Understanding SASRIA Cover and why it is essential during the COVID-19 Lockdown

BACKGROUND

On or about **10 March 2003**, Charter Life Insurance Company Ltd ("**Charter**") entered into a written broking Agreement ("**the Agreement**") with ECE Financial Holdings ("**ECE**"). In terms of the Agreement, ECE was to act as an independent intermediary for Charter's financial products and as compensation for same, ECE would receive commission on premiums Charter would receive for the duration of the Agreement, on contracts issued pursuant to proposals submitted by ECE.

Between **2003** and **2005**, eight individuals, including Warren Illman ("**the Respondent**"), signed separate but identical deeds of suretyship ("**the Suretyship**"). In terms of the Suretyship, the Respondent bound himself as surety and co-principal debtor *in solidum* with ECE, for the payment to Charter of all monies which ECE could in future owe to Charter, "*from whatever cause arising*".

During **March 2003** and **March 2011**, and before having received any premiums in respect of contracts issued by Charter on proposals submitted to ECE by it, Charter paid out commissions to ECE. However, during the same period, up until **August 2011**, the contracts in respect of which commissions ECE had received, had either lapsed, were canceled or terminated by virtue of non-payment of premiums to Charter. In light of same, the advanced commissions, in the amount of **R1 029 963.50** ("**the Outstanding Amount**"), which Charter had compensated ECE for, had become repayable to Charter by ECE in terms of the Agreement, and moreover, by the sureties, including the Respondent, in terms of the Suretyship.

Charter, later, ceded to Liberty Group Ltd ("**the Appellant**"), all of its rights to claims arising from the claw-back commissions in respect of the Agreement. By virtue of same, on **22 September 2011**, the Appellant (now the cessionary) issued summons against the sureties and co-principal debtors for repayment of the Outstanding Amount. In the particulars of claim, it is alleged that the Agreement between Charter and ECE terminated on **14 March 2011**. It is valuable to note that on **29 September 2011**, the summons was served on one of the sureties, Russel September ("**Mr. September**"), who failed to deliver a notice of intention to defend and as such default judgment was grated against him. The summons was served on the Respondent on **31 March 2016**, being 5 (five) years after same was issued. Consequentially, the Respondent raised a special plea of prescription to the Appellant's claim, and alleged that by virtue of the fact that on the Appellant's version, the Agreement had terminated on **14 March 2011**, that such claim against the Respondent had prescribed after three years of said date, based on section 11 of the Prescription Act 68 of 1969.

The Appellant delivered a replication to the Respondent's plea, arguing that the Respondent and Mr. September had bound themselves as sureties and co-principal debtor *in solidum* with ECE, and therefore became co-debtors. Moreover, as the service of the summons on Mr. September was within the prescription period, the running of prescription was supposedly interrupted and as such the Appellant pleaded that its claim against the Respondent had not prescribed.

The High Court of South Africa, Gauteng Division, Pretoria ("**the Court *a quo***"), rejected what the Appellant had pleaded in its replication and upheld the Respondent's plea, dismissing the Appellant's claim with costs. The Appellant with the leave of the Court *a quo*, appeals the Order granted against them.

The Supreme Court of Appeal ("**the SCA**") was tasked in determining whether sureties who also bound themselves as co-principal debtors, such as the Respondent, became co-debtors with the principal debtor (ECE), and with each other. Secondly, the SCA was to decide whether the service of a summons on any of the sureties interrupts the running of prescription in favor of the others.

The SCA, in arriving at its decision, considered various judgments, including, *inter alia Kilroe-Daley v Barclays National Bank* [1984] 2 All SA 551; 1984 (4) SA 609 (A) ("**Kilroe-Daley Judgment**"), and *Neon and Cold Cathode Illuminations* (*Pty) v Ephron* [1978] 2 All SA 1; 1978 (1) SA 463 (A) ("**Neon Judgment**").

In the Kilroe-Daley Judgment, it was held that the addition of the words 'co-principal debtor' did not alter the agreement into any agreement other than an agreement of Suretyship. The consequence of same being that, if the principal debt became prescribed, the surety's debt, by virtue of same, had too prescribed.

In the Neon Judgment, it was held that the only consequence 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.

The Appellant made argument to the extent that the aforementioned judgment were incorrect and should be set aside. Moreover, the Appellant requested the SCA to extend the Justinian constitution to facts at hand. In terms of said constitution, 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. Voet extended this to sureties by adopting the view that interruption of prescription in respect of a principal debtor served to interrupt prescription in respect of a surety. As such, the Appellant urged the SCA to extend the aforementioned principal to the current circumstances, in terms of which the SCA would decide that the interruption of prescription in respect of a surety serves to interrupt prescription in respect of a principal debtor.

HELD

The SCA, in determining whether sureties who also bound themselves as co-principal debtors, such as the Respondent, became co-debtors with the principal debtor (ECE), rejected the Appellant's contentions and held that 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 change such an agreement into any agreement 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 same has been agreed to by the respective parties.

The SCA, in determining whether the service of a summons on any of the sureties interrupts the running of prescription in favor of the others, too rejected the Appellant's argument in this regard, and held that if it were to extend the Justinian constitution, same would constitute a considerable departure from the common law principles on the law of suretyship, and there were no persuasive reasons for the SCA to have done so. Moreover, if the principal debt became prescribed, the surety's debt, by virtue of same, had too prescribed.

As such, the SCA dismissed the appeal with costs.

VALUE

The addition of the words 'co-principal debtor' to an agreement, does not change such an agreement into any agreement 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 same has been agreed to by the respective parties. Moreover, the service of a summons on one co-surety does not interrupt the running of prescription in favour of the other sureties.

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