



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 879/2020

In the matter between:

CORNERSTONE LOGISTICS (PTY) LTD

FIRST APPELLANT

PRESTON CHESLIN AITKEN

SECOND APPELLANT

and

ZACPAK CAPE TOWN DEPOT (PTY) LTD

RESPONDENT

Neutral citation: *Cornerstone Logistics (Pty) Ltd and Another v Zacpak Cape Town Depot (Pty) Ltd* (Case no 879/2020) [2022] ZASCA 12 (25 January 2022)

Coram: ZONDI, GORVEN and MOTHLE JJA and SMITH and PHATSHOANE AJJA

Heard: 22 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 25 January 2022.

Summary: Interpretation of contractual provisions intended to indemnify licensee of a customs warehouse against liability for customs duty, VAT, and other charges in terms of the Customs and Excise Act 91 of 1964 – conditions for indemnity coming into effect – whether licensee acted on client’s instructions and liability caused by its own fault – whether surety’s liability was limited to charges in respect of storage – client issued instructions regarding release of goods to third party – licensee held liable by SARS because it submitted falsified documents – no evidence of licensee’s complicity in the falsification of documents – liability thus not as a result of any fault on its part – surety’s liability accessory to that of the principal debtor – surety also liable to indemnify licensee in respect of customs duty, VAT, penalties and other charges.

ORDER

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

The appeal is dismissed with costs, including the costs of senior counsel.

JUDGMENT

Smith AJA (Zondi, Gorven and Mothle JJA and Phatshoane AJA concurring)

Introduction

[1] The licensee of a customs warehouse assumes various onerous obligations in terms of the Customs and Excise Act, 91 of 1964 (the Act). In terms of s 19(6) of the Act, a licensee is liable, *inter alia*, for the customs duties and VAT on all goods stored in its warehouse, from the time the goods are received into the warehouse. The liability only ceases when it is proved that the goods in question have been duly entered in terms of s 20(4) of the Act, either for home consumption or export (as the case may be), and have been delivered or exported in terms of such entry. The astute licensee would thus strive to avoid financial ruin by requiring clients to indemnify it against claims arising out of processes over which it has no control. This appeal concerns the appellants' obligation to indemnify the respondent under such a clause.

[2] The first appellant, Cornerstone Logistics (Pty) Ltd (Cornerstone), is a licensed clearing agent and remover of goods in bond, with its principal place of business in Cape Town. The second appellant, Preston Cheslin Aitken (Mr Aitken), was cited in his capacity as surety for and co-principal debtor with Cornerstone. Although the South African Revenue Service (SARS) was cited as the third respondent, no relief was sought against it. It neither opposed the application, nor was it involved in the appeal. The respondent, Zacpak Cape Town Depot (Pty) Ltd (Zacpak), is the licensee of a customs and excise warehouse situated in Epping Industria, Cape Town.

[3] On 20 September 2017, Cornerstone, duly represented by Mr Aitken, submitted an application to Zacpak for credit facilities in respect of warehousing services. After Zacpak had provided Cornerstone with a quotation for the services, Mr Aitken signed Zacpak's credit application form, both in his representative capacity and as surety and co-principal debtor, renouncing, *inter alia*, the benefits of excussion and division. Zacpak approved the application, and on 4 December 2017, stipulated a credit limit of R30 000.00 and payment terms of 30 days. In terms of the suretyship clause, Zacpak would be entitled to recover payment from Mr Aitken in his personal capacity, in the event of Cornerstone failing 'to timeously pay any amount due'.

[4] Between August 2017 and November 2018, Cornerstone instructed Zacpak to store various consignments of alcohol in its customs warehouse. It is common cause that Zacpak subsequently released the goods to Bridge Shipping, a road carrier, who was supposed to export the goods to Mozambique. Although the consignments were entered for export to Mozambique, they were impermissibly diverted, thus entering for home consumption in the Republic of South Africa.

[5] During December 2018, SARS addressed a letter to Zacpak demanding payment of duties, VAT and other related charges, in the sum of R37 416 153.27. The letter stated, *inter alia*, that Zacpak had failed to provide proof that the goods had been duly exported to Mozambique, and they were, accordingly, deemed to have been impermissibly diverted for home consumption.

[6] Zacpak, thereafter, lodged an internal appeal and applied for a suspension of its obligations towards SARS. Following an alternative dispute resolution process, Zacpak's appeal was dismissed. It, thereafter, gave notice to SARS of its intention

to institute legal proceedings in terms of s 90 of the Act for an order setting aside the letter of demand. In the interim, it launched proceedings in the court a quo following Cornerstone's and Mr Aitken's resistance to its attempts to enforce the indemnity and suretyship clauses.

[7] Cornerstone disputed both in this Court and in the court a quo that the goods were removed from Zacpak's warehouse on its instructions. It contended that once the goods were acquitted into Zacpak's warehouses, it had nothing further to do with them. It also had no further control over any processes relating to the goods. It contended, furthermore, that the indemnity did not apply where the liability for which it was sought arose as a result of Zacpak's negligence, or was caused through its fault. In this regard it asserted that the liability arose as a result of Zacpak's failure to keep proper records, as it was enjoined to do in terms of rule 19.05 of the Customs and Excise Rules, promulgated under the Act. In respect of the suretyship, Mr Aitken contended that it did not cover the liability to SARS, but was instead limited to charges in respect of the warehousing services which Cornerstone had failed to pay; and then only up to the maximum of the R30 000.00 credit facility.

[8] In addition, the appellants contended that the matter lacked urgency and that the founding affidavit constituted inadmissible hearsay evidence. It also opposed the admission of the replying affidavit, which had been filed out of time.

[9] On 22 October 2019, the Western Cape Division (per Tiry AJ), upheld Zacpak's claim. Cornerstone was held liable on the basis of the indemnity and Mr Aitken on the basis of the suretyship. They were ordered (jointly and severally) to pay whatever amount Zacpak was required to pay SARS, arising out of the demand

for payment made by the latter on 7 December 2018. The appellants appeal that judgment with the leave of this Court.

[10] Because Zacpak has launched proceedings for an order setting aside SARS's letter of demand, it is necessary to state that the issue of its liability vis-à-vis SARS does not fall for decision in this appeal. That matter is still pending in another court and nothing contained in this judgment should therefore be construed as pronouncing on SARS's entitlement to hold Zacpak liable for customs duties, VAT or other related charges.

The facts

[11] It is common cause that Zacpak rendered the warehousing services to Cornerstone on the terms and conditions contained in the letter confirming the credit facility as well as the former's Standard Terms and Conditions.

[12] In terms of clauses 14.1 and 14.6 of the Standard Terms and Conditions, Cornerstone indemnified Zacpak against 'all liability, claims, loss, damages, penalties, costs and expenses incurred or suffered' by Zacpak arising directly or indirectly in connection with:

‘14.1 Zacpak complying with the Customer's express or implied instructions;

...

14.6 Unless caused by the fault of Zacpak, duty, Value Added Tax, fines, penalties or amounts raised in forfeiture in respect of Goods stored at the Depot.’

[13] Since a number of different companies were involved in the processing of the goods, it is necessary to explain their respective roles and capacities. Cornerstone was the clearing agent for the owner of the goods, Real Africa Trading CC. It was

in that capacity that it contracted with Zacpak to provide the warehousing services. Real Africa Trading CC had sold the consignments to Full Boost LDA, c/o Manzano Trading (Manzano Trading). Sonic Clearing (Pty) Ltd was the clearing agent for Manzano Trading and Bridge Shipping, the road carrier to whom Zacpak had released the goods.

[14] As mentioned, in instructing Zacpak to store the consignments of alcohol in its customs warehouse, Cornerstone was acting as an agent on behalf of its principal, Real Africa Trading CC. Cornerstone duly provided the requisite Electronic Data Interchange (paperless EDI notification), an authorisation issued by SARS for the release of bonded goods by a customs warehouse, either for domestic consumption or for export.

[15] While it is common cause that Zacpak eventually released the goods for transportation to Bridge Shipping, Cornerstone has disputed that Manzano Trading was its client and that it instructed Zacpak to release the goods to the former.

[16] Zacpak's assertion that it was acting on instructions from Cornerstone when releasing the goods to Bridge Shipping is founded upon a series of emails sent to it by a Mr Mahlangu, who purported to act on behalf of Cornerstone. These were:

(a) In an email dated 19 January 2018, at 13h40, Mr Mahlangu wrote: 'Please note my client's transporter can only be able to load the stock that we delivered yesterday today . . . are you able to arrange staff to facilitate the loading . . . '.

(b) Later that same day, at 14h05, Mr Mahlangu said: ' . . . we accept the charges so please have your men ready for our client's transporter around 17:00 hrs. . . '.

(c) On 22 January 2018, at 12h46 Mr Mahlangu told Zacpak that: 'We are still waiting for my client's client to provide export documents. . . '.

(d) Later at 17h06 that same day he said that: ‘. . . the export loading will not happen today as client has not provided export documents yet. Will advise in good time once documents are available’.

(e) On 23 January 2018, at 09h11, he said that: ‘[t]he export agent has confirmed that customs export documents were released last night, they will e-mail them directly to you this morning and the truck will be there in the next 30-45 minutes to load’.

[17] Zacak contended that these emails established that Mr Mahlangu, acting on behalf of Cornerstone, issued specific and direct instructions regarding to whom and when the goods should be released. In addition, Zacak asserted that Cornerstone had accepted responsibility to pay invoices, which included charges in respect of the loading of the goods by Bridge Shipping. This, Zacak contended, is a further indication of Cornerstone’s continued involvement with the goods after they were acquitted into the warehouse. After releasing the goods from its warehouses, Zacak presented those invoices for payment to Cornerstone. At the time of deposing to the founding affidavit Cornerstone had paid all but four of those invoices.

[18] While Zacak was able to produce the relevant forms authorising it to release the goods to Bridge Shipping, it was unable to produce various final bills of entry. The Commissioner of the South African Revenue Service (Commissioner) notified Zacak that the proof of exports (the CN2 forms) submitted in respect of each of the consignments entered and released from its warehouse had either been forged or fraudulently obtained. Zacak was unable to verify these allegations.

[19] On 7 November 2018, the Commissioner addressed a letter to Zacak stating that he had conducted verification of the export bills of entry to establish if the goods

were in fact exported in accordance with the declarations. He had established that whilst the goods were cleared on bills of entry, according to his digital system, the goods were never exported out of South Africa and were, therefore, deemed to have been entered for home consumption. In the absence of proof that the goods had in fact been exported, the liability for duty, including that of Zacpak, had not ceased. The Commissioner, consequently, gave notice of his intention to demand forfeiture in lieu of seizure of an amount equal to the value for duty purposes of the goods deemed to have been diverted. Zacpak was afforded an opportunity to respond.

[20] In response, Zacpak argued, *inter alia*, that it had received the goods in bond and subsequently released them on instructions of Cornerstone. At the time it could not reasonably have been expected to know that the goods would not be exported, but would be unlawfully diverted. The exporter had furnished it with the approved export forms which it had passed on to the Commissioner and as far as Zacpak was concerned, the goods had in fact been exported to Mozambique and had, accordingly, not been unlawfully diverted.

[21] The Commissioner, nonetheless, issued a letter of demand wherein he stated, *inter alia*, that the CN2 forms produced by Zacpak were false and invalid, as the reference numbers appearing thereon related to different goods processed at other border posts. The Commissioner pointed out that the reference numbers were unique to each specific export and could not be duplicated. He stated, furthermore, that the company reflected on the CN2 forms produced by Zacpak, namely Bridge Shipping, had notified him that it did not authorise either Sonic Clearing, Manzaro Trading or Zacpak to use its codes to remove the goods to Mozambique. It was, accordingly, not liable for the payment of customs duties, VAT or penalties.

[22] The Commissioner stated that the aforementioned companies, including Zacpak, had impermissibly diverted the consignments of alcohol bound for export to Mozambique and in order to conceal these diversions had forged the relevant proof of export forms. He, accordingly, held them jointly and severally liable for the payment of R37 242 774.42.

Findings of the court a quo

[23] The court a quo found that the evidence established, on a balance of probabilities, that Zacpak released the goods to Bridge Shipping on Cornerstone's instructions. It found support for this finding in the contents of the emails Mr Mahlangu sent to Zacpak and the fact that invoices presented to Cornerstone included charges relating to services rendered in respect of the release of the goods to Bridge Shipping.

[24] Regarding Cornerstone's liability to indemnify Zacpak against the claim by SARS, the court a quo found that '... because the wording of the agreement broadly establishes the First Respondent's [Cornerstone] liability to indemnify the Applicant [Zacpak]: (a) the said contractual indemnity did not cease when the goods were acquitted, (b) consequently, liability was not limited to the storage costs and (c) thus, the said liability encompasses the SARS claim'.

[25] And regarding Cornerstone's contention that Zacpak had attracted liability because of its failure to prove that the goods had been duly exported, the court held that Cornerstone and Mr Aitken had failed to establish that the SARS claim was caused by Zacpak's failure to produce the required documents.

[26] In dealing with the appellant's contention that Mr Aitken only bound himself in respect of storage costs to the maximum of R30 000.00, the court a quo found that the phrase 'to timeously pay any amount due' expanded Mr Aitken's liability as a surety and co-principal debtor beyond Cornerstone's liability for storage costs, and included liability in respect of the SARS claim.

Urgency and other points raised by the appellants

[27] Before I consider the submissions relating to the interpretation of the indemnity and suretyship clauses, it is necessary to consider the various points raised by the appellants, to which I have alluded earlier.

[28] The appellants contended that the application in the court a quo was not urgent and constituted an abuse of the process of the court. In this regard they asserted that Zacpak had been aware of the intended action by SARS by 7 December 2018. It only issued papers on 31 December 2018, and only served on them on 14 January 2019, in respect of an event that was supposed to have occurred on 4 January 2019. There was no indication on the papers as to why the matter remained urgent, despite the fact that the deadline had come and gone. The notice of motion thus sought relief on an urgent, alternatively semi-urgent basis, without establishing any factual basis for either. They contended furthermore that although Zacpak alleged that it would suffer bankruptcy if the relief were not granted, it failed to provide any facts regarding its financial position, or to show why there was a danger that it would become bankrupt.

[29] In dealing with the issue of urgency, the court a quo took into account all the relevant factors, including the fact that SARS would have been entitled to enforce its claim against Zacpak, notwithstanding its challenge to the claim. It found that commercial urgency had been established and there were grounds for semi-urgency.

[30] It is trite that in pronouncing on the issue of urgency, the court a quo was exercising a wide discretion. This court can only interfere with that discretion if it is manifest that the judge misdirected herself. I can find no evidence of such misdirection or irregularity, and this court is, accordingly, not at liberty to interfere. In any event, in my view, the urgency issue is moot. The court a quo had decided to hear and dispose of the matter on a semi-urgent basis. That cannot be undone.

[31] Cornerstone objected to the admission of the replying affidavit because the emails which that affidavit sought to introduce related to only one of 33 shipments and to a transaction concluded prior to the approval of the credit application. The court a quo, however, found that there was no apparent prejudice in admitting the emails as evidence, as they were relevant to the fair adjudication of the dispute. In this regard, as well, the court a quo was exercising a wide discretion. It is clear that the judge considered the arguments advanced on behalf of the parties and gave compelling reasons for her ruling. There is accordingly also no basis upon which this court can disturb that ruling.

[32] Regarding the contention that the contents of the founding affidavit constituted inadmissible hearsay evidence because the deponent, namely Mr Petersen, did not have personal knowledge of the facts to which he deposed, the court a quo found that in his capacity as Zacpak's financial manager, Mr Peterson had access to the relevant records and documentation upon which Zacpak's claim was founded. In that capacity he had sufficient knowledge of the facts, and his affidavit, consequently, did not constitute hearsay evidence.

[33] To my mind, there is also no merit in this point. The court a quo has provided compelling reasons for its finding that Mr Petersen's affidavit did not amount to

hearsay evidence and its reasoning cannot be faulted. In any event, although the emails sent by Mr Mahlangu were addressed to a Mr Simpson, they were also circulated to Ms Tammy Lee Petersen, who had filed a confirmatory affidavit.

[34] Regarding the submission that there were irresolvable disputes of fact on the papers, the court a quo found that the papers did not raise any material disputes which could have justified the dismissal of the matter. The factual disputes, to the extent that there were any, appeared to have related mainly to the emails sent by Mr Mahlangu and Mr Aitken's assertion that he intended to limit the suretyship to Cornerstone's liability in respect of storage charges. I am not convinced that the version put up by the appellants in their answering papers raised bona fide and material disputes of fact in respect of either of these issues. The appellants did not deny that Mr Mahlangu sent the emails, but took issue with Zacpak's construction of their contents. And, as I demonstrate below, Mr Aitken's assertions regarding what he intended when he signed the credit application, offends the integration rule and are consequently inadmissible. I am accordingly of the view that none of these points is sustainable.

Cornerstone's liability in terms of the indemnity clauses

[35] It is against the backdrop of the abovementioned factual matrix that the following issues fall for decision:

- (a) Did Cornerstone give instructions to Zacpak regarding the release of the goods to Bridge Shipping?
- (b) Did Zacpak's liability vis-à-vis SARS arise as a result of its own fault?
- (c) Was Mr Aitken's liability as surety limited to charges in respect of storage services?

[36] The appellants' case can be summarised as follows:

- (a) Cornerstone was acting as the clearing agent for the owner of the goods, namely Real Africa Trading CC. It was in that capacity that it contracted with Zacpak to provide the warehousing services. Once the goods had been duly entered into Zacpak's warehouses, the latter, in its capacity as licensee of a customs warehouse, assumed statutory obligations in respect of the storage and release of the goods and Cornerstone's liability in respect of the goods ceased.
- (b) Zacpak was at all material times aware of these statutory obligations and had known that it was required to provide proof, upon being called by SARS, to show that the goods were acquitted at the South African border, failing which the goods would be deemed to have been impermissibly diverted and that it, together with Sonic Clearing, Bridge Shipping and Manzaro Trading, would be liable in terms of the Act. Despite this knowledge, Zacpak had over a period of three months, allowed goods to be removed from its warehouses by Bridge Shipping without keeping records in compliance with its statutory obligations as licensee of a customs warehouse.
- (c) And since the indemnity is unenforceable against Cornerstone, it is also not enforceable against Mr Aitken, whose liability as a surety is accessory to that of Cornerstone as principal debtor.
- (d) In the event, the suretyship clause was intended to deal only with invoices payable by Cornerstone in respect of the warehousing services, and did not extend to liability in respect of the indemnity.

[37] The indemnity and suretyship clauses must be construed on the basis of the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni*

Municipality (Endumeni).¹ They must thus be given meaning and business-like efficacy by having regard ‘. . . 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. . . The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document’.

[38] When construed in accordance with the aforementioned principles, there can be little doubt that in terms of clause 14.1 of the Standard Terms and Conditions, Cornerstone indemnified Zacpak against any ‘claims, loss, damages, penalties or expenses’ incurred by Zacpak, as a result of Zacpak complying with Cornerstone’s express or implied instructions. The indemnity provided for by this clause is not qualified by reference to liability caused by Zacpak’s negligence or fault. Thus, for the indemnity to become effective it was only incumbent on Zacpak to establish, on a balance of probabilities, that it had released the goods to Bridge Shipping on Cornerstone’s instructions.

[39] As explained earlier, the statutory obligations which Zacpak assumed in its capacity as licensee of a customs warehouse are quite burdensome, and non-compliance results in grave financial consequences. For instance, where, in a case such as this, the goods were destined for export to a neighbouring country, the liability for payment of customs duty and VAT arose immediately, but actual payment was deferred on the condition that liability would cease if it were proved that the goods had been either delivered or exported. Zacpak is wholly dependent on

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

third parties insofar as the export of goods are concerned. Other than ensuring that the necessary documents authorising it to release the bonded goods lawfully are presented to it, it has no control over whether the goods are in fact exported or not. Thus, as mentioned earlier, it is not surprising that Zacpak adopted a belt and braces approach, and incorporated two different indemnity clauses in terms of its Standard Terms and Conditions.

[40] In my view, Cornerstone's assertion that it had nothing further to do with the processing of the goods once they had been acquitted into Zacpak's warehouses, is soundly defeated by the contents of the emails which Mr Mahlangu sent to Zacpak. And Cornerstone's assertion that Mr Mahlangu did no more than provide information to Zacpak, and its denial that the provision of the information amounted to instructions regarding the release of the goods, ring hollow. It is evident from those emails that Mr Mahlangu was arranging for the goods to be loaded on behalf of Cornerstone's client, namely, Manzaro Trading; that he informed Zacpak when the goods would be loaded; gave specific instructions regarding the loading; and repeatedly mentioned that Manzaro Trading was Cornerstone's client. I am therefore of the view that the court a quo correctly found that Zacpak released the goods to Bridge Shipping on Cornerstone's express instructions.

[41] In addition, Cornerstone's continued involvement with the goods beyond their entry into Zacpak's warehouse is further evidenced by the fact that it paid for invoices which included charges in respect of the loading of the goods onto Bridge Shipping's trucks. As a result, there can be little doubt that the evidence established, on a balance of probabilities, that Cornerstone was still involved with the processing of the goods after they were acquitted into Zacpak's warehouse and had instructed Zacpak to release the goods to Bridge Shipping. Any liability that

Zacpak attracted as a consequence of it acting on those instructions is, consequently, covered by the indemnity provided for in clause 14.1 of the Standard Terms and Conditions.

[42] Even if I am wrong in my findings regarding the import of clause 14.1, Zacpak was in any event also entitled to rely on the indemnity provided for in terms of clause 14.6, unless of course its liability to SARS arose as a result of its own fault. As mentioned earlier, in this regard, Cornerstone contended that Zacpak allowed Bridge Shipping to remove the goods from its warehouse without complying with its statutory obligations to keep proper records. It contended, furthermore, that if Zacpak had kept proper records, it would have been able to prove – as it was enjoined to do in terms of s 19(7) of the Act – that the goods had been duly entered in terms of s 20(4) and had been delivered or exported in terms of such entry. Its liability would then have ceased.

[43] To my mind, this argument loses sight of the fact that SARS did not seek to hold Zacpak liable because of its failure or inability to produce the requisite documents, but because the documents provided to SARS appeared to have been forged or fraudulently obtained. Those documents were produced by Manzano Trading and it has not been suggested that Zacpak was complicit in the diversion of the goods or the falsification of the release forms.

[44] As the licensed operator of a customs warehouse, Zacpak's statutory obligations were to ensure that proper bills of entry are presented when receiving the goods into its warehouses, and when releasing the goods for transportation, to do so only upon receipt of the prescribed authorisation.

[45] The SARS letter of demand unambiguously stated that ZACPak was held liable because SARS system administrators ‘. . . confirmed that the CN2’s produced by **ZACPak** were false and invalid due to the **Reference numbers** on the CN2’s relating to different exports/imports processed at various border posts. . .’. As mentioned earlier, it is, thus, manifest that it was not ZACPak’s inability to produce documents that had attracted the liability, but rather the fact that the documents presented to SARS had been forged or fraudulently obtained. It is axiomatic that those documents, but for the fact that they were regarded as being ‘false and invalid’ by SARS, would have constituted acceptable proof of the discharge of ZACPak’s statutory obligations in terms of s 19(7) of the Act.

[46] It was also contended on behalf of ZACPak that the stipulation in s 19(7) of the Act to the effect that the licensee’s liability ceases once it is able to prove that the goods had either been ‘delivered or exported in terms of such entry’, means that it was in any event only necessary for it to prove that it delivered the goods to Bridge Shipping. Cornerstone, on the other hand, argued that the term ‘delivered’ refers only to goods entered for domestic consumption. I do not believe that it necessary to decide that issue, since it is manifest that the documents produced by ZACPak, but for the fact that they had been falsified, would have constituted satisfactory proof of either delivery or export.

[47] Cornerstone is, accordingly, also liable to indemnify ZACPak in respect of the SARS claim in terms of 14.6 of the Standard Terms and Conditions.

Mr Aitken’s liability in terms of the suretyship clause

[48] The suretyship clause reads as follows:

‘11. IN ADDITION, THE SIGNATORY HERETO BINDS HIM/HERSELF AS SURETY AND CO-PRINCIPAL DEBTOR, ENTITLING THE COMPANY TO RECOVER PAYMENT FROM HIM/HER IN HIS/HER PERSONAL CAPACITY IN THE EVENT THAT THE APPLICANT FAILS TO TIMEOUSLY PAY ANY AMOUNT DUE.’

[49] Mr Aitken asserted that he only bound himself as surety in respect of payments for warehousing services procured by Cornerstone, and the indemnity was only to a maximum of R30 000.00. He stated, in addition, that he intended to limit his suretyship in this manner when he signed the credit application form, and that Zacpak has not produced any evidence to contradict that assertion. Essentially then, he contended for a construction of the terms of the credit application without any reference to Zacpak’s Standard Term and Conditions. Other than his *ipse dixit*, he has not proffered any extrinsic evidence to establish the context and purpose of the suretyship clause in support of such a construction.

[50] In my view, therefore, Mr Aitken’s assertion as to what he intended when he signed the application form amounts to parol evidence and is, accordingly, inadmissible. As Harms DP (as he then was) held in *KPMG Chartered Accountants (SA) v Securefin Limited and Another*,²

‘. . . the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses. . . .’

² *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; [2009] 2 All SA 523 (SCA); 2009 (4) SA 399 (SCA) para 39.

[51] And while the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*³ held that parties will invariably be allowed to lead evidence to establish the context and purpose of the relevant contractual clauses, Khampepe J was at pains to point out that this does not mean that extrinsic evidence is always admissible. Clarifying this dictum further, the learned judge said that extrinsic evidence should be used ‘as conservatively as possible’,⁴ because ‘interpretation is a matter for the courts and not for the witnesses’⁵.

[52] To my mind, Mr Aitken’s assertions regarding what he intended when concluding the agreement, cannot, in the circumstances of this case, assist in its interpretation. That evidence was clearly not proffered to provide context or to establish the purpose of the relevant clauses, but rather to amend or alter their unambiguous meaning and import.⁶ In any event, Mr Aitkin’s declaration regarding what was in his mind when he concluded the agreement cannot trump the manifestly clear and unambiguous meaning of the suretyship clause, when construed in the context of the entire agreement. His assertion that the suretyship clause must be construed only in the context of the credit application form, is manifestly at odds with the explicit and unambiguous contractual provisions, which include the Standard Terms and Conditions.

[53] It was, furthermore, submitted on behalf of Mr Aitken that the phrase ‘to timeously pay any amount due can, on a proper construction, only relate to the payment of invoices in respect of warehousing services issued from time to time by

³ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).

⁴ *Ibid* para 68.

⁵ *Ibid* para 68.

⁶ *Ibid* paras 67 and 68.

Zacpak. In terms of the credit facility, those invoices had to be paid within 30 days. His liability as surety, accordingly, related only to the timeous payment of invoices in respect of those services raised by Zacpak from time to time, and then only to the extent of credit facility, namely R30 000, or so the argument went.

[54] When construed on the basis of the principles enunciated in *Endumeni*, Mr Aitken's assertion that the suretyship is limited to storage costs payable to Cornerstone does not find any support in the ordinary grammatical meaning and syntax of that clause. There is nothing in the terms of the application for credit or Standard Terms and Conditions that limits the surety in this manner.

[55] In my view, the incorporation of the Standard Terms and Conditions into the agreement means that Mr Aitken's liability as surety for 'any amount due' must include any amount payable by Cornerstone in terms thereof. And in terms of clause 16.1, Cornerstone was also liable for '... any duties, taxes, imposts, levies, deposits or outlays of whatever nature by or payable to the authority, intermediaries or other parties at any port or place or in connection with the goods, and whether time of entry and/or at any subsequent time, for any payments, fines penalties expenses, loss or damage incurred or sustained by Zacpak in connection therewith, except where such was caused by the sole negligence of Zacpak, or where these conditions provide[d] otherwise'.

[56] Cornerstone's contractual obligations in terms of this clause were separate and in addition to its liability in terms of clauses 14.1 and 14.6. Since Mr Aitken's liability as surety was accessory to that of Cornerstone,⁷ the obligation to 'pay any

⁷ *Kilroe-Daley v Barclays National Bank* 1984 (4) SA 609 (A).

amount due' by Cornerstone would also have extended to the liability in terms of clause 16.1. Mr Aitken is, therefore, also liable as surety and co-principal debtor for any amount that Cornerstone would be obliged to pay in terms of the indemnity clauses or clause 16.1.

[57] The reasoning and findings of the court a quo can, accordingly, not be faulted and the appeal must fail. There is no reason why costs should not follow the result.

[58] In the result the appeal is dismissed with costs, including the costs of senior counsel.

J E SMITH
ACTING JUDGE OF APPEAL

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