Repackaging the General Prejudice Principle in Suretyship Agreements as a Breach of Contract under South African Law

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Abstract

Historically, if a creditor through his conduct prejudiced or injured a surety in the latter's rights or interest, the surety was entitled to claim release from his obligations under the general prejudice principle. However, the principle was summarily rejected by the Supreme Court of Appeal in *Bock v Dubororo Investments (Pty) Ltd* 2004 2 SA 242 (SCA), and it may now be determined whether there exists another interpretation in order to ensure its survival. This article considers the historical application of the general prejudice principle in suretyship agreements under South African law since the principle's original incorporation from the English law up until its outright rejection by the Supreme Court of Appeal in *Bock*. It then aims to reinterpret the principle in the light of ordinary contract law principles as being nothing more than a breach of contract by the creditor.

Keywords

Suretyship; surety; general prejudice principle; prejudice principle; prejudice; *Bock v Dubororo Investments*; *Bock*; creditor; principal debtor; material variation; contract law; breach of contract; tacit term.

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1 Introduction

If a creditor through his conduct towards either the surety or the principal debtor "injured" the surety in the latter's rights or interests, the surety is entitled to claim a release from his obligations. The surety may do so if the conduct of the creditor was "prejudicial" towards him in some way.[1]

This is known as the "general prejudice principle" and it was long accepted as part of South African law.[2] It was steadily developed by the courts over the years and encompasses a number of specific instances or fact patterns when a surety would be considered "prejudiced" and therefore released from his obligations.[3]

The prejudice principle was applied consistently by South African courts until the Supreme Court of Appeal in *Bock v Dubororo Investments (Pty) Ltd*[4] stated, quite succinctly, and somewhat unexpectedly, that such a general principle does not exist and never has existed in our law.[5]

An excursion through the law relating to suretyship arrangements and the prejudice principle in particular may well seem wholly unnecessary or as being a pointless exercise in revisiting a concept long since declared dead. However, questions surrounding the better safeguarding of vulnerable and perhaps unwitting debtors and sureties are surfacing more and more frequently, and the issue needs to be clarified in order that the law may come to the defence of those exposed to unscrupulous creditors.

This article sets out the development of the prejudice principle in pre-*Bock* case law and considers the effect of the judgment in *Bock* and its application in subsequent rulings. Although it comes late after the decision in *Bock* was handed down, the aim of this article is to consider whether there may still be a possible (alternative) future for the prejudice principle in our law and, in so doing, to present one possible interpretation that the principle is, in fact, nothing more than a reference to a breach of contract by the creditor. In doing so it attempts to give concrete content thereto.

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1 Roberts *Law of Contract* para 4295; Forsyth and Pretorius *Caney* 205.

2 *Fry v First National Bank of South Africa Ltd* 1996 4 SA 924 (C) (hereafter the *Fry* case); *Minister of Community Development v SA Mutual Fire and General Insurance Co Ltd* 1978 1 SA 1020 (W) (hereafter the *SA Mutual Fire and General Insurance* case); *Colonial Government v Edenborough* (1885-1886) 4 SC 290 (hereafter the *Colonial Government* case).

3 Forsyth and Pretorius *Caney* 206-209.

4 *Bock v Dubororo Investments (Pty) Ltd* 2004 2 SA 242 (SCA) (hereafter the *Bock* case).

5 *Bock case* para 21.

2 Development of the general prejudice principle

2.1 From early days in Colonial Government *to its summit in* Fry

A convenient point of departure in discussing the origin of the prejudice principle in South African law would be the judgments in *Colonial Government*, *SA Mutual Fire and General Insurance*, and *Fry*. Though the latter two cases are not the first cases dealing with the prejudice principle, they set out clearly the foundation and the content thereof, as it was applied in South African law.

In *Colonial Government* the respondents bound themselves as sureties and co-principal debtors for the due performance of a contract between one Morris and the appellant, whereby Morris was to collect and deliver certain goods to and from stores and a railway line. Morris was entitled to receive payments at delivery per ton of goods delivered and thereafter was obliged to pay the amount due to the appellant every morning to the stationmaster. The cheques sent to the appellant via Morris travelled through a number of channels before finally reaching their destination and, as such, Morris was often left with a substantial amount of money in his accounts in the several days it took for the cheque to be delivered to the appellant.

At some point the cheques began to be dishonoured and an action was brought against the sureties for the outstanding amounts. The sureties argued that they had actually been released from their liability under the deeds, as the length of time the delivery of the cheques took gave the surety ample opportunity to use the funds still in his possession for other means; thereby prejudicing them in their rights.

De Villiers CJ held that:

> [i]f, therefore, a binding contract is entered into between the creditor and the principal debtor, by which a material alteration is made in the original contract to which the surety was a party, he is clearly not bound by the new contract, and, inasmuch as the original contract is at an end, his accessory obligation ceases altogether.[6]

This case is one of the earliest applications of the prejudice principle, incorporating the ratio of the English court in *Holme v Brunskill*,[7] where that court laid the foundation for the prejudice principle and the meaning of "prejudice" to the surety.[8]

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6 *Colonial Government* case 296.

7 *Holme v Brunskill* 1878 3 QBD 495 (hereafter the *Holme* case).

8 The meaning of "prejudice" as stated in the *Holme* case is discussed more fully below at para 4.2.3.1.

In *SA Mutual Fire and General Insurance* a contract was entered into between the applicant and a building company in terms of which the latter was to construct a block of flats.

In terms of a suretyship agreement the defendant bound itself as surety and co-principal debtor for the due performance and completion of the contract and undertook to cover any loss to the plaintiff due to the non-fulfilment of the contract, limited to the amount of R48 000. After some work had been completed the building company was liquidated and the contract abandoned and, as a result, the plaintiff suffered a loss in excess of R48 000. The amount was then claimed from the surety, but the defendant claimed that it had been released from the suretyship agreement as a result of certain prejudicial acts on the part of the plaintiff to which it was not a consenting party (i.e. the defendant relied on the general prejudice principle).

In terms of the contract between the plaintiff and the builder, the former was obliged to make certain interim payments to the latter according to the assessments of a quantity surveyor employed by the plaintiff, one Frynlick, who was to visit the building site regularly in order to determine what necessary materials had been brought to the site by the building company, and then to add those amounts to the interim payment certificates.[9]

It later came to light that Frynlick had not properly discharged those duties and had highly overpaid the building company.

The defendant argued that there was an implied undertaking in the suretyship agreement to the effect that the creditor was obliged to withhold retention monies and that a failure by its agent to do so amounted to a breach of the suretyship obligation. That breach was argued to have been "detrimental to the rights and interests of the surety and consequently operated in law to discharge the surety" from the suretyship agreement.[10]

The court made reference to a "wider class of transactions or activities"; i.e. conduct by the creditor towards either the surety or the principal debtor, that operates in law to discharge the surety – the general prejudice principle. It stated that:

> It does not seem to me to matter whether there was a consensual variation of the [contract] or a mere departure from its terms in respect material to the interests of the surety. I say that because, although a material alteration of a contract between creditor and principal debtor is a well-known cause of the automatic release of the surety from his obligations, such an alteration is no more than a special case in a wider class of transactions or activities.[11]

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9 *SA Mutual Fire and General Insurance* case 1022 A-E.

10 *SA Mutual Fire and General Insurance* case 1023 A-D.

11 *SA Mutual Fire and General Insurance case* 1023 G-H.

The principle is therefore an umbrella term for a range of specific types of conduct which the courts have over the years pointed out as being prejudicial to the surety;[12] one such instance is the material alteration of the contract giving rise to the principal obligation, as in this case.[13] The court also quoted Wessels and Caney in this regard.

Wessels stated the prejudice principle as follows:

> In equity upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his right, or if he *omits* to do any act which his duty enjoins him to do and the omission proves injurious to the surety, the surety will be discharged.[14]

Caney wrote that:

> The creditor's dealings with the principal debtor and the other sureties must not have the effect of prejudicing the surety. If they do the surety is released.[15]

The court held that "there was an implied undertaking by the plaintiff to the defendant that the interim payments … would be made in accordance with the terms of the building contract."[16] The court further noted that a surety binds himself on the faith of the contract creating the principal obligation, and quoted Halsbury[17] in that "the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract."[18]

The court concluded that the overpayments made by the plaintiff's employee were prejudicial to the defendant's interests as surety, because those overpayments were made with reckless disregard for the contractual provisions,[19] and that the defendant was, therefore, automatically released from its obligations.[20]

In *Fry* the respondent lent and advanced money on overdraft to Hagra Developments (Pty) Ltd (hereafter Hagra), in which the appellants were the directors. The overdraft was secured by the appellants, who signed deeds of suretyship to that effect. It was stated in the main agreements between the parties that all documents on behalf of Hagra were to be signed by at least two of three individuals; among those were the two appellants and a third person not party to the dispute.

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12 Forsyth and Pretorius *Caney* 206-209.
13 Forsyth and Pretorius *Caney* 205-207; also see Roberts *Law of Contract* paras 4295-4314.
14 Roberts *Law of Contract* para 4346 (emphasis added).
15 Forsyth and Pretorius *Caney* 205.
16 *SA Mutual Fire and General Insurance* case 1024 E.
17 Simonds *Halsbury Laws of England* para 922.
18 *SA Mutual Fire and General Insurance* case 1024 F.
19 *SA Mutual Fire and General Insurance* case 1026 B-C.
20 *SA Mutual Fire and General Insurance* case 1024 G-H.

In the court *a quo*, judgment was granted in favour of the respondent for a claim in terms of the deed of suretyship. On appeal, the appellants argued that the respondent had breached the above instruction relating to signatures by advancing Hagra a sum on overdraft on the instruction of an insufficient number of the empowered signatories.

The court considered the judgment in *Bank of Lisbon and South Africa Ltd v De Ornelas*[21] and determined that, although it was founded on principles of equity with its origins in English law, the general prejudice principle was not based on "some broad equitable discretionary power". Nevertheless, so it held, the principle had become "firmly embedded and … established for a very long time as part of our law."[22]

In England, the principle is stated as such:

> Equity intervenes to protect the [surety]. To protect [his] right to pay the guaranteed debt and after paying it to sue the principal debtor in the name of the creditor, a [surety] is discharged if the creditor, without his consent, either releases the principle debtor or enters into a binding agreement with him to give time without reserving his rights against the [surety]. Since, by virtue of the [suretyship], a [surety] is as much concerned in very transaction with the principal debtor affecting the guaranteed liability as the creditor, any variation of the principal contract made without his consent discharges him from his [suretyship], unless the variation is clearly insubstantial or obviously cannot prejudice him.[23]

The English position also notes that where the creditor acts in bad faith towards the surety, the surety will be released.[24] However:

> [t]here is no general principle that merely irregular conduct on the part of the creditor, even if prejudicial to the interest of the [surety], discharges the [surety].[25]

This last statement seems to mean that there must be some "contrary" act by the creditor that prejudices the surety, such as varying the terms of the principal obligation or releasing a co-surety, that is not within the scope of either the principal obligation or the suretyship agreement.[26] This shall be returned to later on in this article in the South African context.

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21 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).

22 *Fry* case 931F-G; Roberts *Law of Contract* para 4346; Hay, McKinley and Wright *Halsbury's Laws of England* para 839; Magolego 2005 *Codicillus* 59.

23 Hay, McKinley and Wright Halsbury's Laws of England para 839; also see Whittaker "Suretyship" 2232-2233.

24 Hay, McKinley and Wright Halsbury's Laws of England para 839.

25 Hay, McKinley and Wright Halsbury's Laws of England para 839; also see Bank of India v Trans Continental Commodity Merchants and Patel [1983] 2 Lloyd's Rep 298 (CA) 301-302.

26 Hay, McKinley and Wright Halsbury's Laws of England paras 860, 871.

Finally, the court also noted that established business practice required that creditors act *bona fide* in their conduct when dealing with sureties.[27]

On an application to the facts of the case, the court held that the advance on the overdraft by the respondent was in breach of the instructions regarding signatures contained in the agreements between the parties and was to the prejudice of the sureties.[28]

2.2 Post **Davidson** *confusion*

A few years after the judgment in *Fry*, the Supreme Court of Appeal in *ABSA Bank Ltd v Davidson*[29] made a turnaround in the applicability of the prejudice principle in our law.

In that case the respondent, in his capacity as a director of Whistlers Interiors (Pty) Ltd (hereafter Whistlers), applied to the appellant on Whistler's behalf for the opening of a cheque account. The agreement between the appellant and Whistlers contained a clause stating that the latter would appoint persons to operate the account and sign all documents in connection with its transactions, the agreement being similar to that in *Fry*. The respondent and another director, one Myburgh, bound themselves as sureties and co-principal debtors for the proper performance by Whistlers.

After being sued in terms of the suretyship for the amount owed by Whistlers the respondent argued that the appellant was guilty of two prejudicial acts that released him from his obligations under the deed of suretyship.

The court stated "[t]hat such a wide and unqualified [general prejudice] principle exists in our law cannot be correct"[30] and that the principle must be limited to situations where the prejudice to the surety was caused by the breach of a legal duty or obligation that originated from either the contract giving rise to the principal debt or the suretyship agreement.

According to the court:

> [a]s a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer.[31]

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27 *Fry* case 931 H.
28 *Fry* case 935 B.
29 *ABSA Bank Ltd v Davidson* 2000 1 SA 1117 (SCA) (hereafter the *Davidson* case).
30 *Davidson* case para 14.
31 *Davidson* case para 19.

In the end the court did not uphold the defences put forward by the respondent on the basis that the contract giving rise to the principal obligation expressly allowed for the conduct of the appellant.[32] It is trite that if the conduct is prohibited by either the suretyship agreement or the contract giving rise to the principal debt, the surety will be released.[33]

The facts in *Davidson* were substantially similar to those in both *Fry* and *SA Mutual Fire and General Insurance*, all three dealing with a creditor that deviated from the terms in the principal agreement, yet the Supreme Court of Appeal in *Davidson* refused to recognise the general prejudice principle. It is arguable that the court in that case decided the matter based on merely an interpretation of the contract giving rise to the principal obligation and suretyship agreement, making an application of the prejudice principle unnecessary. It has already been accepted in South African courts and by the court in *Davidson* itself that the primary sources of a creditor's rights and duties are the principal agreement and the suretyship.[34] In other words, if the creditor's conduct is allowed by either agreement it would stand, and the surety would not be released.[35]

The judgment of the Appellate Division in *Davidson* was followed in *Investec Bank Ltd v Lewis*,[36] but not in *Spur Steak Ranches v Mentz* (wherein Davis J took a flexible approach to determining prejudice),[37] or in *Di Giulio v First National Bank of South Africa Ltd*.[38]

In the latter case, the appellant had bound himself as surety and co-principal debtor in favour of the respondent, for proper performance by Soundprops 1094 Investments (Pty) Ltd (hereafter Soundprops). In response to being sued for the principal debt, the appellant argued that he was released from his obligations in terms of the suretyship agreement due to the respondent's honouring of several cheques and withdrawals in breach of its agreement with Soundprops. Allegedly, the agreement provided that the respondent would honour such transactions only when one of a list of "signing officers" approved the transaction; which was not done on numerous occasions.

Although the court dismissed the appeal due to a failure by the appellant to discharge the onus, it made a number of statements relating to the general prejudice principle.

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32 Davidson case paras 20-27; also see the more recent *Antalis South Africa (Pty) Ltd v C* (unreported) case number 73947/2010 of 20 March 2014.

33 Forsyth and Pretorius *Caney* 206.

34 *Davidson* case para 19; *SA Mutual Fire and General Insurance* case 1024 E-F.

35 Forsyth and Pretorius *Caney* 206.

36 *Investec Bank Ltd v Lewis* 2002 2 SA 111 (C) (hereafter the *Lewis* case).

37 *Spur Steak Ranches v Mentz* 2000 3 SA 755 (C).

38 *Di Giulio v First National Bank of South Africa Ltd* 2002 6 SA 281 (C) (hereafter the *Di Giulio* case).

The court considered the judgments in both *Fry* and *SA Mutual Fire and General Insurance* and confirmed that the principle, though founded on the principles of equity, has been firmly established as a part of our law.[39] Van Zyl J noted that "equity goes hand in hand with … justice, reasonableness, good faith (*bona fides*) and good morals (*boni mores*) or public policy" and that the principle is an example of how those values work together to achieve a "fair and just result".[40]

With reference to the judgment in *Davidson*, the court was of the opinion that the qualification of the rule given there[41] did not limit the applicability of the values stated above.[42] Furthermore, any prejudice to the surety would normally arise from a breach by the creditor of either the suretyship agreement or the principal obligation.[43]

Van Zyl J proposed a formulation for the principle based on considerations of "justice, fairness, reasonableness, good faith and public policy",[44] and though it was a more sensible approach to determining the applicability of the prejudice principle than its outright rejection in *Davidson*, even if slightly over-oriented towards judicial discretion, it could not save the prejudice principle from the court in *Bock*.

The development of the prejudice principle up until the judgment in *Bock* was fairly consistent, barring the superfluous statements in *Davidson*. However, the Supreme Court of Appeal would soon halt the application of the prejudice principle in its tracks.

3 *Bock* and its aftermath

In *Bock* the appellants stood as sureties for a number of loans in favour of LS Molope Holdings (Pty) Ltd, the principal debtor. In terms of the agreements a large number of shares in the principal debtor's parent company, Molope Group Ltd, were also pledged to the creditors (a number of banks) as security for the loans.

When the principal debtor defaulted, the respondent (then the creditor in terms of a cession agreement with the banks) called in the loans and took over the pledged shares in terms of the loan agreement. The pledge permitted the creditors to "immediately and at any time … at [their] discretion … realise the securities … or take over the securities at the bank's discretion at a fair value."[45] In other words, the creditors had the option of either (i)

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39 *Di Giulio* case paras 31-33, 37.
40 *Di Giulio* case para 38.
41 *Davidson* case para 19.
42 *Di Giulio* case para 39.
43 *Di Giulio* case para 40.
44 *Di Giulio* case para 40.
45 *Bock* case para 5.

realising the pledged shares; or (ii) taking them over, but was not obliged to do either.

The respondents wished to claim the remainder of the outstanding debt and, upon instituting action, the appellants argued that the respondent had acted to their prejudice in the taking over of the pledged shares in a manner that led to a reduced value at realisation.

The court rejected the appellants' arguments based upon an interpretation of the agreements between the parties.[46] On the issue of the general prejudice principle, the court stated unequivocally that it agreed with the judgment in *Davidson*, that no such general principle exists in our law.[47] Furthermore, the court also dealt with the statements of the court in *Di Giulio* and stated that the values set out therein for consideration when dealing with the general prejudice principle would be appropriate "where a judicial discretion is involved or a value judgment called for" but not when dealing with the release of a surety.[48] Further, that "making all rules of law discretionary or subject to value judgments may be destructive of the principle [of legality]" and that the statements made by Van Zyl J were, in any event, in conflict with *Brisley v Drotsky*.[49]

Pretorius noted that one of the main concerns with the court's reliance on *Davidson* was that the latter case did not refer to any authority for stating that the general prejudice principle did not exist, nor did it fully consider the law relating to the principle.[50] He argued further that *Davidson*, and by extension *Bock*, could be authority only for the principle that "where the allegedly prejudicial conduct is authorised by the principal obligation … or the suretyship, the surety cannot complain."[51] This was not novel, and has long been accepted in South African law.[52]

The judgment in *Bock*, as well as the court's conclusion in *Davidson*, hinged on an interpretation of the agreements between the parties and not upon an application of the general prejudice principle.[53] Because of this, some authors have suggested that the statements in *Bock* were *obiter* and did not have any effect on the continued existence of the principle.[54] Regardless of

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46 Pretorius 2005 *SA Merc LJ* 386.
47 *Bock* case para 21.
48 *Bock* case para 21; *Di Giulio* case para 19.
49 *Bock* case para 21; *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 11-24 (hereafter the *Brisley* case); see Van Zyl J in the *Di Giulio* case paras 38-41.
50 Pretorius 2005 *SA Merc LJ* 385-386.
51 Pretorius 2005 *SA Merc LJ* 386.
52 *SA Mutual Fire and General Insurance* case 1024 E-F; Forsyth and Pretorius *Caney* 206.
53 Pretorius 2005 *SA Merc LJ* 386.
54 Pretorius 2005 *SA Merc LJ* 386; Magolego 2005 *Codicillus* 61; Pretorius 2005 *JBL* 49.

the arguably *obiter* nature of the statements in *Bock*, subsequent cases have cited the judgment with approval.

Some authors have also noted that the decision in *Bock* was in fact heavily influenced by the Supreme Court of Appeal's judgment in *Brisley*.[55] In that case the court held that as far as good faith justified using the *boni mores* of the community to determine the enforceability of a contractual term, that standard is not applicable in South African law of contract.[56]

It is in the light of this rejection of the role of good faith that the judgment in *Bock* was delivered. In fact, the judgment in *Brisley* was handed down slightly over one year before *Bock*. At the time (though this is pure speculation) it is possible that the protection of *pacta sunt servanda* was uppermost in the mind of the Supreme Court of Appeal, hence the outright rejection in *Bock* of Van Zyl J's public policy and good faith-driven formulation of the principle in *Di Giulio*.[57]

It seems that the main concern for the court in *Bock* was that the general prejudice principle did not have any concrete contract law application but seemed to be nothing more than a wholly discretionary value judgment.[58] Here again there is an indirect reference to *Brisley,* where the court in that case stood firmly against granting individual judges a discretion to strike down terms that may be "unreasonable or unfair" in the mind of a single judge, as that would have the consequence of undermining the principle of *pacta sunt servanda*.[59]

Most courts after *Bock* have followed its lead in stating that the general prejudice principle has ceased to exist in our law, in simply making no reference to the principle at all, or in stating that the defence had proved unsuccessful.[60] The application of the general prejudice principle, in its pre-*Bock* form, seems to have come to a halt.

Only a few months *before* the judgment in *Bock*, the Supreme Court of Appeal in *Jans v Nedcor Bank Ltd*[61] was faced with the question of whether

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55 Pretorius 2005 *SA Merc LJ* 386-387; Magolego 2005 *Codicillus* 61.

56 *Brisley* case paras 11-24.

57 *Bock* case para 21; see Van Zyl J in the *Di Giulio* case paras 38-41.

58 *Brisley* case para 21.

59 *Brisley* case para 24.

60 See, amongst others: Fedbond Nominees (Pty) Ltd v Meier 2008 1 SA 458 (C); New Port Finance Company (Pty) Ltd v Nedbank Ltd 2016 5 SA 503 (SCA); Lodhi 5 Properties Investments CC v Firstrand Bank Ltd 2015 3 All SA 32 (SCA); Dominick v Nedbank Limited (20463/14) [2015] ZASCA 160 (13 November 2015); Firstrand Bank Ltd v Hazan, Firstrand Bank Ltd v Hazan Wholesalers and Distributors CC 2016 2 All SA 112 (GJ); Arijs v Firstrand Bank Ltd (39338/2014) [2018] ZAGPJHC 402 (29 May 2018); Firstrand Bank Ltd v Barreiro (91920/19) [2020] ZAGPPHC 287 (25 June 2020).

61 *Jans v Nedcor Bank Ltd* 2003 5 SA 646 (SCA) (hereafter the *Jans* case).

an interruption in the prescription of a debt also interrupted the prescription of a surety's obligation. In that case the appellant had entered into a suretyship agreement in terms of which she had bound herself jointly and severally as surety and co-principal debtor for the debt of Ryday Construction (Pty) Ltd, which became indebted to the respondent.

The court stated that a suretyship agreement is burdensome by nature and the law therefore affords a surety protection in releasing him or her "if the creditor does something in his dealings with the principal debtor which has the effect of prejudicing the surety."[62] Only a few months before the court in *Bock* made to dispose of the general prejudice principle, a different panel in the same court upheld its existence.

The question now is whether accepted instances of prejudicial conduct by the creditor can be treated in terms of other contract law rules to make the application of the prejudice principle more concrete, thereby perhaps satisfying the concerns raised in *Bock et al*.

The next part of this article will consider the possibility of bringing the general prejudice principle home as a breach of contract by the creditor of the suretyship agreement.

4 A possible (alternative) future of the general prejudice principle

4.1 The meaning of "prejudice"

In order to determine whether the prejudice principle can be catered for by other subsets of the law of contract, it should first be established what is actually meant by the surety's "prejudice".[63]

Wessels noted that our law takes the position that "the creditor may improve the position of the surety but he may not render his liability more burdensome."[64] Though the formulation put forward by Caney did not provide a definition of "prejudice", two examples given where prejudice would arise and the surety be released are instructive.

Caney wrote that a surety will *not* be released where a creditor obtains additional sureties to further secure the principal obligation, because in that case there would be no "prejudice", as the contractual obligation or risk that the surety must bear would be diminished by the presence of further co-sureties to absorb a claim from the creditor. Conversely, where the creditor

62 *Jans* case para 30.
63 Forsyth and Pretorius *Caney* 205.
64 Roberts *Law of Contract* para 4295.

releases a co-surety the contractual obligation of the surety in question would be increased and the surety released.[65]

He wrote further that where the creditor gives the principal debtor further time to pay, that would amount to a variation of the principal obligation that prejudices the surety, because it would deprive the surety of the right to recourse he would have had at the due date,[66] thereby increasing the contractual burden or risk that the surety would have to bear.

This interpretation is in line with those given in past judgments. In *Di Giulio*, Van Zyl J's formulation referred to the creditor's conduct "unduly increasing the contractual burden of the surety."[67] In *SA Mutual Fire and General Insurance* the court held that the conduct of the creditor's agent released the surety as it had been "detrimental to the rights and interests of the surety."[68]

In attempting to provide a formulation for the principle Magolego writes that the conduct of the creditor should "actually and materially increase the risk of the surety."[69] The author states that this would mean that the surety would need to show that his "risk" has been "materially increased" as a result of the creditor's conduct, determined with reference to the quantum of that increased "risk".[70]

Whatever the correct definition of prejudice may be, it is at least clear that there must be some increase in the contractual burden that the surety bears due to the creditor's conduct. If there is no such increase or in fact a decrease in the burden, then the surety will not be "prejudiced" in whatever may be the final meaning of that term.

4.2 The accepted instances of prejudicial conduct and breach of contract

4.2.1 Introduction

Caney identified four types of conduct of the creditor that would prejudice the surety and therefore release him from his obligations.[71] First, where the surety is prejudiced through a variation of or departure from the principal obligation.[72] Secondly, where the surety is prejudiced through the creditor's granting of an extension of time to pay to the principal debtor.[73] Thirdly,

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65 Forsyth and Pretorius *Caney* 207; Roberts *Law of Contract* para 4336.
66 Forsyth and Pretorius *Caney* 208.
67 *Di Giulio* case para 41.
68 *SA Mutual Fire and General Insurance* case 1023 A-D.
69 Magolego 2005 *Codicillus* 62.
70 Magolego 2005 *Codicillus* 62-63.
71 Forsyth and Pretorius *Caney* 205-210.
72 Forsyth and Pretorius *Caney* 205.
73 Forsyth and Pretorius *Caney* 208.

prejudice to the surety through an agreement between the creditor and the principal debtor to not enforce the principal obligation.[74] Lastly, where the creditor breaches his contract with the surety due to the non-observation of an express or implied duty which the creditor undertook.[75]

In terms of their respective variations of either the principal obligation or the suretyship agreement, the types of conduct can generally be placed under two main categories.

First, prejudice arising from a material variation of or departure from the suretyship agreement would arise where the creditor does not observe the terms of the actual suretyship agreement between himself and the surety.

Secondly, prejudice arising from a material variation of or departure from the principal obligation would include varying the term in the principal obligation regulating the time of payment to be changed; and also an agreement between the debtor and the creditor not to enforce the obligation, as that would render the obligation itself non-enforceable by the creditor, leaving the surety to be sued for the debt.

These two categories are distinct from each other, as in the first instance there was some conduct of the creditor that was not in line with the suretyship agreement itself, whereas in the latter instance the conduct of the creditor is departing from the terms of the principal obligation – to which the surety is not necessarily a party. In the latter case there may be something more required before the surety can be said to be released. Both of these categories will be discussed in turn.

4.2.2 Material variation of, or departure from, the suretyship agreement

The first category is where the creditor varies or departs from a term in the suretyship agreement, where the terms of the agreement were set out at the time of contracting.[76]

Wessels wrote that "[i]f the failure of the creditor to carry out the terms of the suretyship agreement can fairly be construed into a breach of contract between himself and the surety, the latter is discharged."[77] Furthermore, if the breach occurred in terms of the suretyship agreement itself, then prejudice would not be a consideration that the court would take into account in determining whether the surety would be released.[78]

One instance of such a variation or departure would arise where more than one surety bound himself to the same suretyship agreement, or in respect

74 Forsyth and Pretorius *Caney* 208.
75 Forsyth and Pretorius *Caney* 209.
76 Roberts *Law of Contract* para 4315.
77 Roberts *Law of Contract* para 4316.
78 Forsyth and Pretorius *Caney* 210 fn 181.

of the same debt, and the creditor released only one of the co-sureties.[79] The reason for the release of the surety in these instances is said to be the loss of his right of recourse against the co-surety.[80]

Another instance is where the surety bound himself to the suretyship agreement which included an express term that the creditor would undertake to perform some act.[81] In this regard Wessels gives an example from the English case of *Watts v Shuttleworth*,[82] where a surety agreed to the suretyship agreement which contained a term stating that the creditor "must" take fire insurance, and the creditor's failure to do so released the surety.[83]

In *Watts* the court held that the creditor's failure to take out the fire insurance was nothing more than an omission of the creditor to comply with the terms of the agreement with the surety.[84] The court's reasoning was based almost entirely on the consideration of a failure to comply with the terms of the suretyship agreement (akin to a breach of contract). In fact, the concept of prejudice appeared not once in the judgment; most likely because a breach of the suretyship agreement would be enough to release the surety *without more*.

In *Fry* the appellants' argument also rested on the same basis. They argued that the signing arrangements "governed the relationship between all the parties" and that a divergence from those arrangements amounted to a breach.[85] Because the signing arrangements had been included in the agreements between the parties, a failure to comply with them on the part of the creditor would necessarily mean that it had breached its contract with the surety.

In *Standard Bank of South Africa Ltd v Cohen*[86] the plaintiff sued the defendant for an amount of R33 000 in terms of two suretyship agreements entered into between the defendant, as surety and co-principal debtor, and the plaintiff. The agreements were entered into as security for the debts of a single principal debtor, more specifically an overdraft facility taken out with the plaintiff. The court accepted the defendant's argument that it was agreed between the parties that the principal debtor's overdraft could be increased beyond the originally agreed limits only with the consent of the surety.[87] The

79 Roberts *Law of Contract* paras 4335-4337.
80 Roberts *Law of Contract* para 4336.
81 Forsyth and Pretorius *Caney* 209.
82 *Watts v Shuttleworth* 1861 158 ER 510 (hereafter the *Watts* case).
83 Roberts *Law of Contract* para 4346.
84 *Watts* case 510-511.
85 *Fry* case 926 F-G.
86 *Standard Bank of South Africa Ltd v Cohen* 1993 3 SA 854 (SE) (hereafter the *Cohen* case).
87 *Cohen* case 854 I-860 GH.

creditor's subsequent increase of the overdraft facility was therefore a breach of the agreement between the parties.[88]

Much the same occurred in *Administrator General South West Africa v Trust Bank of Africa Ltd*.[89] The Department of Water Affairs and a building company entered into an agreement whereby the builder was to construct a water scheme in Namibia. The defendant bound itself as a surety and co-principal debtor, guaranteeing full and proper performance by the builder. The building company failed to perform in terms of its contract and was placed under provisional sequestration, leaving the defendant to be sued for the debt.

The defendant argued that it had been released from its obligations owing to certain conduct of the creditor. The suretyship agreement in question contained a clause that mandated the creditor to investigate whether the builder had already paid for materials used before it could make interim payments to the builder for those materials. The creditor failed to comply with this clause and certified payment for an amount of just over R150 000 for the purchasing of reinforced steel.

The court accepted that the conduct of the creditor was not only a clear departure from the terms of the agreement, but "a serious breach of contract on the part of [the creditor]".[90] Taking into account "the evidence and all the surrounding circumstances", it was clear to the court that the overpayments represented a "very material departure from the terms of the agreement".[91]

Where the surety and the creditor set out the terms of the suretyship agreement the creditor must observe those terms and cannot vary or depart from them without the consent of the surety. If the creditor does so, the surety is released because such a variation or departure amounts to a breach of the suretyship agreement between the creditor and the surety.

Caney noted that in the first set of cases there actually need not be any prejudice to the surety at all.[92] This would mean that a departure from the terms of the suretyship agreement would in most instances amount to nothing more than a breach of contract by the creditor.

It is in the second category that the inquiry becomes more involved and the issue of prejudice comes to the fore.

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88 *Cohen* case 863 D-E.

89 *Administrator General South West Africa v Trust Bank of Africa Ltd* 1982 1 SA 635 (SWA) (hereafter the *Administrator General* case).

90 *Administrator General* case 645 E.

91 *Administrator General* case 644 E.

92 Forsyth and Pretorius *Caney* 210 fn 181.

4.2.3 Material variation of, or departure from, the principal obligation

In the above category it was determined that a variation or departure from the suretyship agreement by the creditor amounted to nothing more than a breach of contract where the breached term was expressly included in the suretyship agreement.

However, there are certain instances where the creditor's conduct does not touch upon an express term in the suretyship agreement but rather has an effect on a term in the contract giving rise to the principal obligation. This is one of the most historically prevalent cases of prejudice; where the creditor and the principal debtor, without the surety's consent, made a material variation to a term in the contract creating the principal obligation, which is prejudicial to the surety.[93]

The historical formulation of this category presents two requirements for the surety to be discharged. First, the variation must be "material", and secondly, there must be prejudice to the surety.

The requirement of prejudice under this category is referred to by Wessels in relation to circumstances where the surety bound himself in "general terms", as opposed to being bound in specific terms.[94] In the former case he must show that he has suffered prejudice. In "general terms" means that the terms of the contract giving rise to the principal obligation had not been known to the surety when he entered into the suretyship agreement; as opposed to binding oneself in "specific terms", where the terms included in the principal obligation were stated in the suretyship and were known by the surety.

The question then arises whether prejudice would be a requirement in cases where the surety bound himself in specific terms, i.e. where the terms of the contract giving rise to the principal obligation were included in the suretyship agreement.

The answer to this must be no. Though Wessels does not explicitly touch upon this issue, he gave some examples that are telling. For instance, where the surety enters into the suretyship agreement on the understanding that the creditor would retain certain securities and the creditor fails to do so, the surety is released without a question of prejudice.[95]

The English position, however, turns the inquiry around. In English law it is accepted that any variation of the principal obligation by the creditor will release the surety; unless the variation is "insubstantial", does not *have the*

93 Forsyth and Pretorius *Caney* 205-207; Roberts *Law of Contract* paras 4295, 4307; also see the *Colonial Government* case generally.

94 Roberts *Law of Contract* paras 4297, 4313-4314.

95 Roberts *Law of Contract* para 4305.

capacity to prejudice the surety, or is "merely irregular".[96] In other words, if the variation would in the bigger scheme of things have no possibility of having effect upon the rights and interests of the surety, then the surety will not be released. This is a very low threshold for prejudice, making the requirement almost akin to requiring that the impact on the surety must simply not be *de minimis*.

For instance, take the judgment in *Holme* (which the court in *Colonial Government* supported as being in line with South African law),[97] in which the defendant stood as surety to guarantee that the principal debtor, the tenant of a farm, would at the expiration of his lease deliver a flock of sheep in good condition to the creditor. In the meantime and without the consent of the surety the principal debtor and the creditor agreed that the rent for the land would be reduced in exchange for the principal debtor’s giving up a small portion of the land. The court upheld the release of the surety on the basis that the surrender of the land might have made it more difficult for the principal debtor to look after the sheep and perhaps make him unable to deliver them at the end of the lease period. Even though there was absolutely no actual prejudice to the surety, the mere fact that there were specific terms upon which the surety relied when he entered into the obligation (i.e. to which he bound himself in "specific terms"), meant that a variation of those terms released the surety.

Taking into account the English position in conjunction with Wessels' construction of a surety who bound himself in "general terms", it seems that the requirement of prejudice is applicable only in situations where the surety was unaware of the terms of the contract giving rise to the principle obligation.

Where the surety entered into the suretyship agreement in "specific terms", however, prejudice to the surety does not truly play a role in the determination of whether the surety ought to be released. This would make sense, for how can it be said that a creditor could get away with not observing the terms of the principal obligation merely because there is the "extra" requirement of that conduct’s having to prejudice the surety? If the surety trusts in the creditor's observance of those specific terms (for that is all he can do) and the creditor does not do so, a court should not require harm to the surety above and beyond that breach, for the main concern should be the protection of the surety.

96 Hay, McKinley and Wright *Halsbury's Laws of England* para 839; Whittaker "Suretyship" 2232-2233; see also *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506.

97 For a discussion of the case see Whittaker "Suretyship" 2233.

It is clear that the issue of prejudice would be applicable only to cases where the terms of the contract giving rise to the principal obligation were not included in the suretyship agreement.

However, before we touch upon that, a second question remains to be determined; i.e., when would a breach be "material"?

The most likely suggestion would be where the surety entered into the suretyship agreement on the basis of a certain "material" term in the principal obligation, so that that term has become a tacit one in the suretyship agreement.

It must be understood that the requirement of "materiality" is not necessarily the same as it is generally understood in the law of contract. Rather, it refers to a situation where the term that was varied by the creditor was a "material" consideration for the surety in his agreement to be bound. Wessels wrote that if it is reasonably possible that the surety would not have consented to the variation had it been included in the original contract giving rise to the principal obligation, then the surety will be released.[98]

The first half of the sentence in this formulation may point towards the test of the materiality of the variation; i.e. whether the surety would have entered into the contract had the varied term been included in the first place. If the answer is "no", then the term would be a material one.

The materiality requirement as set out by Wessels can be put in slightly different (and clearer) terms. Caney writes that the surety would be released where the creditor, by varying the suretyship agreement, had breached a duty undertaken either expressly or impliedly, and "that duty formed a *condition* upon which basis the surety has undertaken his obligations."[99] In other words, where the surety entered into the suretyship agreement on the basis of the creditor’s undertaking a particular duty, then that term has become a "condition" for the surety's undertaking of liability.

Caney's reference to a "condition" probably means that if the term in the principal obligation has become a tacit term of the suretyship agreement (i.e. the surety would not have entered into the suretyship agreement without the express or implied duty contained in the principal obligation and an interpretation of the agreements found that the term has become a tacit one in the suretyship agreement), then a failure to perform that duty would be a breach of the suretyship obligation that would release the surety.

Caney gives the example of a creditor undertaking liability on the basis that the creditor would register a mortgage over the debtor's property.[100] If the

98 Roberts *Law of Contract* para 4299.
99 Forsyth and Pretorius *Caney* 209 (emphasis added).
100 Forsyth and Pretorius *Caney* 209.

undertaking was so important to the surety that he bound himself to the creditor on the basis thereof, then it may well be that the term as arising from the principal obligation has become a tacit term of the suretyship agreement and a breach thereof would release the surety.

To concretise by way of example, in *SA Mutual Fire and General Insurance* the surety argued that the creditor had breached an implied duty in the suretyship agreement.[101] The term in question, in fact, originated from the principal obligation where it placed a duty on the creditor to effect the interim payments to the principal debtor in a specific way. However, because the surety had entered into the contract "on the basis of" that term or bound itself "in specific terms" in relation to the principal obligation or "on the faith of" that particular term (for these formulations are all synonymous with one another), the duty had become a tacit term of the suretyship agreement." Therefore, a breach of that term in the context of the principal obligation would necessarily mean that there was also a breach of the same term (though tacit) in the suretyship agreement, releasing the surety. Because they are, at the end of the day, the same term and duty, they are applicable to both documents at the same time. The court in fact held that the term formed a condition upon which basis the surety undertook his obligations, as per the formulation given by Caney.[102]

Much the same position as the above had been forward under English law, where South African law finds its prejudice principle. There, a surety will be discharged if there is a variation or departure from the terms of the principal contract, regardless of materiality, as long as it is clear from the suretyship agreement and the principal obligation that the surety entered into his obligation "on the faith of the original contract" or if the terms in the principal obligation are a part of the suretyship agreement.[103] In fact, where the terms of the principal obligation are included, expressly or tacitly, in the suretyship agreement, "any breach of [those terms] constitutes a breach of the guarantee itself."[104] This release would occur without the need for any actual prejudice to the surety.[105]

In *The Wardens and Commonalty of the Mystery of Mercers of the City of London v New Hampshire Insurance Company*[106] the appellant proposed to place a building contract with Rush and Tompkins Ltd (hereafter Rush), which was to be payable through interim payments to be issued monthly (in much the same manner as the building contract in *SA Mutual Fire and*

101 *SA Mutual Fire and General Insurance* case 1023A-D.
102 Forsyth and Pretorius *Caney* 209.
103 Roberts *Law of Contract* para 4311.
104 Roberts *Law of Contract* para 4312.
105 Whittaker "Suretyship" 2232.
106 *The Wardens and Commonalty of the Mystery of Mercers of the City of London v New Hampshire Insurance Company* 1992 WL 895900.

General Insurance). The respondent provided financing for the endeavour by guaranteeing any loss that might arise from the non-completion of the contract (I will refer to this as the "suretyship agreement"). In terms of the agreements between the parties, the appellant was to give possession of the building site to Rush by a certain date to begin construction; though this was not done until four weeks after the date stipulated in the agreement.

Construction began shortly after possession had been given and interim payment certificates were issued to Rush to an amount exceeding £1 million. However, Rush went bankrupt and the appellant sought to reclaim the amounts from the respondent in terms of the suretyship agreement. The respondent argued that the delay by the appellant (the creditor) in giving possession of the building site to Rush (the principal debtor), amounted to a breach of an implied duty in the suretyship agreement that the possession would be handed over at the time put forward in the principal obligation. The time stated in the principal obligation was, as such, argued to have been *implied* in the suretyship agreement through a tacit term.

The court quoted with approval the judgment in *National Westminster Bank plc v Riley*,[107] wherein the court stated that a breach of the principal obligation by the creditor would release the surety if it amounted to a departure from the terms in the principal obligation, if those terms were included either expressly or impliedly in the suretyship agreement (or "embodied" in the suretyship agreement). Even though the court in *Mercers* did not find that the terms of the principal obligation were in fact included in the suretyship agreement, it did give a definition of such an "embodiment". The court held that this would require that the term in question "is the contractual basis of the suretyship obligation." In other words, where the surety bound himself "on the basis of" certain terms being present in the contract giving rise to the principal obligation, those terms would be tacitly embodied in the suretyship agreement. This means that if they were to be breached by the creditor in his dealings with the principal debtor in the context of the principal obligation, the suretyship agreement would also be breached because the same term arose therein, albeit tacitly.

If Caney and Wessels' statements relating to the "materiality" of a variation means nothing more than the breach of a tacit term in the suretyship agreement, then those instances would be closely linked to the position under the English law "embodiment".

To state the submission more succinctly: where the surety enters into a suretyship agreement on the basis of a term existing in the principal obligation and it is found by a court that the term has become a tacit one in the suretyship agreement, a creditor's variation or departure from that term

107 *National Westminster Bank plc v Riley* [1986] BCLC 268.

in his dealings with the principal debtor would amount to a breach of the suretyship agreement too, releasing the surety.

Such an interpretation would be sensible in the light of Olivier JA's statements in *Davidson* that prejudice would release the surety only where it arose due to a breach of some legal duty or obligation arising from the principal obligation or the suretyship agreement.[108] If the term in question as it is stated in the principal obligation became tacitly included in the suretyship agreement, then a breach of that term by the creditor must necessarily mean a breach of the suretyship agreement and must release the surety.

It must be borne in mind that the surety would not necessarily in all cases be released here, for it is open to the surety to consent to the variation or departure, whether expressly or tacitly. If the consent is granted, then the rule from *Davidson* would apply that the surety cannot complain about injury to its interests where the agreement between it and the creditor allows for it.[109]

The proposal that a breach by the creditor of the principal obligation would release the surety from the suretyship agreement is not a novel one. It is also an accepted position in our law that "a surety is released by the *mora creditoris* of the creditor in respect of the principal debt."[110] In other words, where the creditor failed to co-operate with the debtor to receive the payment of the principal obligation, then the surety will be released.

In *St Patrick's Mansions (Pty) Ltd v Grange Restaurant (Pty) Ltd*[111] the plaintiff, and owner of St Patrick's Mansions leased certain shops on the premises to the first defendant. The second defendant and one Segal signed a suretyship agreement to guarantee proper performance by the first defendant of the terms of the lease agreement.

The second defendant argued that the plaintiff's failure to accept rental tendered by the first defendant was wrongful, unlawful and prejudicial to him and that he was subsequently discharged from the suretyship agreement.

Even though the court allowed the claim against the second defendant on the ground that the offers of payment were not valid offers, it stated that there is "no doubt" that "a valid tender of the amount of a debt made by the

108 *Davidson* case para 19.
109 *Davidson* case para 19.
110 Van der Merwe *et al Contract* 321.
111 *St Patrick's Mansions (Pty) Ltd v Grange Restaurant (Pty) Ltd* 1949 4 SA 57 (W) (hereafter the *St Patrick's Mansions* case).

principal debtor discharged the surety"[112] and, therefore, the *mora creditoris* of the creditor could lead to the release of the surety.

If, therefore, the creditor's breach of the principle obligation in the form of *mora creditoris* releases the surety without the need to touch on the issue of prejudice, then it must be possible that the position in our law set out above cannot be far off the mark.

The one situation that might prove difficult with the formulation provided is where the creditor grants an extension of time to pay to the principal debtor.[113] Wessels noted that:

> [o]ur courts do not consider that every variation in the performance of the contract between the creditor and the debtor is a breach of the suretyship contract, for if that were so an extension of time ought *ipso facto* to discharge the surety.[114]

In those situations it has traditionally been held that the surety would be released only where the extension is given both before the debt falls due and where time is of the essence of the contract.[115]

However, an interpretation of the suretyship agreement and the principal obligation and a consideration of the conduct of the parties and the surrounding circumstances would determine whether the due date of the principal debt had become a tacit term of the suretyship agreement; and, in turn, whether a breach thereof would release the surety.[116]

It may be argued that that this interpretation of the principle as it stands would place an undue burden on the creditor, for he would be unable to depart in any way from the terms of either agreement in fear that those terms may be construed as being tacitly included in the suretyship agreement. However, as the English court in *Aviva Insurance Limited v Hackney Empire Ltd*[117] suggested, where creditors feel unsure as to whether their acts may be in breach of either the suretyship or the principle obligation, they should always consult with the surety.[118]

It would not take much from the creditor to simply communicate his intended acts to the surety, for if he does so the surety is informed and may object to the creditor's proposed course of action. If the surety does not raise an objection, then it may well be that a court would find that the surety tacitly

112 *St Patrick's Mansions* case 63.
113 Forsyth and Pretorius *Caney* 208.
114 Roberts *Law of Contract* para 4313.
115 Forsyth and Pretorius *Caney* 208; *Estate Liebenberg v Standard Bank of South Africa Ltd* 1927 AD 502.
116 Van der Merwe *et al Contract* 242-244.
117 *Aviva Insurance Limited v Hackney Empire Limited* [2012] EWCA Civ 1716 (hereafter the *Aviva Insurance* case).
118 *Aviva Insurance* case para 59.

consented to the variation or departure. An even simpler suggestion would be for the surety and the creditor to set out during negotiations which terms in the agreement may be varied or departed from or what procedure may be followed if the creditor believes such a variation or departure to be necessary, especially in cases where the creditor may wish to grant extensions of time.

5 Conclusion

The general prejudice principle has been a long accepted recourse open to a surety who, through the conduct of a creditor, has been prejudiced in his interests. However, after the judgment in *Bock* the principle as it has been historically applied, has been summarily expunged.

The structure of suretyship obligations, having two distinct contractual arrangements in the form of a principal obligation between the principal debtor and the creditor and a suretyship agreement entered into between the creditor and the surety, opens the principle up to a new, more concrete interpretation. It may be open to a surety who is now unable to rely on the traditional form of the prejudice principle to argue his case on the basis of a breach of contract in the ordinary contract law sense.

Where the creditor acts to the "prejudice" of the surety by altering or deviating from the terms of the suretyship agreement itself, there is a clear case for the surety to argue that the creditor is guilty of a breach of that suretyship agreement, releasing the surety of his obligations in terms thereof.

On the other hand, where the creditor alters or deviates from the principal obligation between him and the principal debtor, the interpretation is somewhat more complex. In those instances, the surety may argue that he entered into the suretyship agreement on the condition that a particular term in the principle obligation would be upheld and that that obligation had formed a tacit term of the suretyship agreement. If the surety is successful in that argument, a breach of that tacit term would therefore be a breach of the suretyship agreement and he would be released. For example, taking the facts of *Fry* and *Davidson*; an argument that a signing agreement as in those cases amounts to a tacit term in a suretyship agreement would succeed if the surety can prove that he entered into the suretyship agreement on the basis of the signing agreements being included in the principal obligation, making a departure therefrom a material variation of the suretyship agreement, releasing the surety.

This article presents an alternative interpretation of the prejudice principle as nothing more than an instance of a breach of contract by the creditor. Such an interpretation brings home the prejudice principle under the more concrete foundational principles of contract law, allowing for its continued use in the equitable protection of sureties from creditors' prejudicial acts.

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Watts v Shuttleworth 1861 158 ER 510

List of Abbreviations

JBL	Juta's Business Law
SA Merc LJ	South African Mercantile Law Journal