THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 20191/14

In the matter between:

DORMELL PROPERTIES 282 CC **APPELLANT**

and

ALWYN GIDEON BAMBERGER **RESPONDENT**

Neutral citation: *Dormell Properties 282 CC v Bamberger* (20191/14) [2015] ZASCA 89 (29 May 2015)

Coram: Lewis, Shongwe and Majiedt JJA and Schoeman and Mayat AJJA

Heard: **15 May 2015**

Delivered: **29 May 2015**

Summary: Civil Procedure – particulars of claim premised on an invalid suretyship agreement – breach of an offer to lease agreement containing a suretyship clause not expressly pleaded but annexed to the particulars of claim as if incorporated – surety not afforded an opportunity to raise the defence of the benefit of excussion – fatal to the landlord's case.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Savage AJ with Yekiso J concurring, sitting as court of appeal):

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

JUDGMENT

Shongwe JA (Lewis and Majiedt JJA and Schoeman and Mayat AJJA concurring)

[1] This appeal concerns a claim against a surety for damages resulting from a breach of a lease agreement. The appellant, Dormell Properties 282 CC (Dormell), successfully sued Edulyn (Pty) Ltd (Edulyn), as the first defendant in its capacity as the tenant. The respondent, Mr A G Bamberger, was sued as the second defendant in his capacity as surety for the obligations of Edulyn. Both Edulyn and Bamberger were sued in the Bellville Magistrate's Court jointly and severally, the one paying the other to be absolved. Bamberger in turn successfully appealed against the judgment and order of the Bellville Magistrate's Court to the court a quo (Western Cape Division, Cape Town, Savage AJ with Yekiso J concurring). This appeal is with the leave of this court. It should be noted at the outset that at the time when the appeal was heard by this court, Edulyn had been liquidated.

[2] Edulyn made a written offer on 12 September 2008 to lease certain premises situated at shop 26, Cobble Walk, corner De Villiers Road and Verdi Boulevard, Sonstraal Heights, Durbanville, Western Cape (the premises), which offer Dormell, as owner and landlord, accepted on 16 September 2008. The

terms and conditions of the lease were fully set out in the offer to lease. Of significance are clauses 9.1, 9.2 and 10 which read as follows:

'9 Offer and Agreement

9.1 This offer is irrevocable and open for acceptance by the Landlord by noon on the sixtieth day following the date of signature hereof by the Tenant, unless another date is stipulated in "I" below, following which it shall become a building agreement ("the Agreement"). Upon acceptance hereof by the Landlord, this offer shall become a binding agreement, mutatis mutandis with the terms and conditions of the Landlord's Agreement of Lease assigned to this project (a copy of the lease can be viewed at the following address: Suite OG, Nautica, The Waterclub, Beach Road, Granger Bay, 8005).

9.2 The parties agree that after acceptance hereof they will sign the Lease for the premises whereupon this Agreement will fall away. A copy of the Lease is filed with and available for inspection at the offices of GAIN CC, Suite OG, Nautica, The Waterclub, Beach Road, Granger Bay. Any failure so to sign shall not, however, affect the validity of this Agreement, but the duty to sign shall be enforceable at the instance of either party and pending such signature the provisions of 9.2 shall apply. Should there be any conflict between this Agreement and the Lease, the terms of this Agreement will prevail.

10 Suretyship

The person/s signing this Offer on behalf of the Tenant, if such be the case, hereby guarantees the Tenant's obligations to the Landlord and undertake/s in his/her/their personal capacity and on behalf of the Tenant, to procure that such of the Directors and/or Shareholders and/or members and/or partners and/or spouse of the Tenant, as the case may be, as the Landlord requires, will, if the Landlord requires, guarantee the obligations of the Tenant to the Landlord.'

[3] Bamberger, as the sole director of Edulyn, represented and signed the offer to lease on behalf of Edulyn. By doing so, he also bound himself as surety for Edulyn's obligations under the lease. The lease was due to commence on 1 November 2008 and terminate on 31 October 2013. In the particulars of claim, Dormell alleged, *inter alia*, that the offer to lease annexed should be read as if

incorporated in the particulars. But no express mention was made of clause 10 which bound Bamberger as a surety.

[4] As clause 9 quoted above stated, the parties agreed that they would sign a further agreement of lease, the terms of which were to be found at the address referred to. But failure to sign the memorandum would not affect the validity of the offer to lease. And if there was conflict between the offer signed and the terms of the lease to be signed, the former would prevail.

[5] As fate would have it, Bamberger did sign the memorandum anticipated in the offer to lease, but Dormell, for some unknown reason, did not. And after signing, on 21 October 2008, Bamberger signed yet another suretyship, purporting to bind himself as surety and co-principal debtor for the fulfilment of the obligations of Edulyn as tenant. It is significant to mention that this deed of suretyship was made an annexure to the memorandum of agreement of lease, and was annexed to Dormell's particulars of claim as if it were the instrument that bound Bamberger as surety and co-principal debtor. The deed of suretyship was expressly said to arise 'from the Agreement of Lease to which this Suretyship is annexed'. More will be said on this aspect later in the judgment.

[6] Dormell's first claim against Bamberger was premised on the suretyship signed by him on 21 October 2008 to fulfil the obligations of Edulyn. It was alleged, which allegation was not denied by Bamberger, that Edulyn had failed to pay the rental, hence the breach of the offer to lease. As a consequence, Dormell cancelled the agreement of lease on 9 March 2009. The second claim was based on the fact that Edulyn unlawfully remained in occupation of the

premises, despite the cancellation. It was alleged further that the unlawful holding over of the premises made Edulyn liable for the monthly rental and associated charges arising from its continued unlawful occupation of the premises. The trial court granted judgment in favour of Dormell.

[7] While the action against Edulyn and Bamberger was pending, Dormell issued an application to have Edulyn and all those occupying the premises by, through or under it evicted from the premises. The full court that dealt with the eviction application on appeal found that Bamberger had bound himself as surety for the obligations of Edulyn. It also found that Bamberger had admitted in his answering affidavit that he was bound as surety. The eviction order was granted with costs.

[8] However, the court a quo upheld the appeal against the decision to award damages against Bamberger on the basis that, because the deed of suretyship was attached to an invalid memorandum of lease, the suretyship was also invalid. Savage AJ said that 'A contract of suretyship requires a valid principal obligation with someone other than the surety as debtor and the liability of the surety does not arise until this principal obligation has been contracted (*Caney* [C F Forsyth and J T Pretorius *Caney's The Law of Suretyship in South Africa* 6 ed (2010)] at 47)'. Dormell does not take issue with the finding in principle. Savage AJ also found that the admission of liability as surety in the eviction application was not binding on Bamberger in the action for damages.

[9] Before us, the appellant attacked the judgment and order of the court a quo on the basis that – although the appellant conceded that no express

reference to the suretyship clause was made in the particulars of claim – 'in the circumstances of this case the omission caused no prejudice to Bamberger' and secondly, that 'the rules of pleading in the Magistrate's Court at the time were less stringent than those pertaining to High Court pleadings.' Dormell contended that Bamberger was sued together with Edulyn on the basis that he was a continuing covering surety for Edulyn's obligations to Dormell. This argument was put forward on the basis that Bamberger did not dispute that he had signed the deed of suretyship and that he had admitted in his answering affidavit during the eviction application that he had bound himself as a surety and co-principal debtor for Edulyn's obligations

[10] On the other hand, Bamberger contended that Dormell's cause of action, as pleaded *ab initio,* was premised on the deed of suretyship and not on the offer to lease containing the suretyship clause. It was argued further that no reference at all was made in the particulars of claim to the suretyship clause in the offer to lease. It was contended further that 'it is not open to Dormell at this stage, to seek to rely upon the suretyship clause – doing so amounts, effectively, to an amendment of its particulars of claim in order to advance a case which has not been pleaded.' In a nutshell, Bamberger contended that he was denied the opportunity to raise any defence he could legally have been permitted to raise, 'had the suretyship clause been an issue in the trial court.' I shall deal later with the possible defences that Bamberger says he could have raised.

[11] Generally, it is accepted that the purpose of pleadings is to define the issues for the parties and the court. Pleadings must set out the cause of action in clear and unequivocal terms to enable the opponent to know exactly what case to meet. Once a party has pinned its colours to the mast it is impermissible at a

later stage to change those colours. This general proposition is applicable in motion proceedings as well as in action proceedings (see *Diggers Development (Pty) Ltd v City of Matlosana* [2011] ZASCA 247; [2012] 1 All SA 428 (SCA) para 18; *Naidoo v Sunker* [2011] ZASCA 216; [2012] JOL 28488 (SCA); *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323F-234C; *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 21-22).

[12] It is settled law that a party who wishes to claim on a deed of suretyship must comply with the ordinary rules relating to pleading of a contract. In the present case, Dormell should have alleged, inter alia, a valid contract of suretyship that complied with the provisions of the General Law Amendment Act 50 of 1956 – the terms of the deed of suretyship must have been embodied in a written document signed by or on behalf of the surety which identified the creditor, the surety and the principal debtor. It must have alleged the cause of the debt in respect of which the defendant undertook liability as well as the actual indebtedness of the principal debtor – that is, the amount owed and that it was due.

[13] In the present case, we know that the deed of suretyship was invalid because the suretyship was annexed to an agreement of lease which was not signed by Dormell, as the landlord. The deed expressly guaranteed the obligations of Edulyn under that agreement. Failure to sign that agreement of lease by Dormell meant that it did not come into existence: thus the suretyship to which it was annexed was in respect of a non-existent obligation and was accordingly unenforceable. Therefore Dormell could not have relied on the deed of suretyship as pleaded in the particulars of claim. As I have indicated earlier,

the appellant conceded the invalidity but averred that there was no prejudice to Bamberger in relying instead on the suretyship embodied in the offer to lease which was itself still valid.

[14] In their plea to the particulars of claim Edulyn and Bamberger denied liability for arrear rental and damages for holding over, but asserted also that the anticipated memorandum of lease had not been signed by Dormell and that the suretyship was in respect of a non-existent obligation. It was at this stage, after the plea, that Dormell should have applied for an amendment of the particulars of claim so as to rely on the clause in the offer to lease guaranteeing Edulyn's obligations under it as against Bamberger, rather than the deed of suretyship. Dormell did not amend its particulars of claim. This failure to amend was fatal, it was submitted, to Dormell's case, particularly since no explanation was proffered for the failure to effect the amendment.

[15] Counsel for Dormell submitted that, despite the principle that the object of pleading is to define the issues and that the parties will be kept strictly to their pleadings, within those limits the court has a wide discretion: *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 168 at 173. The question arises: how far does this 'wide discretion' stretch? Can the exercise of this discretion go as far as placing Bamberger at a disadvantage in that he could not be permitted to raise any legal defence, be it a dilatory defence or not? I do not think so.

[16] Generally a court's discretion in relation to pleadings is based upon a consideration of all the factors involved, taking into account fairness to the

parties. The exercise of the discretion is not unlimited and must be judicially justifiable. If the outcome of the exercise of a discretion will prejudice a party such as Bamberger, a court should be slow to exercise the discretion. (*Fourway Haulage SA (Pty) v South African National Road Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 para 14, which allowed a legal issue not canvassed in the pleadings or at the trial to be argued on appeal. See contra *Presidency Property Investments (Pty) Ltd & others v Patel* 2011 (5) SA 432 (SCA) para 21). In the present case, as discussed below, Bamberger would have conducted his case materially differently if Dormell's case had been properly pleaded. Therefore the prejudice to Bamberger that would result requires exercising the discretion in favour of him if he can show how he might have conducted himself differently had the claim against him been pleaded on the basis of the offer to lease rather than the deed of suretyship.

[17] Counsel for Bamberger submitted that, had the matter been properly pleaded, he could have raised a number of defences that had not been pleaded and canvassed during the course of the trial. I shall deal with only two of the defences since Bamberger did not press the others at the hearing.

[18] The first defence that could have been argued, it was submitted, was that 'unlike the deed of suretyship, the offer to lease was not co-signed by Bamberger's wife'. As they are married in community of property 'and since his wife has not consented to the signing of the offer to lease the suretyship clause (clause 10 of the offer to lease) was invalid by virtue of s 15(2)*(h)* of the Matrimonial Property Act 88 of 1984, in that the suretyship was not executed in the ordinary course of Bamberger's business but the business of Edulyn'. However, as Dormell argued, there is an answer to the defence in s 15(6) of the

Matrimonial Property Act. It provides that the provisions of s 15(2)*(h)*, inter alia, do not apply where an act contemplated in para *(h)* is performed by a spouse in the ordinary course of his profession, trade or business. The evidence before the trial court clearly showed that Bamberger, though he referred to himself as a financial advisor, was the sole director and shareholder of Edulyn. He described himself as the owner of the Silverspoon restaurant, which occupied the leased premises. His son managed the restaurant but had no role in Edulyn itself. The conclusion that he signed the offer to lease in the 'ordinary course of business' is inescapable. The fact that this defence was not raised in the plea and at the trial thus did not prejudice Bamberger.

[19] At the hearing before us, Bamberger raised another point which was not canvassed in his heads of argument. Counsel submitted that it was open to Dormell to raise a defence of non-excussion under the guarantee in the offer to lease. Because Bamberger was sued in his capacity as a surety he was entitled to have the benefit of excussion. Dormell should have proceeded against Edulyn first (as principal debtor) unless Bamberger had waived his right to raise the defence of the benefit. The authors C F Forsyth and J T Pretorius in *Caney's The Law of Suretyship in South Africa*, above at 128, hold the view that the benefit of excussion 'is a dilatory defence which the surety may elect to set up if the creditor first sues him. If the surety intends to raise the defence, he must do so in *initio litis*; it is too late to raise it after *litis contestatio*. It certainly cannot be raised for the first time on appeal'. (See *Hurley v Marais* (1883-1884) 2 SC 155 at 158; *Klopper v Van Straaten* (1894) 11 SC 94 at 98 and *Worthington v Wilson* 1918 TPD 104 at 107).

[20] If the defence of non-excussion succeeds, the court may postpone the proceedings pending excussion of the principal debtor or grant absolution against the creditor. In this matter, if the clause in the offer to lease in terms of which Bamberger guaranteed Edulyn's obligations under the lease had been pleaded, Bamberger would have been able to raise the benefit of excussion, since he had not waived it when he had signed the offer to lease. He did not raise the defence in his plea or at the trial because the deed of suretyship was pleaded instead. In that deed he had waived the various benefits available to sureties including that of excussion.

[21] The guarantee that Bamberger gave under the offer to lease did not include a waiver of any of the benefits accorded to a surety. If Dormell were able, at appellate level, to rely on the guarantee in the offer to lease, Bamberger's defence that Edulyn had not yet been excussed would be of no value: Edulyn had already been liquidated.

[22] Dormell argued, on the other hand, that the benefit of excussion is a dilatory plea which would have postponed the inevitable. I do not agree. As the authors in *Caney's The Law of Suretyship in South Africa* have said, the defence must be raised in *initio* and not after *litis contestatio*. Edulyn had not been liquidated at the time when the summons was issued. This court cannot speculate on whether or not Edulyn would have been in a position to settle its debts at that time. Bamberger would thus suffer prejudice if this court were to allow Dormell to rely on the guarantee in the offer to lease.

[23] For the above reasons the appeal is dismissed with costs, including the costs of two counsel.

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J B Z Shongwe
Judge of Appeal

Appearances

For the Appellant:	E W Fagan SC (with him J P Steenkamp) Instructed by: Ben Groot Attorneys, Cape Town; Symington & De Kok, Bloemfontein.
For the Respondent:	J A Newdigate SC (with him W P Coetzee) Instructed by: Gerhard Gous Attorneys, Cape Town; Honey Attorneys, Bloemfontein.