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An excursion into the benefit of excussion

An unusual case on suretyship considered

Asco Carbon Dioxide Ltd v Labner 2005 (3) SA 213 (N) deals with the rather infrequent situation where the surety was entitled to rely on the benefit of excussion. Although the benefit of excussion is one of the ancient benefits that were afforded to sureties by means of Justinian’s legislation (Caney’s The Law of Suretyship in South Africa 5 ed by CF Forsyth & JT Pretorius (2002) 15ff), sureties invariably waive or ‘tacitly renounce’ reliance on the benefit by undertaking liability as ‘surety and co-principal debtor’ (Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) at 472).

The benefit of excussion does not constitute a complete defence against a claim by the creditor. Rather, it is a dilatory defence, in the sense that the surety who is entitled to raise excussion can resist paying the creditor until the creditor has first excused the principal debtor.

The benefit is furthermore procedural in nature, in that the surety must raise it when litigation is instituted, with the result that the benefit then delays payment by insisting that the creditor must follow a certain procedure — he must excuss the principal debtor before seeking to recover the outstanding debt from the surety. Even if the surety is entitled to rely on the benefit of excussion, there are certain instances in which reliance would in any event be futile, such as where the principal debtor is insolvent.

Our writers have long recognized that not only is reliance on the benefit not available in all instances but also that the benefit is simply dilatory and procedural in nature. The important principle to remember, however, is that it is a remedy available to the surety when sued by the creditor to make good the undertaking to indemnify the creditor against the indebtedness of the principal debtor.

I now turn to the decision in Labner. Here we have the rather odd situation of a creditor of a company (the principal debtor) applying to court for a declaratory order against the surety to restrain the surety from issuing or executing any warrant of execution in respect of a debt allegedly owed by the creditor to the surety.

This is how it came about: The appellant (creditor) had previously applied for the liquidation of the principal debtor. The respondent (surety) was the director of the principal debtor. The appellant was granted leave to withdraw the application and was ordered to pay the costs of the application. The appellant then refused to pay the taxed costs and maintained that the respondent was personally indebted to the appellant in terms
of the suretyship undertaking and that the appellant’s indebtedness for the taxed costs was extinguished by set-off against the much larger amount owed by the respondent to the appellant. All this may sound confusing, but the long and the short of the matter is that we are dealing not with a creditor who is suing the surety but rather with a creditor who is jumping the gun by applying for a declaratory order to interdict the surety from executing on an order to pay the taxed costs, because the creditor alleges that the surety owes him money and that taxed costs have already been paid by means of set-off.

The full bench of the court confirmed the order of the court below that the application should be dismissed. As the benefit of excussion had not been renounced, the respondent (surety) was entitled to insist that the creditor must first excuss the principal debtor before the creditor could claim any amount from the surety. So set-off could not operate between the creditor and the surety, as it is a fundamental requirement for the operation of set-off that the reciprocal debts both be payable (at 222). The matter would have been quite different had the creditor brought the action on the basis that the principal debtor was unable to pay the debt and that the surety thus did not have the benefit of excussion (ibid).

There are a few aspects in the judgment that warrant further comment.

The particular undertaking before the court was that the surety personally guarantees 75% of [the] loan amount and its full repayment to the creditor within a maximum of five years’ (quoted at 215). The court below expressed doubt as to whether this undertaking actually constitutes a suretyship. To identify a contract of suretyship and to distinguish it from other forms of guarantee can be quite challenging (see Carrim v Omar 2001 (4) SA 691 (W)). The difficulty is compounded by the fact that the parties to the contract do not always use precise terminology. The appeal court in Labner expressed the view that the previously mentioned undertaking ‘has the dual effect of making the respondent a surety for 75% of the loan and a guarantor that the company would pay the loan in full within the period of five years’ (supra at 217). But the court did not consider it necessary to analyse the precise meaning and effect of the provision, and proceeded on the basis that the clause did contain a suretyship undertaking.

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The person responsible for drafting the contract between the parties made quite a hash of it. So much so that there was some confusion with regard to the proper identity of the principal debtor. The court endorsed the view put forward by Canev (op cit at 67) that where a surety undertakes to secure the debt to be incurred in future by one of two potential debtors, extrinsic evidence is admissible for the purpose of identifying the principal debtor once the debt has been incurred (Labner supra at 218). However, since the identity of the principal debtor was not called into question, the court proceeded on the basis that the suretyship undertaking was valid in law. The court observed that if the point of formal invalidity had been raised, the suretyship could not be enforced in the absence of a prayer for rectification or, at the very least, explicit extrinsic evidence demonstrating agreement as to the identity of the principal debtor (ibid).

Another noteworthy aspect of the judgment is the court’s view of Voet’s statement that the surety does not in certain circumstances have the benefit of excussion when he sues the creditor (Commentarius ad Pandectas 46.1.17, Percival Gane’s translation sub nom The Selective Voet, being the Commentary on the Pandects (Paris Edition of 1829) by Johannes Voet, and the Supplement to that Work by Johannes van
der Linden (1955-8)). In this passage, Voet remarked:

‘Then again it seems that this exception should not be allowed if a creditor is willing to set-off against his surety, when he is being sued by the surety for the payment of what he owes the surety. This is because there can be a set-off even of what is naturally due. But that a surety is naturally indebted, though he has a dilatory exception is quite clear from the fact that even when protected by the peremptory exception of division he nonetheless remains naturally a debtor to the extent that, if he has paid without raising the exception, he cannot sue in a personal action for what was paid.’

This passage is relied upon by the authors of Caney who remark that ‘Voet says that if the surety sues the creditor for a debt due by the creditor to him, the creditor can set off what is owing to him by the surety’s principal debtor; the surety is not entitled in that event to the benefit of excussion’ (op cit at 217). In Labner, the court referred to both these passages and remarked that the statement in Caney must be considered in its proper context and that Voet may have been misunderstood by his peers and successors (at 221). The court examined other passages from Voet and concluded that Voet merely dealt with the procedure in terms of which a surety could raise the claim in reconvention; he did not intend to convey that set-off can operate when the reciprocal debts are not payable (at 222). The court concluded (ibid):

‘It is obviously only after both claims have become payable that set-off can operate. To that extent, the bold statement ... from Voet, that it is set-off which deprives the surety of the benefit of excussion has validly been doubted.’

I feel that the court in Labner may perhaps have overlooked the fact that the appellant before the court was not claiming an amount from the surety. Rather, the appellant sought an interdict to restrain the creditor from issuing a warrant of execution against the appellant. Voet deals with the situation where a surety sues the creditor and the creditor maintains that the surety owes the creditor money. Surely, the surety should not then be entitled to the benefit of excussion? The correctness of Voet 46.1.17 will have to be decided on some other occasion.

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