REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 381/04

In the matter between:

S A BREWERIES LIMITED Appellant

and

PIETER VAN ZYL Respondent

CORAM: **MPATI DP, BRAND, JAFTA, MLAMBO JJA and CACHALIA AJA**
HEARD: **1 SEPTEMBER 2005**
DELIVERED: **29 SEPTEMBER 2005**

Summary: Cession – Deed of Suretyship in respect of money owing – rights under - debt ceded – principle relating to rule 'huur gaat voor koop' has no application in law relating to cession – unless Deed of Suretyship provides otherwise, surety only liable in respect of moneys owing at time of cession of principal debt.

JUDGMENT

MPATI DP:

[1] The issue in this appeal is the extent of the liability of a surety where the creditor, as part of a sale agreement in respect of a business, ceded claims against its debtors and the cessionary, as the new owner, continues to give credit to the debtor. The facts are fairly straight forward. During July 1997 the respondent (second defendant in the court *a quo*) and four other persons (third to sixth defendants *a quo*) purchased all the shares in a company, Gensam (Pty) Ltd (first defendant *a quo*), the owner of a liquor business, Ray's Liquor Store, and consequently became its directors. On 7 July 1997 two of the directors (third and fourth defendants *a quo*) (the managers), having taken charge of the business, signed an application form 'to trade with cash and/or credit facilities' with the beer division of South African Breweries Ltd, a company registered in 1969 (SAB 69). On the same date the appellant and the other directors signed individual Deeds of Suretyship, each binding himself as surety and co-principal debtor for money 'which may at any time be or become owing' by Gensam to SAB 69.

[2] On 4 March 1999 SAB 69 sold its beer division business, as a going concern, to Lexshell 159 Investment Holdings (Pty) Ltd (Lexshell), a private company registered in 1998. In terms of the agreement of purchase and sale

SAB 69 ceded to Lexshell 'all the seller's right, title and interest in and to debtors' and 'any outstanding orders for goods in transit' with effect from 'the effective date', viz 4 March 1999. On 19 March 1999 Lexshell changed its name to South African Breweries (Pty) Ltd, which was later converted into a public company, South African Breweries Ltd, the appellant (SAB 98). The original South African Breweries Ltd had become dormant.

[3] Lexshell and its successor (SAB 98) continued to sell liquor to Gensam on account, apparently on the strength of the agreement (the credit agreement) between the latter and SAB 69. The credit agreement, according to Hermanus Jacobus Kriel (Kriel), credit manager of SAB 69 at the time, came into existence when the application for credit, signed on 7 July 1997 by the managers, was received and accepted. Because of mismanagement Gensam encountered difficulty in reducing its indebtedness to SAB 98 and in June 2000 it owed more than R610 000. Certain negotiations then took place, on how the debt was to be paid off, between Pieter Venter (third defendant *a quo*), one of the managers, and Kriel, who was now the credit manager of SAB 98, having transferred with other staff members from SAB 69 to Lexshell in terms of the agreement of sale. It was, however, clear by November 2000 that the debt was not being satisfactorily served, but as at 28 February 2001 it

had been reduced to R515 177,14. On 31 March 2001 Kriel issued a certificate of indebtedness in that amount, as contemplated in terms of clause 4 of the credit agreement, as well as clause 8 of the Deed of Suretyship.

[4] Summons was then issued against Gensam as the debtor, and against its five directors, in their capacity as sureties, for payment of the amount of R515 177,14. Judgment by default was obtained against the first, third, fourth and sixth defendants. The fifth defendant's estate had already been sequestrated and no judgment was entered against him. Only the respondent (as second defendant) defended the action. The court *a quo* (Van den Heever AJ) dismissed the action and refused leave to appeal, which was subsequently granted by this court.

[5] In dismissing the action Van den Heever AJ upheld the respondent's main defence, which was, in essence, that the respondent had never secured the debts of Gensam arising from liquor purchases made from SAB 98 on account. It had been argued, on behalf of SAB 98, that through the cession of the principal debt and by operation of law (*ex lege*), SAB 98 was substituted as creditor in the place of SAB 69. It was thus entitled to claim payment of the principal debt from the respondent as surety. This argument was pursued in this court, reliance for the proposition being placed on *Pizani and Another v*

First Consolidated Holdings (Pty) Ltd 1979 (1) 69 (A) and *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) 1042 (A). The court *a quo* held, however, that no substitution by operation of law had taken place, in respect of both the credit agreement and the Deed of Suretyship, when SAB 69 ceded its 'right, title and interest in and to the debtors' to Lexshell, and that what was ceded was only SAB 69's right of action in respect of any amounts owed to it as at the date of the cession.

[6] The *Pizani* judgment held (at 78H) that in the absence of any contrary indications in the cession or in the deed of suretyship, the cessionary acquires the cedent's rights against both the principal debtor and the surety, and may sue the surety without the necessity of a separate cession in respect of the rights against the surety. The correctness of that position was not challenged by counsel for the respondent in the present matter, nor did he submit that the Deed of Suretyship prohibits the cession by the cedent of its rights against the respondent as surety. I can find no support in *Pizani* for the proposition that a cession of the principal debt has the effect of substituting the cessionary for the cedent, which would then have the effect of burdening the surety with liability for a future debt owed to the cessionary by the principal debtor.

[7] In *Mignoel Properties*, supra, the lessor (owner) leased certain premises

to the lessee for a period of three years in terms of a written agreement of lease. After a year the lessor sold the immovable property of which the leased premises formed part. The lessee failed to pay rental for a period of eight months subsequent to the sale of the property. The new owner (the appellant) sued the respondent (and another), for payment of the outstanding rental. The respondent had, in writing, bound himself to the lessor (previous owner) as surety and co-principal debtor for the due payment by the lessee 'of all such sums which may now or at any time be or become owing by or claimable from the debtor . . . to the creditor from any cause whatsoever, in respect of' the lease. The respondent pleaded specially that, as there had been no cession to the appellant of the lessor's rights in and to the lease between it and the lessee, the appellant was not entitled to claim payment of the outstanding rental from him. It was held in that case (at 1050J-1051A) that once a lessee 'elects' to remain in the leased premises after a sale, 'the seller *ex lege* falls out of the picture and his place as lessor is taken by the purchaser'. No new contract comes into existence. The purchaser is substituted for the seller as lessor without the necessity for a cession of rights or an assignment of obligations. By such substitution the purchaser acquires all the rights which the seller had in terms of the lease. This is the effect of the maxim 'huur gaat voor koop', the court held, ie the purchaser is

substituted as lessor in place of the seller. See also *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) 926 (A).

[8] Counsel for SAB 98 submitted that this principle is similarly applicable in the instant case and that on that basis the court *a quo* should have found in favour of SAB 98. I disagree. Different considerations apply. With the sale of leased property the purchaser steps into the shoes of the seller. He or she becomes the new owner and acquires the seller's rights with regard to the lease agreement by operation of law. The seller falls out of the picture completely. No cession of rights is necessary (*Mignoel's* case, supra). In the present matter SAB 98 could not claim, from the debtors of SAB 69, payment of moneys owed to SAB 69 without the latter having ceded its rights to the debts to the former. The reason is obvious. Prior to the sale the relationship of debtor and creditor was only between SAB 69 and its debtors. SAB 98 would have had no *locus standi* to sue SAB 69's debtors for payment of debts owed to the latter. For it to be able to claim payment of such debts it would require a right to do so. And it could only acquire such right by way of the cession, whereby SAB 69 (the cedent) transferred its right of action against its debtors to Lexshell (later to become SAB 98) (the cessionary). *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) 747 (A) 762 A.

The sale of the business, without the cession, would not have conferred any rights upon SAB 98 to recover debts owed to SAB 69, and consequently would have had no right of action against the respondent as surety. It follows that the principle relating to the rule 'huur gaat voor koop' has no application in the law relating to cession of rights or assignment of obligations.

[9] What then, was the extent of the respondent's liability under the suretyship agreement? The only right of action that SAB 69 had against its debtors and which it could cede to SAB 98 at the time of the cession was the right to claim what was owed to it as at the date of the cession. It had no right of action for the future debts of its debtors and it could not cede rights that had not accrued to it. The liability of a surety being ancillary to that of the principal debtor, the respondent was accordingly only liable to be sued for payment of moneys owed to SAB 69 by Gensam on the date of the cession, viz 4 March 1999, and for moneys in respect of 'outstanding orders for goods in transit'. There was no allegation in the pleadings that the moneys sued for by SAB 98 is money that was owed to SAB 69 or moneys for 'outstanding orders for goods in transit' at the time of the cession. But the court *a quo* considered the relevant accounts and found that on 28 April 2000 the account of Gensam was in credit and that all subsequent purchases were made from SAB 98. All

amounts that were owing to SAB 69 as at the date of the cession had thus been settled, the court held.

[10] It was in my view unnecessary for the court *a quo* to embark on this exercise. There was no endeavour whatsoever, on behalf of SAB 98, to prove the amount owing by Gensam to SAB 69 as at the date of the cession of SAB 69's 'right, title and interest in and to' its debtors. Counsel for SAB 98 conceded that in the event of it being found that the respondent, as surety, was only liable for amounts owed by Gensam to SAB 69 as at the date of the cession then the action had to be dismissed. That was indeed the order of the court *a quo*.

[11] The appeal is dismissed with costs.

L MPATI DP

CONCUR:

BRAND JA)
JAFTA JA)
MLAMBO JA
CACHALIA AJA)