

SURETY BINDS HIMSELF AS CO-PRINCIPAL DEBTOR: DOES HE BECOME A CO-DEBTOR?**Liberty Group Ltd v Illman (1334/2018) [2020] ZASCA 38 (16 April 2020)**

A suretyship document often dictates that the surety binds himself as “surety and co-principal debtor in solidum” with the principal debtor. Could this mean that the surety becomes a co-debtor to the principal debt? And if so, as summons on one co-debtor interrupts prescription in respect all co-debtors, then surely summons on the surety as “co-debtor” would interrupt the running of prescription in respect of sureties as well? This judgment clarifies the position in our law and is a worthwhile read.

The Judgment can be viewed [here](#).

FACTS

In March 2003 Charter Life Insurance Company Ltd (which later changed its name to Liberty Active Ltd (“Liberty”)) concluded a written broking agreement with ECE Financial Holdings (“ECE”). In terms thereof, ECE was to act as an independent intermediary for Liberty’s financial products. As compensation, ECE would be paid commission on premiums received by Liberty during the currency of the agreement on contracts issued pursuant to proposals submitted by ECE.

In the period during March 2003 and February 2005, eight individuals, including Mr Illman, each signed separate but identical deeds of suretyship in terms of which they bound themselves as sureties and co-principal debtors *in solidum* with ECE for the payment to Liberty of all monies which ECE could in future owe to Liberty, ‘from whatsoever cause arising’.

During March 2003 and March 2011, and before receiving any premiums in respect of contracts issued by Liberty on proposals submitted to it by ECE, Liberty advanced commissions to ECE. However, during the same period, and up to August 2011, the contracts in respect of which commissions were advanced to ECE either lapsed, were cancelled, or terminated because of non-payment of premiums to Liberty.

As a result, the commissions which Liberty had paid in advance, became repayable to it by ECE in terms of the agreement and by the sureties in terms of the deeds of suretyship. The total amount of the commissions was R1,029,963.50.

Liberty later ceded all its rights to claims arising from the claw-back commissions in respect of the broking agreement to Liberty Group Ltd (LG).

On 14 March 2011, the agreement with ECE was terminated and on 22 September 2011, LG, as cessionary, *issued* summons against all the sureties and co-principal debtors for re-payment of the commission. On 29 September 2011, the summons was *served* on one of the sureties, Mr September. He failed to deliver a notice of intention to defend. As a result, LG obtained default judgment against him in January 2012.

With regard to Mr Illman, the summons was *served* on him only on 31 March 2016, approximately five years after it was issued. Mr Illman raised a special plea of prescription to LG’s claim and asserted that to the extent that LG’s claim against him was based on the alleged termination of the agreement on 14 March 2011, such claim became prescribed after three years of that date, in terms of the Prescription Act 68 of 1969.

LG responded and argued that as Messrs September, Illman and the other trustees had bound themselves as sureties and co-principal debtors *in solidum* with ECE, they became ‘co-debtors.’ As the claim against ECE and the

sureties became due on 14 March 2011, service of the summons on Mr September within the prescription period interrupted the running of prescription in favour of ECE and all co-debtors, including Illman. Accordingly, it was pleaded, the claim against Illman had not prescribed.

The Gauteng High Court found in favour of Illman and the sureties and LG then appealed to the Supreme Court of Appeal ("SCA").

HELD

- Three previous SCA decisions must be considered in this context, namely *Kilroe-Daley v Barclays National Bank*, *Neon and Cold Cathode Illuminations (Pty) v Ephro and Jans v Nedcor Bank Ltd*.
- In *Jans* the issue was whether the interruption in the running of prescription in favour of the principal debtor interrupted the running of prescription, in favour of a surety. The Court concluded that there were significant differences between the relationship existing between the principal debtor and surety on the one hand, and that between co-debtors, in solidum on the other. He accordingly concluded that an interruption or delay in the running of prescription in favour of the principal debtor, interrupted or delayed the running of prescription in favour of the surety. As between co-debtors, the common law allowed the judicial interruption of prescription of a co-debtor by service on another co-debtor.
- In this regard, it was significant that LG referred to Illman and the other sureties as 'co-debtors'.
- LG submitted that the addition of the words 'co-principal debtor *in solidum*' signaled an intention that the liability shall be of the same scope and nature as that of the principal debtor. This made the principal debtor and the surety, co-debtors. Thus, service of summons on any of them, Mr September in this case, interrupted prescription running in favour of the rest.
- LG was cognisant that this submission was contrary to the jurisprudence of this court in the decisions of *Kilroe-Daley* and *Neon*. In *Kilroe-Daley*, the accessorial nature of a suretyship agreement to the main contract was emphasised, despite it being a separate contract from that of the principal debtor and his creditor. The addition of the words 'co-principal debtor' did not transform the contract into any contract other than one of suretyship. Consequently, it was held that if the principal debt became prescribed the surety's debt also became prescribed and ceased to exist. In *Neon* it was held that the sole consequence (albeit an important one) of a surety binding himself as a co-principal debtor is that, as regards the creditor, he renounces the benefits such as excussion and division available to him and he becomes liable with the principal debtor jointly and severally. It did not make him a co-debtor.
- LG argued that that *Kilroe-Daley* and *Neon*, to the extent that they limited the effect of the phrase 'and co-principal debtor' to only a tacit renunciation of the legal exceptions, had been wrongly decided.
- The flaw in the criticism of the decisions of the previous judgments lie in the conflation of two distinct concepts: co-debtors and co-principal debtors. The undertaking of the surety is accessory to the main contract. It is an undertaking that the obligation of the principal debtor will be discharged, and if not, that the creditor will be indemnified.
- Although the surety binds himself as co-principal debtor, that does not 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. He does not become a party to the contract between the creditor and the principal debtor.
- A surety and co-principal debtor does not undertake a separate independent liability as a principal debtor; the

addition of the words 'co-principal debtor' does not transform his contract into any contract other than one of suretyship. The surety does not become a co-debtor with the principal debtor, nor does he become a co-debtor with any of the co-sureties and co-principal debtors, unless they have agreed to that effect.

- There was another string to LG's bow, based on the rule that if a creditor, through the service of a process, claimed payment from one co-debtor who bound himself jointly and severally with others, the remaining co-debtors could not rely upon extinction of the debt by prescription. The principle was received into Roman-Dutch law.
- LG urged the Court to apply this principle to the converse situation. In other words, that the interruption of prescription in respect of a surety serves to interrupt prescription in respect of a principal debtor. Once so decided, it was said, the further logical extension of the principle would be that interruption of prescription in favour of a surety would also interrupt prescription in favour of a co-surety. The result would therefore be that service on Mr September interrupted prescription in favour of Illman.
- The argument could not succeed. Neither in the Roman law nor in the Roman Dutch law had it ever been suggested that the converse should apply - in other words that interruption of prescription against the surety should constitute interruption of prescription against the principal debtor. The Roman Dutch writers, who wrote extensively on the topic and debated the pros and cons thereof, were *ad idem* that the converse should not apply. It is consequently simply not part of our common law.

CONCLUSION

In the circumstances, the appeal had to fail.