sureties raised the arbitrator’s lack of jurisdiction to determine their liability for the debt, as the deeds of suretyship did not provide for arbitration. On 11 February 2015, the arbitrator granted an interim award, wherein he upheld the challenge by the sureties that he did not have jurisdiction to make a determination on their liability in respect of the debt, and as they requested, discharged them from the arbitration proceedings.

[7] The arbitration proceedings against the principal debtor continued, scheduled for hearing on 22 July 2015. The hearing was preceded by a notice of withdrawal from the attorneys of the principal debtor. On 8 July 2015, the arbitrator inquired from the closed corporation members of the principal debtor (the applicants), whether they would be representing the principal debtor. The second applicant informed the arbitrator that the principal debtor would no longer oppose the claims in the arbitration. Consequently, on 22 July 2015, there was no appearance on behalf of the principal debtor at the arbitration. The arbitrator made a final award in default of the principal debtor's appearance, upholding the claims against it and dismissing its counterclaim. The arbitrator's award was made an order of the high court on 29 March 2016.

[8] In July 2016, the respondents then instituted the action in the high court against the applicants, in their capacities as sureties, the outcome of which resulted in the petition before this Court. In terms of s 17(2)*(e)* of the Act, this Court may thus grant, or refuse leave to appeal, and if it grants such leave, the Court will proceed to consider the merits of the appeal. The applicable test, stated in s 17(1) of the Act, is whether (a) the proposed appeal would have a reasonable prospect of success, or whether (b) there is some other compelling reason why the appeal should be heard, including whether there are conflicting judgments on the matter under consideration.[1]

[9] The high court had adjudicated this application on the basis of an agreement concluded by the parties before the hearing and presented as stated facts. The issues for determination in the high court, as in this Court, turned on the defences of prescription as raised by the applicants in response to the action, as well as the defences of *res judicata* or *issue estoppel* of the applicants' counterclaims, as raised by the respondents.

[10] The applicants, relying on s 15 of the Prescription Act 68 of 1969 ('the Prescription Act'), contend that the running of the prescription period against

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[1] *Christopher Charles Hughes v Nicolas Gargassoulas and Others* (1030/2022) [2024] ZASCA 46; 2024 JDR 1534 (SCA) (12 April 2024) paras 2 and 3.

the principal debtor and the sureties commenced when the principal debtor fell in arrears. At that time, it is contended, the period of the running of prescription was interrupted by the service of summons issued in the magistrates court on 17 May 2012, for the first two leases and on 6 April 2013 in the regional court for the third lease. The applicants conclude that when the respondents' summary judgment was refused by the regional court, and all the actions in that court were not prosecuted to finality, the interruption of the period of prescription of the actions against the sureties lapsed, in terms of s 15(2) of the Prescription Act. Section 15(1) of the Prescription Act provides that the running of prescription shall, be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'. Section 15(2) which follows on 15(1) of the Prescription Act, provides:

'Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.'

Therefore, in effect, the applicants contend that in terms of s 15(2) of the Prescription Act, the interruption of the running of prescription, as a result of the service of the summons on them, is deemed not to have occurred.

[11] The applicants' contention has no merit for the reasons that follow. First, in their special plea as defendants, the applicants conceded that the respondents' debts became due, latest on 12 May 2012 and 5 April 2013 respectively when service of summons was effected on them. Applying the provisions of s 11(*d*) of the Prescription Act, the applicants had also pleaded that the prescription, running for a period of three years, would have occurred on 12 May 2015 and 5 April 2016 respectively. It is common cause that after the regional court refused the application for summary judgment, the parties submitted the adjudication of the actions to arbitration. On 5 December 2013 and before the completion of the three-year period of prescription in terms of s 11*(d)* of the Prescription Act, the arbitrator was appointed. The appointment of the arbitrator, interrupted the running of prescription in terms of s 13(1)*(f)* of

the Prescription Act, which provides that the completion of prescription is delayed in certain circumstances, including:

'(1) If-

(a)…

…

(f) the debt is the object of a dispute subjected to arbitration; or…'

[12] Second, the proceedings in the regional court were stayed in terms of s 6 of the Arbitration Act 42 of 1965 (the Arbitration Act), to enable the actions to be referred to arbitration. Section 6 of the Arbitration Act provides for the stay of proceedings, even in an inferior court, where there is an arbitration agreement between the litigating parties. On completion of the arbitration, the final award was made an order of court. Section 31 of the Arbitration Act, read with s 1 which provides for the definition of a court as the high court, provides that an award may be made an order in the high court. On conclusion of the arbitration, the merits of the actions instituted against the principal debtor, had been adjudicated and the final award made an order of the high court. There was therefore no need for a repeat of the adjudication of the actions in the regional court. Therefore, the proceedings in the regional court were not 'abandoned' as the applicants claim, but stayed in terms of the Arbitration Act. The respondents cannot thus be faulted for having turned to the high court that granted the order, to institute the proceedings for payment of the judgment order, against the sureties.

[13] Third, the applicants, at their own request, were excused from participating in the arbitration, because the deeds of suretyship did not provide for arbitration. As such, the arbitrator lacked jurisdiction in respect of the sureties. However, the principal debtor was bound by the arbitration clause in the lease agreements. The running of prescription was therefore interrupted or delayed, until the final award was made, on 22 July 2015. The question which then arose was whether by being excused from the arbitration, the running of prescription of the debt against the surety resumed or continued, independent

of that of the principal debtor. This question was raised and answered by this Court in *Jans v Nedcor Bank* (*Jans*).[2]

[14] At the outset, *Jans* stated the question for consideration as follows: 'The question in issue in this appeal is one which has been the subject of debate for centuries. Does an interruption or delay in the running of prescription in favour of the principal debtor interrupt or delay the running of prescription in favour of a surety?'.[3] The Court went further to state thus:

'…Those who argue that the claim against the surety should prescribe independently of that against the principal debtor, point in the first place to the fact that the claim against the former arises from a contract which is quite separate and distinct from the contract giving rise to the claim against the latter, and that both contracts give rise to distinct obligations. This is undoubtedly so. In the case of the one, the contract is between the creditor and the principal debtor. In the other it is between the creditor and the surety. See, for example, *Bulsara v Jordan and Co Ltd* (*Conshu Ltd*) 1996 (1) SA 805 (A) at 810D-G…However, in most contracts of suretyship, certainly in more modern times, it is usual for the surety to bind him-or herself as surety and co-principal debtor. But this does not mean that the surety becomes a party to the contract between the creditor and the principal debtor. As pointed out by Trollip JA in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 471C-G the effect of a surety binding himself as a co-principal debtor is not to render him liable to the creditor in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor. But where the surety is bound as a co-principal debtor, he or she will be jointly and severally liable with the principal debtor and prescription will begin to run in favour of both at the same time.'[4]

[15] After conducting an historical overview of the authorities, the Court in *Jans* analysed the various scenarios in the inter play between the running and interruption or delay of prescription, as it may affect the principal debtor and the surety.[5] In one of the scenarios, the Court identified the anomaly apposite to this case, as follows: '…If a disputed claim against the principal debtor is

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[2] *Jans v Nedcor Bank* [2003] ZASCA 15; 2003 (6) SA 646 (SCA); [2003] 2 All SA 11 (SCA) para 32.
[3] Ibid para 1.
[4] Ibid para 9.
[5] Ibid para 31.

subjected to arbitration (see s 13(1)*(f)[of the Prescription Act]*) the creditor may be compelled to institute action against the surety to interrupt prescription. If the matter were resolved by arbitration the action against the surety would once again have been a needless exercise resulting in wasted costs…'.[6] The Court in *Jans* concluded thus:

'…In my view, therefore, the position in the South African law is 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….'[7]

[16] The principle established in *Jans* was confirmed in *Eley (formerly Memmel) v Lynn & Main Inc*, where the Court stated as follows:

'…The thrust of the dicta is, therefore, that if the principal debt is kept alive by a judgment, the surety's accessory obligation by common law continue to exist.'[8] Therefore, the running or interruption of prescription on a principal debtor's debt, cannot be de-linked from the running or interruption of prescription of the same debt on the surety. I conclude that in this case, the withdrawal of the applicants as sureties from the arbitration proceedings, did not affect the interruption or delay on the running of prescription of the debt, in terms of s 13(1)*(f)* of the Prescription Act. The arbitration interrupted or delayed prescription for the principal debtor, for whose debts the applicants have bound themselves in *solidum* as co-principal debtors. For the reasons stated, I find that there would be no prospect of a successful appeal on the ground of prescription raised by the applicants. I turn to deal with the defence of *res judicata*, as raised by the respondents. The defence of *res judicata*, which was upheld by the high court, is raised as one of the grounds in the application for leave to appeal.

[17] After the appointment of the arbitrator in February 2015, the respondent delivered a statement of claim. The applicants and the principal debtor filed their plea and also lodged a counterclaim (claim in reconvention) against the

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[6] Ibid para 31.
[7] Ibid para 32.
[8] *Eley (formerly Memmel) v Lynn & Main Inc* [2007] ZASCA 142; [2007] SCA 142 (RSA); [2008] 1 All SA 315 (SCA); 2008 (2) SA 151 (SCA) para 11.

respondents in the amount of R1 924 623.88, as total damages suffered, arising from the lease agreements. The respondent filed a plea to the applicants' counterclaim, that the counterclaim was considered and dismissed by the arbitrator in an award that was made an order of the high court. In that regard, the arbitrator had concluded in his final award dated 22 July 2015, as follows:

'…Adv Crookes also addressed me in relation to the First Defendant's [the principal debtor's] Claim in Reconvention. I am satisfied that the Claimants are entitled to an award in default of any appearance for the First Defendant; I am also satisfied that the onus in respect of the First Defendant's Claim in Reconvention rests upon the First Defendant and that in the absence of any appearance, the claim should be dismissed. I am also satisfied that the Claim in Reconvention is sufficiently linked to the First Defendant's default in terms of the lease agreement, as to constitute a matter arising therefrom and accordingly that the scale of costs sought by the Claimants is appropriate.'

[18] The applicants (as sureties), withdrew from the arbitration in February 2015 as per the interim award, raising the arbitrator's lack of jurisdiction on the suretyships. By withdrawing, the applicants did not prosecute the counterclaim, in which they had joined cause with the principal debtor. Similarly, the first applicant in her capacity as a member of the close corporation (of the principal debtor), caused the latter not to participate in the arbitration process and prosecute the counterclaim.

[19] The respondents' plea is a defence of *res judicata* or *issue estoppel.* As the respondents' counsel correctly submits, 'the requirements for a defence of *res judicata* are that the judgment in the prior proceedings was [granted] between the same parties, based on the same cause of action (*ex eadem petendi causa*), with respect to the same subject-matter or thing *(de eadem re*)'. In *Jans*,[9] the Court distinguished the nature and characteristics of the contract between the creditor and debtor and that between the creditor and the surety. The latter is based on the terms of the deed of suretyship. It is clear from the counterclaim, that the damages complained of, arise from the lease

[9] Ibid para 9.

agreements concluded with the principal debtor and not from the terms of the deeds of suretyship. It is the principal debtor that raised the counterclaim in the arbitration, but was in default of appearance to prosecute it. However, in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* (*Caesarstone*), this Court accepted that the requirement of 'same party' in respect of the defence of *res judicata*, is not interpreted narrowly.[10]

[20] The failure to prosecute the claim in reconvention in the arbitration proceedings had its consequences. This Court in *Aon South Africa (Pty) Ltd v Van Den Heever NO and Others* referring to *Caesarstone,* 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.'[11]

Having failed to prosecute the claim in reconvention, and the claim being dismissed by the final award made an order of the high court, the applicants are estopped from raising that claim in this case.

[21] In a matter whose facts resemble the one at hand, the high court in *MAN Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others*,[12] held that where a close corporation was a party to the proceedings, and the member of the close corporation who stood surety for its debt, was identified with the close corporation, issue estoppel applied to such member. The principal debtor and at least the first applicant, failed to prosecute the counterclaim before the arbitration. The high court was thus correct to uphold the respondents' defence of *res judicata*.

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[10] *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA) para 42.
[11] *Aon South Africa (Pty) Ltd v Van Den Heever NO and Others* [2017] ZASCA 66; [2017] 3 All SA 365 (SCA); 2018 (6) SA 38 (SCA) para 27.
[12] *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others* 2004 (1) SA 454 (W).

[22] The high court's reasoning and conclusion cannot be faulted. The envisaged appeal has no reasonable prospect of success, and there is no other compelling reason why leave to appeal should be granted. Accordingly, the application for leave to appeal cannot succeed, and there is no reason why the costs should not follow the result.

[23] In the result, the following order shall issue:

The application for leave to appeal is dismissed with costs.

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S P MOTHLE
JUDGE OF APPEAL

Appearances:

For appellant:	B Hack
Instructed by:	Johan Victor Attorneys, Cape Town.
	Rosendorff Reitz Barry, Bloemfontein
For respondent:	T Crookes
Instructed by:	Gideon Pretorius Inc., Bellville.
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