Baumann Appellant v Thomas Respondent
1920 AD 428

Appellate Division, BLOEMFONTEIN --- CAPE TOWN.

1920. March. 3, April 28.

INNES, C.J.; SOLOMON, J.A; C.G. MAASDORP, J.A.; DE VILLIERS, A.J.A; and JUTA, A.J.A.

Flynote

Debtor and creditor. --- Guarantee. --- Condition precedent. --- Estoppel. --- Waiver.

Headnote

In July, 1917, H being indebted to sundry creditors in the sum of £527 in order to avoid insolvency undertook to pay to plaintiff as trustee for the creditors a sum of £20 per month until they should have been paid in full, and in consideration thereof the creditors agreed not to press H for their claims nor take any action in respect thereof. Defendant then agreed as guarantor, "subject to the debtor passing a notarial bond for £700 over all his assets in his favour, to guarantee payment of not less than £20 per mensem to the trustee."

The bond for £700 was never passed by H and in January, 1919, the liability of H being then reduced to £167, defendant repudiated any liability under the agreement. Thereafter judgment was obtained against defendant by plaintiff in a magistrate's court for three instalments of £20 due under his guarantee.

On appeal from a decision of the Natal Provincial Division affirming the judgment of the magistrate.

Held, that on a true construction of the agreement the passing of the bond for £700 by H was a condition precedent to any liability of defendant upon his guarantee.

Held, further, that in the absence of proof that the creditors had been prejudiced by anything done by the defendant, defendant was not by his conduct estopped from denying that the bond had been passed or that he was otherwise satisfied to accept liability as a guarantor.

Held further, that as there was a conflict of evidence between H and the defendant as to whether defendant had waived his right to the bond and the magistrate had given no finding upon such conflict but had assumed that the evidence of defendant that there was no waiver was correct, the judgment of the magistrate should be altered to one of absolution from the instance.

The decision of the Natal Provincial Division in *Baumann v Thomas* reversed.

Case Information

Appeal from a decision of the Natal Provincial Division (DOVE WILSON, J.P.; TATHAM, J.; and MATTHEWS, A.J.), sitting as a Court of Appeal from a decision of the Additional Magistrate, Durban.

Plaintiff Thomas sued defendant Baumann to recover £60 under a guarantee. The Magistrate gave judgment for the plaintiff, and on appeal to the Natal Provincial Division this decision was affirmed.

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Defendant appealed after obtaining leave.

The facts appear from the judgment of SOLOMON, J.A.

P.U. Fischer, for the appellant: Assuming that the magistrate made no finding on the facts, absolution from the instance should have been granted.

As a creditor is suing, the *onus* was on him to prove that he had seen that the bond was passed. There was no undertaking in the agreement to pass the bond. If the debtor failed to pass the bond the creditors could have refused to recognise the contract.

The *onus* was on the plaintiff to prove that all that was necessary under the contract had been done or that the reason for non-performance was entirely the fault of the defendant and not at all that of plaintiff.

It was not competent to set up estoppel or any variance of the contract by parole evidence or evidence of conduct by reason of the provisions of Law 12 of 1884 (Natal).

I admit that there is an obligation on all or on nobody. Waiver can only be raised if there is a contract binding on all.

The Provincial Division did not decide whether the principle applicable was estoppel or waiver. But I base my argument on estoppel. The case of *Morrell v Stud & Millington* (1913, 2 Ch. D. 648) appears at first sight to be against my contention, but see the judgment on the Statute of Frauds and on Estoppel.

All the terms are contained in the contract. To prove estoppel, plaintiff ought to have shown that defendant had led him to believe that the bond had been passed.

The guarantee of the old debts and the guarantee of the new ones were separate and distinct.

The mere failure to reply to letters assuming liability on behalf of the defendant could not create estoppel, as there was no obligation to reply. Defendant was under no obligation till the bond was passed.

According to *Morrell's* case (*supra*) it should have been proved that defendant knew he had misled the plaintiff, and the plaintiff must as a fact have been misled. To constitute estoppel I submit that some dishonesty or quasi-fraud must be proved.

As to the question whether supervening insolvency brings the agreement to assign to an end, see *Walton v Cook* (40 Ch. D. 325).

I submit that performance has been rendered impossible.

I admit a surety would not, as a general rule, be released on sequestration, but I submit that this is a special agreement of

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guarantee, and that the guarantor is not liable on insolvency because the idea underlying the contract was to prevent insolvency and because the guarantee was only in respect of certain debts. I admit *Glegg v Gilbey* (2 QBD 6 and 209) is against me, but I submit that under our law it would be impossible for an insolvent to continue to pay debts under an assignment. See *Middelburg Divisional Council v Close* (3 S.C. 411). In the present case the surety is released by operation of law.

H.J. Stuart, for the respondent: The maxim *volenti non fit injuria* is applicable because insolvency proceedings were instituted by the defendant.

I rely on *Glegg v Gilbey* (*supra*).

All the trustee had to do under the agreement was to receive and distribute, and, on the debtor's failure, to come down on the guarantor.

Even assuming that the trustee was liable to see that the bond was passed, he did not think it was his duty. Defendant, by leading plaintiff to believe he had got the bond, induced him to believe that it was not his duty to see it passed.

As to estoppel, see Halsbury's *Laws of England,* Vol xiii, sec. 560, p. 396.

If one of the creditors had tried to compel the insolvent to pass the bond defendant could have objected, because he had the right to waive any condition in the contract.

It is the practice for the mortgagee's attorney to pass a bond. The insolvent was under no obligation under the contract to see that the bond was passed. The passing of the bond could not affect his position: see *Chiat v Oldham and Jankelowitz* 1917 CPD 575.

Fischer, replied.

Cur. adv. vult.

Postea (April 28th).

Judgment

SoLoMoN, J.A.: In the middle of 1917 one Heron, a grocer at Bellair, in the Province of Natal, found himself in financial difficulties, and to avoid insolvency he entered into negotiations with his creditors. These negotiations resulted in the agreement of the 19th July, 1917, annexed to the plaintiff's claim in the magistrate's court, which it is unnecessary to set out at length. Its

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object was to give time to the debtor to discharge his liabilities in full, which he could not have done if his creditors had then pressed him for payment. There were four parties to the agreement: (1) Heron himself, --- the debtor, (2) his creditors, (3) one Thomas, the trustee for the creditors --- the plaintiff in the action, and (4) Baumann, the defendant, called in the deed the guarantor. The debtor undertook, *inter alia,* to pay to the trustee a sum of not less than £20 *per mensem* commencing from the 1st July, 1917, in reduction of the creditors' claims against him until they shall have received 20s in the £, and in consideration thereof the creditors agreed not to press the debtor for their claims nor take any action against him in respect thereof." Then the guarantor agreed "subject to the debtor passing a notarial bond for the sum of £700 over all his assets in his favour to guarantee the payment of not less than £20 *per mensem* to the trustee as aforesaid." The deed was signed on the 19th July, 1917, and on the 24th the trustee wrote to Heron reminding him that the first payment of £20 due on the 1st July had not been made. No notice was taken of this letter by Heron, whereupon on the 28th of the same month the trustee wrote to the defendant drawing his attention to the debtor's default, and calling upon him to pay the amount. The defendant did not answer this communication, but upon its receipt he took the letter to Heron, who thereupon remitted the amount by cheque to the trustee. Similar communications passed between the trustee and the guarantor on nine subsequent occasions during a period extending up to the month of January, 1919. In no case did the latter answer the letters nor make any payments to the former, but he invariably took the letters to Heron and induced him to pay

the monthly instalments up to the end of 1918. On one or two occasions also it would appear from the evidence that he advanced money to the debtor to enable him to make the payments. On the 24th January, 1919, the defendant went to the office of the trustee to inspect the agreement of the 19th July, 1917, and immediately thereafter he repudiated any liability under it. The trustee then sued him in the Court of the magistrate of Durban for three instalments of £20 each for the months of January, February and March, 1919. His main defence was that his undertaking to guarantee the payment of the monthly instalments was conditional upon the debtor passing a notarial bond for the sum of £700 in his favour, and that this condition had not been fulfilled. Judgment was

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given against him for the sum of £60 with costs, and on appeal to the Natal Provincial Division this judgment was affirmed. Leave was then given to appeal to this Court, and the case now comes before us for final decision.

It is common cause that the bond for £700 provided for in the agreement has not been passed, but there is a direct conflict of evidence between Heron and Baumann as to the reason for this omission. The former states that immediately after the deed was signed he had a discussion with the latter on the subject, and was told by him that the bond would cost £5, and that the £5 was better spent in the business. He further states that he was always willing to pass the bond, and that he had no reason for not doing so. On the other hand, Baumann's evidence is that after the agreement was signed he saw Heron about the bond, and asked him if it were in order, to which the former replied that everything was in order and that he was not to worry. He states that he relied upon Heron's word, and believed that the bond had been passed, and that it was in the possession of the solicitor who had drawn up the agreement.

It is unfortunate that in this direct conflict of evidence there is no finding by the magistrate as to which of these witnesses was speaking the truth. He states in his reasons: "it was not easy for me to decide between Heron and Baumann . . . . . On the one hand it seems probable that Baumann did say what Heron alleges he said about the bond: on the other hand, it is equally probable that Heron told Baumann everything was in order and not to worry." There the magistrate leaves the matter, but for the purposes of the case he assumes Baumann's evidence to be correct and, notwithstanding, finds that he was liable in the action. In these circumstances we also must approach the consideration of the appeal on the assumption that Baumann's evidence is to be believed. And the first question to be decided is as to the construction to be placed upon the clause of the agreement relating to the guarantee. In the Court below the JUDGE-PRESIDENT said: "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

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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 obligations 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." If this is the correct interpretation of this clause of the agreement, it is, of course, immaterial whether Heron or Baumann is to be believed, but I regret that I am unable to agree with the construction thus placed upon it by the JUDGE-PRESIDENT. The language is perfectly clear and simple: "The guarantor agrees subject to the debtor passing a notarial bond for the sum of £700 over all his assets in favour of him (the guarantor) to guarantee the payment of not less than £20 *per mensem* to the trustee." His undertaking, therefore, was a conditional one, the condition precedent being that the debtor should pass a bond in his favour. *Prima facie,* therefore, until that condition had been fulfilled no liability attached to him. It is true, as the JUDGE-PRESIDENT says, that the bond was for his protection, but it was only on condition that he was so protected that he agreed to become guarantor. He himself had no interest in the agreement and obtained no benefit from it He intervened on behalf of the debtor purely out of friendship and because he was anxious to help him in his difficulties. The parties who stood to benefit by the agreement were the debtor and the creditors. The former obtained time to pay his debts and so staved off insolvency: the latter arranged for the payment of their debts in full, which, as admitted in the preamble to the deed, the debtor was unable at the time to effect. It was to their joint interest, therefore, to see that the bond was passed, and that the condition subject to which the defendant agreed to guarantee the payments of the instalments was fulfilled. I can find nothing in the agreement to justify the conclusion that the obligation lay upon the guarantor to see that the bond was passed, and that consequently he became liable immediately upon its being signed without regard to whether the bond was passed or not. Suppose, *e.g.*, that, when the defendant was called upon on the 28th July, 1917, for the payment of the first instalment of £20, he had replied to the trustee that the bond had not been passed, and that consequently no liability had yet attached to him. Would it have been any answer for the latter to have said: "that is a matter which does not concern me; it is for

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you to see that you get the bond, which is for your own protection, and unless you can satisfy me that you cannot obtain it, I must insist upon your paying the amount"? In my opinion, it would not have been, for the guarantor's position was an impregnable one that he had agreed to guarantee the payments only on condition that the bond was passed, and until that condition had been fulfilled he was entitled to repudiate any liability. I find myself unable, therefore, to accept the construction placed upon the clause in question by the JUDGE-PRESIDENT, or to decide the appeal upon the simple ground upon which his judgment was mainly based. That does not, however, conclude the matter, for the real case set up by the plaintiff in his summons is that "the defendant having waived his right to the passing of the bond, and having by his actions allowed the plaintiff and the creditors of Heron to believe that the bond had been passed, or that he was otherwise satisfied, is estopped from denying liability as

guarantor on the ground of the non-passing of the bond." This paragraph anticipates the setting-up by the defendant of the plea that his undertaking was a conditional one, and that the condition had not been fulfilled. Strictly, it should have been pleaded by way of reply to that defence. But, however, that may be, it becomes necessary to consider whether either waiver or estoppel has been established against the defendant. As regards the former no reliance was placed upon that ground at the hearing of the appeal. And, properly so, for if we accept Baumann's evidence, as we are bound to do, it is clear that he did not waive his right to the passing of the bond, seeing that he believed that it had actually been passed. It remains, therefore, to consider whether the defendant is by his conduct estopped from denying that the bond had been passed, or that he was otherwise satisfied to accept liability as guarantor.

The word estoppel is one which has been taken over by us from the English law, and which is now freely used in our daily practice. The doctrine, however, is as much a part of our law as it is of that of England. In the case of *Waterval G.M. Co. v New Bullion G.M. Co.* (1905, T.S p. 722) it was pointed out by CURLEWIS, J. that the estoppel *in pais* of English law is analogus to what was known in Roman Law as the *exceptio doli mali.* In his judgment the learned judge says "the application of the maxim of Roman Law *nemo contra suum factum venire debet,* would create the same legal consequences as estoppel in English law: it is practically the

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estoppel by conduct of the English law." The subject, however, has been much more fully developed by the decisions of the English Courts than it has been in our own authorities, so that in practice we usually look for guidance to the former rather than to the latter. The leading case on the subject is that of *Pickard v Sears* (6 Ad. & E. 469), where LORD DENMAN, in delivering the considered judgment of the Court, said: "But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act in that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Later in the case of *Freeman v Cooke* (18 L.J. Ex. 119) the rule here laid down was qualified as follows in the judgment of the Exchequer Chamber: "By the term 'wilfully', however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon and that it is acted upon accordingly: and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." Later decisions in the English Courts have shown that the rule in *Pickard v Sears* thus qualified, is by no means an exhaustive statement of the doctrine. In the case of *Carr v The London and N.W. Railway Co.* (10 LRCP 307), BRETT, J., formulated a number of what he calls generally recognized propositions of an estoppel *in pais,* but with reference thereto Lord MACNAGHTEN in the case of *George Whitechurch, Ltd. v Cavanagh* (1902, A.C., p. 130) says: "The doctrine of estoppel by representation is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as these which have been formulated in the case of *Carr v London and N.W. Railway Co.* Perhaps some of the difficulties which have gathered round the present case have come from clinging to rules rather than attending to principles." Now, without attempting to lay down the exact limits of the doctrine, it is sufficient for our present purpose to say that anyone who sets up a case of estoppel against

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another must, at any rate, prove not only that the latter has led him to believe in the existence of a certain state of facts, but also that he has induced him to act on that belief so as to alter his own previous position to his detriment. And, in my opinion, the question whether the defendant is estopped in this case may be decided, without regard to whether or not the creditors have been misled by his conduct, on the simple ground that, even assuming that to be so, the plaintiff has failed to prove that they have been prejudiced by anything that the defendant has done. That it is essential that this should be proved is clearly recognized law, which has been applied in many cases. In *George Whitechurch, Ltd. v Cavanagh,* already referred to, Lord ROBERTSON, in his judgment at p. 135, says: "My Lords, the case for the respondents is one of estoppel, that the person to whom the representation was made has suffered loss by acting upon it: or to put it in another way, has altered his position to his detriment by acting on the representation." He then examines the facts and concludes: "As things stand I think it has been proved that no loss was caused to the respondent by acting as he did, and that no wrong is now wrought him by the appellants averring the truth as to the shares." And in the same case Lord MACNAGHTEN says: "As regards the other points which have been discussed, I do not propose to add anything beyond saying that even if there were an estoppel the respondent would have, in my opinion, some difficulty in proving damage." It was on this ground also that in the case of *Heyman v Napier & Rounthwaite* 1917 AD 456, this Court held that the defendants had failed to establish their plea of estoppel. In his judgment the CHIEF JUSTICE says: "I prefer to base my decision upon another point. Supposing the representation to have been all that is contended for, the respondent must show that he acted upon it to his prejudice. And the *onus* of establishing that was upon him." He then examines the facts and comes to the conclusion that "the prejudice which was an essential element of the defence has not been established."

What, then, is the plaintiff's case here on this point? It is that owing to the defendant leading the creditors to believe that he had unconditionally accepted the position of guarantor they were induced to give time to the debtor, and consequently that their position had been changed. Now, undoubtedly, by giving time to the debtor their position had been changed, for they lost

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thereby the right to take legal steps to enforce their claims against him. But the evidence is wholly wanting to show that they were in any way prejudiced, or that they suffered any loss in consequence. At the time of the signing of

the agreement the debts due to the various creditors amounted, in all, to £527 9s. 10d. Had they exercised their right to press the debtor for payment at that time he must have become insolvent, as admittedly he was unable to pay his debts in full. What his exact position then was, or what dividend his estate could have paid in case of insolvency, is not disclosed by the evidence. The result, however, of the intervention of the defendant was that insolvency was staved off until February, 1919, and in the meantime the creditors received regularly £20 a month up to December, 1918, that is to say the sum of £360 in all, so that their debts were reduced from £527 to £167. To that extent, therefore, they were apparently in a distinctly better position at the date of his insolvency in February, 1919, than they would have been in had his estate been sequestrated in July, 1917. For not only have they already received two-thirds of the amount of their debts, but they, moreover, have the right to prove for the balance in his insolvent estate, so that a comparatively small dividend of 6s. 6d in the £ would result in their being paid in full. No doubt considerable delay has taken place, but at the date of the signing of the agreement they evidently considered that it was to their advantage to wait for two years to enable the debtor to discharge his liabilities by monthly instalments rather than to secure a present payment of such dividend as his insolvent estate would have yielded. It is true that we have no means from the evidence of comparing his financial positions in July, 1917, and in February, 1919, but bearing in mind that the creditors have in hand two-thirds of their debts it would, indeed, be strange if they are not better off now than they would have been if the debtor's estate had been sequestrated at the earlier date. And, in any event, the *onus* lies upon the plaintiff who has set up an estoppel against the defendant to prove that the creditors have suffered loss by his representations, and this they have certainly failed to do. On the contrary the evidence, so far as it goes, rather indicates that they have benefited by the delay in the sequestration of the estate. In these circumstances, the plaintiff having failed to prove what is an essential part of his case, it becomes unnecessary to consider whether the other requisites of an estoppel are here present.

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In the Court below great stress was laid in the judgments upon the delay that had taken place before the defendant repudiated his liability under the agreement. It is not very clear whether it was considered that this gave rise to an estoppel, for that word is not used by any of the judges in their reasons. But, in any event, seeing that, as already pointed, there is nothing to show that the creditors were prejudiced by the delay, it is impossible to endorse the view that on that ground it was too late for him at the trial to repudiate his liability. Nor can the fact that he himself was one of the creditors who benefited by the payment of the monthly instalments, which also is a point insisted upon in the Court below, affect the legal position, seeing that no detriment was caused to the other creditors by that fact.

I come to the conclusion, therefore, that, accepting the defendant's evidence at the trial as true, which is the basis upon which the magistrate decided the case, he was wrong in giving judgment for the plaintiff. If, however, Heron's explanation of the reason for not passing The bond had been accepted by the magistrate, then clearly the plaintiff should have succeeded, for in that case there would have been a waiver by the defendant of his right to the bond. The question whether Heron or the defendant spoke the truth on this point is still an open one as the magistrate gave no finding upon it. While, therefore, allowing the appeal, it is right that the judgment in the magistrate's court should be altered into one of absolution from the instance, so as to entitle the plaintiff to re-open the case, if he thinks that he can establish that in the conflict of evidence between Baumann & Heron, the evidence of the latter should be accepted. The costs in this Court, as well as in the lower Courts, must be paid by the respondent.

INNES, C.J.; C.G. MAASDORP, J.A.; DE VILLIERS, A.J.A, and JUTA, A.J.A, concurred.

Appeal accordingly allowed.

Appellant's Attorneys: *Stocken & Stocken,* Durban. *G.A. Hill,* Bloemfontein.

Respondent's Attorneys: *H.J. Stuart,* Durban; *F.S. Webber,* Bloemfontein.