



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
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Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Moss & another v KMSA Distributors (673/2018) [2019] ZASCA 81 (31 May 2019)

Today the Supreme Court of Appeal (SCA) handed down a unanimous judgment upholding an appeal against the judgment of the Gauteng Division of the High Court, Pretoria. Two appellants, Mr Edmund Harold Moss and Mr Francois De Lange appeal against a judgment of that Court, in terms of which they were ordered to pay the respondent, KMSA Distributors (Pty) Ltd (KSMA), an amount of R3 million based on a suretyship they had executed in favour of KMSA. The issue before the High Court was whether the suretyship covered liabilities arising from the sale agreement to which the R3 million debt related. The background to the debt was this: During October 2011 KMSA and Express Motor Trading (Pty) Ltd (EMT) concluded a sale agreement in terms of which KMSA sold to EMT a business known as Mean Machines. Nine months thereafter KMSA and EMT concluded another agreement, a dealer agreement, which included a suretyship executed by the two appellants in favour of KMSA in relation to EMT's obligations under that agreement. The deed of suretyship was an annexure to the main dealer agreement.

In April 2013, KMSA instituted arbitration proceedings against EMT through the Arbitration Foundation of Southern Africa, claiming an amount of R11 824 221.60 which consisted of various amounts relating to unpaid rental in respect of the premises from which the business to which the sale agreement related, was conducted. Whilst the arbitration proceedings were pending, EMT was placed under voluntary liquidation at the instance of the appellants. The claim in the arbitration proceedings was ultimately settled, with the liquidators of EMT admitting liability in the amount of R3 million. The arbitration award, made as a result of the settlement, was made an order of court. It is this court order and the suretyship executed by the appellants that formed the basis of KMSA's claim against the appellants. KMSA insisted that the suretyship covered liabilities arising under both the sale agreement and the dealership agreement. The appellants, on the other hand, contended that the suretyship only covered liabilities arising out of the dealer agreement. There were other defences raised by the appellants, however the SCA decided the matter only on this issue.

The SCA found that the deed of suretyship had to be interpreted as part of the dealership agreement of which it was part. Clause 17 of that agreement expressly limited the application of the suretyship to the dealer agreement. The suretyship could not be interpreted independently or attached to the sale agreement which was concluded prior to the dealer agreement. It was part of the composite dealer agreement and its express incorporation into and limitation to that agreement could not be ignored. The suretyship did not cover liabilities arising from the sale agreement. For these reasons the appeal succeeded and the judgment of the High Court was set aside.