CIV/APN/ /96
CIV/T/670/95

IN THE HIGH COURT OF LESOTHO

In the matter between :

YING-KUE HSU **APPLICANT**

and

STANDARD CHARTERED BANK LESOTHO LTD **1ST RESPONDENT**
MESSENGER OF COURT (HIGH COURT) **2ND RESPONDENT**

For the Applicant : Mr. H.E. Phoofolo

For the Respondents : Mr. S. Malebanye

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 26th day of July, 2000

This was an application for rescission of judgment and stay of execution of the judgment in this proceedings. The Applicant also applied for costs of the

application. The judgment had been obtained by default of entry of appearance to defend. This application was opposed and the First Respondent had duly filed an opposing affidavit. The Applicant thereafter filed a replying affidavit. The Applicant had been surety in a debt against a Co-defendant Diana Linda Pritchard (Miss Pritchard) . The debt was owed to Respondent Bank who had been Plaintiff in the action.

The relevant summons was issued on the 13th December 1995. Summary judgment was entered against Miss Pritchard on the 18th March 1996. It became common cause that the Applicant was served with summons on the 18th March 1996 and default judgment (which is challenged herein) was entered on 27th May 1996. It was only on the 6th August 1996 when the instant application was filed. I concluded that the Applicant must have known about the judgment more than twenty one (21) days before coming to this Court. This was contrary to the requirements of Rule 27(6). He applied much later than what was required. Despite having fallen foul of this rule he had not even filed a substantive application for condonation. Nor had Counsel for the Applicant Mr. Phoofolo sought to explain the reasons for the delay. His Counsel was not even able to do from the bar except to ask for condonation of late filing of the application which was obviously unsupportable. There was a firm ground for refusing the application.

This application was premised on the following grounds: Firstly, that before Miss Pritchard had disappeared (as it became common cause that she had removed from Lesotho) Applicant had approached the Plaintiff Bank and told it that he wanted to cancel his guarantee of repayment of the amount of M45,000.00 (Forty Five Thousand Maloti) which he signed in November 1993. By the Applicant's own admission the Bank refused to accede to this request. This I will come to later in this judgment.

The second ground was the following. That the Applicant said after he had been served with summons on the 9th January 1996, Applicant had instructed his then attorney, to defend him. He then left the matter in the attorney's hands (vide paragraph 6.1 of founding affidavit). Four months later Applicant was informed that someone had called a Court messenger had been to the restaurant managed by the Applicant where he jotted down something on paper which the Applicant had not seen. He then approached his attorney who assured him that there would be no judgment against him and the matter would be settled amicably out of Court. Why (even if it be true) would this be a good reason for failure on the part of the Applicant to take timeous action to approach the Court? The Court was therefore not convinced. This is more so when delay on the part of the Applicant ensued even after attendance by Court messenger.

When I remarked during argument, that this matter of instruction and consultation by Applicant with his attorney, with whom he left the summons, had been dealt with somewhat cursorily by Applicant. His Counsel replied to say that: The criticized attorney's name was a Mr. Redelinhuys who was no longer in the country and whose firm later merged with that of the Plaintiff. This aspect was a thing that anchored the Applicant's explanation that he was not in wilful default of entering appearance to defend. The name of the attorney was not stated in the founding affidavit. The Respondent's opposing affidavit had emphasized the point when he remarked in paragraph 6.1 of the affidavit that he had noted that the Applicant did not take the Court into his confidence by not advising of the name of the Attorney he had instructed to serve him. In the replying affidavit (vide paragraph 6) it was however stated that it was one Mr. Stephen Redelinhuys. It could not be correct therefore that the name of the attorney was first known during argument. I concluded that even if this matter of the conduct of Mr Redelinhuys could be an adequate explanation other things stood out, however, to show that the application could only have been made for purpose of delay.

Thirdly, the Applicant has recorded at paragraph 6 of the founding affidavit that he did not know of the judgment in respect of which the goods were later attached on the 3rd May 1996. In addition the goods were not his but belonged to a company. This would easily be interpreted as an indication that the Applicant

had been lax. And this could not justify his attitude of not following up on the summons when it had become clear that his co-defendant was threatened with execution which the Applicant most probably knew was from a judgment obtained in the summons in which both had been defendants.

What took most of the time of the argument before the Court was about the circumstances from which it was attempted to show that the Applicant was able to show a bona fide defence. It centred on that he had told the Respondent Bank that there was no longer any good faith nor trust between himself and Miss Pritchard in their business. He had then approached the Respondent bank with intention to resile from the agreement of suretyship. This bank had not accepted. I will come back to the last aspect above after stating the legal requirements for a rescission application to succeed, which follow.

In order for his application to succeed the Applicant must show that firstly he was not in wilful default of entering appearance to defend. Secondly, that he has a bona fide defence on the merits. And lastly, that the application was not made merely for the purposes of delay. I was referred in that regard to GRANT v PLUMBERS (PTY) LTD 1949(2) SA 470(O) and SANDERSON TECHNITOOL (PTY) LTD v INTERMENUA (PTY) LTD 1980(4) SA 573(W). I had then asked Counsel, during argument, to assist me with a Lesotho decision which emphasized

that three requirements must actually coincide for the success of this kind of application. It was in vain

When speaking about existence of a bona fide defence Mr. Malebanye submitted that assuming, without conceding, that Applicant was not in wilful disobedience of entering appearance to defend, he had no bona fide defence which if established at a trial it would constitute a good defence. He went on to set out the circumstances as follows: First Respondent's claim was based on a written guarantee in terms of which Applicant bound himself as a surety for the repayment on demand of all sums of money on which the debtor may from time to time owe or be indebted to the First Respondent.

It was a further condition of the said guarantee that in addition to his liability the amount of his liability shall also bear interest at the rate and in the manner charged by the Bank to the debtor in respect of the obligation. Applicant also renounced the two benefits namely *beneficium ordinis ser excussionis* and the *beneficium divisionis*. The most relevant is the first one which is defined as:

> "The benefit of order or excussion. It is the right of defence given to a surety, when called upon for payment by creditor, whereby he claims that the principal debtor shall be excussed. The benefit may be renounced farcify tacitly or specially" DICTIONARY OF LEGAL

WORDS AND PHRASES Vol. 1 CJ Claasens, page 176-177.

It was contended that the Applicant had not only renounced the benefit of excussion but that prior demand had, in fact, been made from the principal debtor. It was submitted in any event, Applicant had not specifically averred that he was entitled to the benefits of excussion or division. Those defences could not therefore be available to the Applicant. With that I was in most respectful agreement with the Respondents submission. See NEON AND COLD CATHODE ILLUMINATIONS (PTY) LTD vs EPHRON 1978(1) SA 463.

By the Applicant's own admission, the indebtedness to First Respondent had not been discharged as Applicant only had paid M10,000.00 (Ten Thousand Maloti) while First Defendant had paid nothing. The Court would regard the payment as being consistent with the understanding that a surety without the benefit of excussion would to that extent be similar to a co-principal. The probability was that whatever the interpretation the Applicant felt obligated to pay in much the same way as Miss Pritchard. The applicant spoke about their joint venture as follows:

> "We borrowed money from Respondent under Pritchard's name though our business association had broken down."

This would readily give a feeling that that must have been the Applicant's state of

mind.

It was not denied that Miss Pritchard was no longer in Lesotho but was reported to be living in Johannesburg at an address that was unknown to the Applicant. What assumed importance in the Applicant's case was that before Miss Pritchard disappeared he approached the Respondent Bank and informed the management that he no longer trusted Miss Pritchard. That their business association had broken down "and that I wanted to cancel my guarantee since the Jeep was now virtually hers." Applicant had gone on to explain the situation concerning the disappearance of the "sample" Jeep whose similar model vehicles were to be exported to Zambia. It obviously could be a good defence for the Applicant if he was to prove that he was released from his obligation. He said he ought to have been released or be deemed in law to have been released.

The law relating to surety can be summarized as follows: The law required that a plaintiff who wishes to claim on a deed of suretyship must comply with the ordinary rules relating to the pleading of contracts. The party relying on such suretyship must allege and prove the following:

(a) a valid contract of suretyship

(b) that the *causa debiti* is one in respect of which the other party understood liability and

(c) that the indebtedness of the principal debtor, that is the amount, is due. See DU TOIT v BARCLAYS NATIONALE BANK 1985(1) SA 563 and SENEKAL v TRUST BANK OF AFRICA (LTD) 1978 375.

It was submitted on behalf of the Respondent Bank that it had satisfied all the above requirements.

The next issue that arose was that of alleged release of Applicant from his obligation as surety. His Counsel argued accordingly that a surety can only be released from his obligation by acceptance of the creditor or if the creditor acts in a manner which prejudices the surety. The surety must allege and prove the defence of release. See FISHERIES DEVELOPMENT CORP OF SA (LTD) vs JORGENSEM 1980(4) SA 156 (W).

It was common cause that the Respondent Bank refused to release Applicant from his obligation. The other side of this issue was the submission by the Applicant that in refusing to release Applicant the Respondent Bank had acted in a manner prejudiced to the Applicant. The First Respondent had replied thereto by saying that Applicant had to state what prejudice that he had suffered. Mr. Malebanye submitted further that in any event the Applicant would have a right of recovery against the principal debtor. He referred to ROSSOW AND ROSSOW

v HODGSON 1925 AD 97.

The Applicant contended that the Respondent Bank acted in a prejudicial manner in the following way: Firstly the Bank had refused to cancel the guarantee when it was approached and informed of the misunderstanding or loss of trust between the Applicant and Miss Pritchard. Secondly the Respondent Bank had failed to recover the sample vehicle from Miss Pritchard before she either sold it or disappeared with it. As it was contended:

> " .....the conduct of the Bank in refusing to act against Diana Pritchard despite applicant's appeal to it to take action is prejudicial to the Applicant. Applicant could himself have, in law, grounds upon which to take legal action against Pritchard at that stage. Pritchard left the country taking with her the vehicle and her whereabouts unknown. The Court should ask itself as to how the applicant is to have recover against Pritchard in the circumstances. Applicant did what he could have done in the circumstances to protect the Bank but the Bank felt there was no need to take action to recover its debt as long as the applicant was available."

The above statement underlines the failure on the part of the Applicant to understand the nature of the renunciation of the benefits of excussion. The position of a surety without the benefit:

> "..... is in the same situation as an ordinary debtor, indeed as the principal debtor, a fortiori this is the case when a surety has assumed liability as surety and co-principal debtor. He may be sued as soon as the principal debtor is in default. It must appear however, that payment of the debt is actually due; it is necessary that everything shall have happened which is required to before the principal debtor can be sued." CANEY'S THE LAW OF SURETYSHIP C.F. Forsyth & J.T. Pretorius, 4th Edition - page 115-116.

In effect this renunciation gives a choice on the part of the judgment creditor to claim from the surety and/ or the debtor. I did not therefore see how it could be correctly submitted that the Respondent had waived its rights to proceed against the Applicant when it took judgment against Miss Pritchard when in fact they were both parties to the agreement and were co-defendants in the action. I did not see how the Respondent's action in proceeding against Miss Pritchard and getting judgment against her first was "plainly inconsistent with an intention to enforce the right now relied upon." By the latter was meant the right to proceed against the Applicant.

When Respondent bona fide made his choice to sue Applicant no reasonableness was required nor could one speak of good reasons or absence of such good reasons. In a way the choice was subjective. The procedural aspect is even

clear in that:

> "The creditor may join the principal debtor and surety or sureties in one action even sureties who have the benefit of excussion, for as we have seen it is for them to raise the defence." CANEY'S THE LAW OF SURETYSHIP (supra) at page 116.

To approach the Respondent Bank as the Applicant did and to speak of the circumstances of Miss Pritchard, either of the misunderstanding or the need to take action against her or her having disappeared appears to import a requirement of objectivity, reasonableness or discretion that is not built into the renunciation of the benefit of excussion once it has been done. By not doing the things the Applicant thought and urged the Respondent Bank to do it could not be said that the Respondent acted in a way prejudicial to the interests of the Applicant. Once that prejudice cannot be proved as a matter of fact, the law entitled the Respondent to have adopted the attitude that it took. In a strict sense there cannot have been any prejudice to the Applicant.

It was submitted by Mr. Phoofolo that in the context of the Applicant having approached the Respondent Bank, with intention to cancel the suretyship agreement that in itself was enough to prove that the applicant was no longer a party in the agreement in that it

> "may by inference be construed as a cancellation of the agreement

with Pritchard."

The basis of the submission was that a Deed of suretyship may be cancelled orally. Reference was made to VISSER vs THEODORE SASSEN (PTY) LTD 1982(2) SA 320. This case could only be authority for the proposition that it was possible to release a surety by oral cancellation of a condition, for example in a case where two co-sureties had executed the same deed of suretyship while the other surety remained bound. See the latter case at 322E-323A. But the case would not be authority for the situation where there was no cancellation by agreement between the parties in a consensual agreement to cancel or one brought about by the exercise of a right to cancel or terminate. Where the right to withdraw, revoke or cancel depended on the creditor's prior written consent or waiver (as in the instant case) it meant what it says. That in the absence of that consent or waiver the Applicant remained bound. See MORGAN AND ANOTHER vs BRITTAN BUSTRED LTD 1992(2) SA 775(A) at 784. It is clear, in my view, that the Applicant cannot speak of having been released or that it be deemed that he was released, by reason of the Miss Pritchard's attitude, without the consent of the creditor. The creditor (First Respondent) had to agree to the release.

It became clear in the circumstances that the Applicant could not have a bona fide defence. Consequently an order of rescission if allowed could only serve to delay the evil day. It should not.

The application was refused with costs.

T. MONAPATHI
JUDGE

26th July 2000