68/98

REPUBLIC OF SOUTH AFRICA

CASE NO.567/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

LANGSTON CLOTHING (PROPERTIES) CC APPELLANT

AND

DANCO CLOTHING (PTY) LIMITED RESPONDENT

BEFORE: VAN HEERDEN DCJ, SMALBERGER, HOWIE, SCHUTZ AND PLEWMAN JJA

HEARD: 8 SEPTEMBER 1998

DELIVERED: 17 SEPTEMBER 1998

SCHUTZ JA

JUDGMENT

SCHUTZ JA:

The same words often mean different things to different people. This helps to keep the forensic pot boiling. The dispute in this case affords a simple if stubborn example. At issue is whether the words of a suretyship mean that on a stated date all liability of the surety ended, even for debts that had already accrued; or whether the surety was relieved of liability for further debts incurred by the principal debtor after that date, but remained liable for debts already incurred.

The principal debtor was Langston's Clothing (Head Office) CC, and the creditor, who was the successful plaintiff below before Traverso J in the Cape Provincial Division, and who is thus the respondent on appeal, is Danco Clothing

(Pty) Ltd ("Danco"). There were originally two defendants, co-sureties, but the estate of one of them was sequestrated, so that only one, Langston Clothing (Properties) CC ("Langston"), survives as the appellant. The suretyship was signed on 18 May 1994 and the liability under it, if Langston be liable, is agreed at R 375 217,48.

The document is drawn in the common form and only a few of its terms need mention. It was said to be a continuing covering security for present and future debts and was to "remain in full force and effect notwithstanding any fluctuation in or even temporary extinction of such indebtedness". Langston warranted that all contracts between the principal debtor and Danco would be properly authorised; and ceded to Danco in security all amounts due to it by the principal debtor. It was further provided in a clause later numbered as 13:

> "I/We agree that my/our liability hereunder may only be terminated by the giving to the Creditor of one calendar month's written notice of termination coupled with the payment of the amount owing at the expiry of

the period of the said notice. Notwithstanding termination, I/we shall continue to remain liable in terms thereof in respect of any amounts falling due after the date of termination arising from transactions entered into prior to the date of termination."

The document was in typed form, save that at the end of it came the words, in handwriting, that have caused the dispute: "This surety is valid until 31 December 1994". For convenience this clause has been numbered 16.

Langston contends that clause 16 overrides clause 13 (particularly because 16 is handwritten) and that the effect of 16 is not only to preclude its liability for debts incurred by the principal debtor after 31 December 1994, but also to end its liability for such debts incurred before that date. Danco challenges the latter of these propositions. I shall call Langston's version the first interpretation. Traverso J found for Danco on a second, namely that there is an inconsistency between 13 and 16, that 16 overrides 13, and that on a proper construction of 16, in its setting, it does not have the effect of discharging Langston from liability for

debts incurred by 31 December 1994, but merely constitute advance notice of termination. A criticism of this version is that it does not give effect to all the words in the suretyship.

There is a third possible construction of the suretyship that would also support Danco. It is that the two clauses should be read in conformity with one another, so that 16 merely states the latest date of termination, thus relieving Langston of the need of giving notice, whilst leaving intact Langston's right to give earlier notice in terms of clause 13 and also its liability for accrued debts under that clause. Merits of this version are, among others, that it does give effect to all the words and that it avoids imputing a lack of consistency in the contract seen as a whole (ie between clauses 13 and 16).

There is a conceivable fourth alternative, that the right to give prior notice is maintained but that liability for accrued debts ends on 31 December 1994. This seems to be an extraordinarily unlikely intention as it would entail that if there is

a termination before that date as a result of the giving of a month's notice liability would be unaffected, whereas if there is a termination on that date all liability for accrued debts would end.

However, before one can choose between these alternatives it is necessary to address the central question, namely the meaning of clause 16 ("This surety is valid until 31 December 1994"). Langston's argument entails that the liability for debts that have accrued should cease, or be cancelled, or be discharged, at 31 December 1994. That applies not only to the debts for which it stood surety but also entails that the debts owed by the principal debtor to Langston which have in terms of the suretyship been ceded to Danco in security, should somehow be ceded back on that date. The words of clause 16 do not in terms address either of these situations. The "surety" (meaning no doubt the suretyship) is to cease to be valid. The word "valid", according to the Shorter OED means "Good or adequate in law; legally binding or efficacious". Accordingly the meaning of clause 16 is that the

suretyship will not have effect in the future. That statement tells one nothing about debts already accrued. To my mind clear words would have been needed to cancel such debts, e.g. phrases such as "liability shall be terminated", "debts shall be discharged", or the like.

Even more is this so if one has regard to the nature and purpose of the contract (*Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202 C-D), as one is enjoined to do. The normal rule in suretyship is that where a surety is entitled to give notice of termination of a continuing guarantee and he does so, his notice "obviously could only relate to amounts advanced to or becoming due by the principal debtor after the notice; the surety's liability in relation to any amount due at the time of the giving of the notice would remain unaffected" - per Williamson JA in *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A) at 555 G-H. Any arrangement to contrary effect would normally be so unbusinesslike as to require clear indications of its presence. Among other things,

if it was allowed to be present it might be possible for the surety to employ delaying tactics until the day of his release. Such clear indications are not present in this case. In *Boland Bank Ltd v Loeb and Others* 1995 (2) SA 142 (C), to take an example upon which I make no comment, they were found to exist in the wording of the suretyship "This deed of suretyship *and the surety's liability thereunder* will be valid until . . ." (own emphasis).

Reliance was placed by Langston's counsel on Voet 46.1.36. The case postulated by Voet is one where Titius is engaged in taking up a loan of 100 aurei and the surety becomes security for him in such a wise that he declines to be bound for longer than two years. In such a case, says Voet, the surety could be sued successfully only during the two years. The case is obvious enough, but I fail to see what it has to do with a continuing guarantee such as we are concerned with.

Something has been sought to be made of the fact that whereas clause 13 uses the word "termination", clause 16 employs the word "valid". The suggestion

is that this change in wording indicates that clause 16 was not concerned with termination of the suretyship but with the destruction of it and all its effects. I follow the force of this argument along the beaten path (cf *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947 (2) SA 1269 (A)); but it does not seem to me that the person who wrote the words "This surety is valid . . ." was one with a ready appreciation of the lawyer's notion that a change in wording is a *prima facie* indication of a change in intention.

Finally it has been contended for Langston that at least there is such ambiguity as to warrant a referral to evidence for proof of surrounding circumstances. The fact that there may be difficulties in arriving at an interpretation does not in itself mean that there is ambiguity. To my mind there is no ambiguity. The correct interpretation is the one that I have earlier called the third. Everything points to it: the words (*pace Port Elizabeth Electric Tramways*), the purpose of the transaction and the dictates of business efficacy.

The appeal is dismissed with costs.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
VAN HEERDEN DCJ
SMALBERGER JA
HOWIE JA
PLEWMAN JA