Baumann v Thomas
(1919) 40 NPD 337

Natal Provincial Division

1919. October 15.

DOVE-WILSON, J.P., TATHAM, J., and MATTHEWS, A.J.

Flynote

Guarantee given in consideration of bond to be passed. --- Bond not passed but benefits received by guarantor. --- Subsequent repudiation of guarantee by guarantor.

Headnote

In terms of a written agreement between H., the debtor of the one part; B., the guarantor of the other part; and certain creditors of H. of the third part, H. agreed to pay not less than £20 per month in reduction of his debts, and B., who was also one of the creditors, agreed, subject to H. passing in his favour a bond for £700 over all his assets, to guarantee the monthly payments. B. took no steps whatsoever to obtain the bond, but for a period of eighteen months acquiesced in time being given to H., and received the benefit of five distributions made during that period among the creditors. Plaintiff, the trustee, under the deed sued H. for certain of the monthly payments,

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Held, that H. could not now repudiate the guarantee on the ground that a condition necessarily precedent to his liability, viz., the passing of the bond, had not been fulfilled.

Case Information

This was an appeal against the decision of the Additional Magistrate, Durban. The respondent was trustee under a deed made between one Heron of the first part, the creditors of Heron of the second part, and the respondent who was also a creditor of Heron of the third part. The deed provided that Heron should pay into the respondent trustee's hands the sum of £20 per month for distribution among the creditors until their debts were settled, and this monthly sum appellant guaranteed to pay to the respondent trustee provided Heron passed a notarial bond for £700 over all his assets in appellant's favour. The bond was not passed, but during the period of eighteen months five distributions under the deed were made to the creditors, including the appellant. The respondent upon failure by Heron to pay ensuing instalments under the deed then sued appellant in the Magistrate's Court for £60 arrear instalments, and pleaded that appellant had waived his right to the passing of the bond and had allowed the respondent and the creditors of Heron to believe that the bond had been passed or that he was otherwise satisfied, and was thereby estopped from denying liability as guarantor on the ground of non-passing of the bond. The plea denied any waiver or estoppel, and in particular averred that the alleged waiver being founded on alleged conduct or verbal communications was inadmissible and unenforceable in view of the terms of Law 12 of 1884. The Magistrate gave judgment for plaintiff as prayed, and from this decision the defendant appealed.

H.G. Mackeurtan, K.C. (with him *Stocken*), for appellant: In regard to the plea of waiver: The evidence was not in writing, and was not admissible. *Taylor Evidence, Vol. II.,* 1,144. *Halsbury,* 15, § 1,068. *Morrell v Studd,* 1912 2 Ch., 659. *Sanderson v Graves*, L.R., 10 Ex., 241. *Goss v Lord Nugent,* 110 E.R., 713. Even if admissible, the evidence does not help respondent, as the Magistrate accepted appellant's evidence that he

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thought the bond had been passed. In regard to estoppel the essentials of estoppel are set out in 13 *Halsbury,* pp. 381-383. They are not present here.

H. J. Stuart, for respondent: On the evidence of waiver, see *Mallandain v Mangena,* 14 NLR 50; *Rigby v Williams & Bell*, 29 NLR 654. Appellant admitted liability before any bond was passed; his action confirmed respondent's evidence. *Ackerman v Colonial Government,* 1869 NLR 155. *Smuts v Behrends*, 1872 NLR

71. It was appellant's duty to see he got his bond. If he can avoid liability now creditors will be prejudiced. He is estopped. *Smith v Momberg*, 12 C.S.C*.,* at p. 304. *Union Bank v Beit,* 2 CTR 89*.* Waiver need not be in writing

Mackeurtan, K.C., replied.

Judgment

DOVE-WILSON, J.P.: In my opinion the question raised by this appeal turns upon the proper construction to be put upon the agreement which is sued upon. There are three parties to the agreement --- the debtor of the first part, the creditors of the second part, and Baumann, the guarantor, of the third part. The preamble proceeds upon a narration that "whereas the guarantor has agreed to assist the debtor, and whereas all the parties have come to an agreement the conditions whereof should be reduced to writing." Then follows a provision whereby the debtor undertakes to pay not less than £20 stg. per month in reduction of the creditors' claims until they shall have received 20/- in the £. The trustee agrees to receive these sums and distribute them; and the creditors agree in consideration of the payment of these instalments not to press the debtor or take any action against him in respect of their claims. Then the guarantor agrees: "Subject to the debtor passing a notarial bond for the sum of £700 in favour of him (the guarantor) to guarantee the payments of not less than £20 per mensem to the trustee as aforesaid in reduction of the creditors' claims." Now, all three parties are parties to this agreement and to all parts of it, and it is perfectly clear that one of the foundations of the agreement, and

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no doubt a very important one, was the guarantee by Baumann; and I can only read the undertaking of the guarantor, having regard to the agreement as a whole, as meaning that he agrees to guarantee the monthly payments, at the same time taking for his own protection a bond over the assets of the debtor, and that both the. debtor and the creditors agree to his so protecting himself. The bond being for the protection of the guarantor, naturally it would be left to him to see that he got it. All he had to do was to ask for it, and in such circumstances it appears to me that he cannot be permitted to escape from his obligation under the guarantee unless he can show that he was prevented from obtaining the bond which *ex facie* of the agreement the debtor, the creditors and himself were agreed he could exact. Now, so far from his having established that there was any difficulty whatever about his obtaining the bond everything goes to show that he could have got it the moment he required it. But he took no steps whatever to obtain it, or even to ascertain whether it was in existence as, strangely enough, he says was his opinion. Further, he allowed, for a period of 18 months, the creditors, of whom he himself was one, to give time to the debtor and accept the dividends under this agreement, the foundation of which was the existence of the guarantee. He was given every opportunity from first to last of repudiating the guarantee on the ground that the bond had not been passed, but he, did not do so, and I do not think he can be allowed to do so now. On these grounds I think that the judgment appealed from was right and that the appeal should be dismissed with costs.

TATHAM, J.: The defendant was not only the guarantor under the agreement of the 19th July, 1917, but he was one of the creditors of Heron at that date, and as a creditor he benefited by the agreement for a period of 18 months, receiving no less than five distributions under it. It was quite open to him, if he chose, to treat the condition of his guarantee, if it is to be construed as a conditional guarantee, as having been fulfilled; and I

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think there can be no doubt that in fact he did treat it as having been fulfilled. By his conduct he led all the other creditors, represented by the Trustee, to treat the condition as fulfilled also and to believe that his guarantee was in force. It is therefore altogether too late for him now, after having had the benefit of the agreement for eighteen months, to repudiate his obligation on the ground that a condition, which he alleges was a condition precedent to his liability under it, was never fulfilled. I agree that the appeal should be dismissed.

MATTHEWS, A.J.: I agree.

DOVE-WILSON, J.P.: The appeal will be dismissed with costs.

Appellant's Attorney: *Stocken & Stocken*.

Respondents' Attorney: *H.J. Stuart.*

On the 28th April, 1920, the Appellate Division allowed an appeal against the decision of the Natal Provincial Division in this case, and altered the judgment of Magistrate's Court to one of absolution from the instance, with costs.