IN THE SEYCHELLES COURT OF APPEAL

Adelina Port Louis — Appellant

v/s

Central Stores (Development) Limited — Respondent

Civil Appeal No. 10 of 1984

JUDGMENT

The respondent was the owner and lessor of business premises at Victoria House, Victoria. The lessee was a private company called Cam Group (Pty) Ltd, trading under the name "Boutique des Jeunes". The shop (boutique) was managed by the appellant.

The monthly rent payable for the premises was R 4,248.92 cs and in addition R 684.90 cs monthly as service charge.

As at October 5, 1979, the lessee was indebted to the respondent in the sum of R 73,623.74 cs as arrears of rent and service charge. On the same date, i.e. October 5, 1979, the appellant allegedly signed a document (Exhibit 7) undertaking to pay to the respondent "all sums which remain due and outstanding by virtue of an underpayment of the rental and charges", under the lease agreement between the respondent and the Cam Group (Pty) Ltd.

On October 19, 1983, the respondent, on the strength of the document (Exhibit 7), sued the appellant before the Supreme Court claiming payment of R 67,189.92 cs as arrears due by the lessee.

The defence of the appellant was one of general denial.// After hearing evidence the learned trial Judge gave judgment in favour of the respondent in the sum claimed. The judgment of the learned trial Judge is being impugned on the following grounds:

"1. The finding of the learned judge that on a balance of probabilities it is more likely than not that Mrs Port Louis signed the note is not supported by any evidence and fails to take into account the signature of Mrs Port Louis on the lease which defers from the one on the note.

2. The learned judge erred in his finding that the defendant was acting within the scope of her trade or employment when she signed the note as surety and Act 1326 therefore has no application to this case.

3. The finding of the learned judge that the appellant is liable for rent and charge incurred by the lease after the date of the note is wrong and unreasonable."

Ground 1. This ground is devoid of any merit. The appellant in her plea chose not to specifically deny being the author of the document relied upon by the respondent. It is an elementary rule of pleadings that what is not specifically denied is deemed to have been admitted. It must also be noted that the document was admitted in Court without any objection. In my view the learned trial Judge should not have allowed counsel for the appellant to address the Court and raise the issue of the signature appearing on the document at the close of the case in face of the pleadings and admissions.

Ground 2. I agree with the submission of counsel for the appellant that Art 1326 applies in this case. But, although the document (Exhibit 7) did not comply with the provisions of Article 1326, it does not mean that it is null and void to all intents and purpose. It may constitute "a commencement de preuve par écrit" which could be supplemented by oral evidence or presumption. Dalloz, Nouveau Répertoire Pratique V°. Preuve n.170. D.1806.1.528.

Fuzier-Herman in Code Civil Livre III Titre III note 154 has this to say: "L'irrégularité de l'acte provenant de l'omission "du bon" ou "approuvé" peut se couvrir par l'exécution volontaire de l'obligation ..."

In the present case there has been partial execution of the obligation. Further the document has been amply "supplemented" by the evidence of Mrs. Gayon. Ground 2 fails.

Ground 3. The relevant part of the judgment of the learned judge reads as follows:

> "Mr Boullé has made a number of submissions with regard to the amount for which his client is liable on the note in the event of her being liable at all. The main point he has submitted is that only the sum outstanding as at October 5, 1979 less payment is payable. I do not think I can sustain this argument in the face of the wording of the note itself which is clear that the promisor "(undertook) to repay all sums which remain due and outstanding by virtue of an underpayment of the rental and charges under a lease agreement with Central Stores Development Limited for the shop No. 1 in Victoria House Arcade."

I cannot find my way to go along with the learned trial Judge in his construction of the document (Exhibit 7). In my view, the appellant undertook to guarantee payment of R 73,623.74 cs only and not all past and future arrears. In that connection I find the evidence of Mrs Gayon very pertinent :

> " The tenant was not regular with the rent and service charge. Statement of account was submitted to the tenant on July 5, 1979 and the claim was R 73,623.74cs ... After the statement of September 5, 1979, Mrs Port Louis signed a note to undertake to pay all underpayments under the lease. This was registered on October 5 (exhibit 7). It is upon that note that the company is now claiming the sum of money from Mrs Adelina Port Louis."

The position of a "cautionneur" is always, in the eye of the law, a favourable one, his obligation will not be extended beyond the precise limits of the words used.

Le cautionnement ne se présume point, il doit être exprès, et on ne peut l'étendre au delà des limites, dans lesquelles il a été contracté (CC 2015).

"Le paiement fait par le débiteur de deux dettes également échues, dont l'une est cautionnée, doit être imputé sur la dette cautionnée."

There have been two payments effected by the appellant, one of the sum of R 1,500 and the other of R 14,801.46 cs. I agree with Sauzier J A for the reasons he has given in his separate judgment (which I need not repeat) that both these two payments should be applied to the sum which was guaranteed by the appellant. The appellant succeeds on this ground. I accordingly amend the judgment of the Supreme Court by substituting the sum of R 57,322.28 cs for the sum of R 67,182.92 cs. I order the respondent to pay half of the appellant's costs of the appeal.

Delivered at Victoria this 30th day July 1985.

H. Goburdhun
Justice of Appeal.

IN THE SEYCHELLES COURT OF APPEAL

Adelina Port Louis Appellant

v/s

Central Stores (Development) Limited Respondent

Civil Appeal No. 10 of 1984

Mr. K. Karan for the appellant
Mr. K. Shah for the respondent

JUDGMENT

The respondent is the owner of shop premises at Victoria House in the town of Victoria. Those premises were leased to a private company called Cam Group (Pty) Ltd., hereinafter referred to as "Cam Group", which was trading under the name of Boutique des Jeunes. The appellant was the manager of Boutique des Jeunes and was the only person who ever dealt with the respondent on behalf of Cam Group.

The respondent sued the appellant in the Supreme Court for the payment of R.67,189.92 plus interest and costs on the strength of a document allegedly signed by the appellant and dated October 5, 1979 by virtue of which the appellant, in her personal name and capacity, undertook to repay to the respondent all sums which remain due and outstanding by virtue of an underpayment of the rental and charges under the lease agreement between the respondent and Cam Group. The document has been produced and marked as Exhibit 7.

After hearing the case and dealing with the various points raised in argument by counsel for the appellant, the learned trial Judge gave judgment for the respondent in the sum of R.67,189.92 with interest and costs as claimed.

The appellant appeals to this Court against the whole of the decision on three grounds as follows;-

"1. The finding of the learned judge that on a balance of probabilities it is more likely than not that Mrs. Port Louis signed the note is not supported by any evidence and fails to take into account the signature of Mrs. Port Louis on the lease which differs from the one on the note.

2. The learned judge erred in his finding that the defendant was acting within the scope of her trade or employment when she signed the note as surety and Article 1326 therefore has no application to this case.

3. The finding of the learned judge that the appellant is liable for rent and charge incurred by the lessee after the date of the note is wrong and unreasonable."

I shall deal with the grounds of appeal in the order in which they have been raised.

Ground 1

The document, Exhibit 7, on which the respondent relied in his case against the appellant is a document under private signature to which Articles 1323 and 1326 of the Civil Code of Seychelles, hereinafter referred to as "the Code", apply. Under this ground of appeal we are concerned with Articles 1323 and 1324 of the Code which run as follows:-

Article 1323

> A person against whom a document under private signature is pleaded shall be bound to acknowledge or repudiate formally his handwriting or his signature.
>
> His heirs or assigns may restrict themselves to declaring that they do not recognise either the handwriting or the signature of the principal.

Article 1324

> When a party repudiates his handwriting or his signature, or when his heirs or assigns declare that they do not recognise either of them, the Court shall decide the issue after hearing evidence. In this respect, the law of evidence shall apply.

It is unfortunate that when the amended plaint was filed a photocopy of the document, Exhibit 7, was not attached to it. That would have given the opportunity to the appellant to acknowledge or repudiate her signature in her statement of defence. As it is, the statement of defence only contains a general denial of paragraph 2 of the plaint in which it was specifically alleged that the appellant had signed Exhibit 7. Apart from being bad pleading, that general denial is not a sufficient formal repudiation of her signature by the appellant as required by Article 1323 of the Code.

Moreover when Exhibit 7 was produced as an exhibit in the case, no formal objection was taken to its admission by Mr. Boullé, counsel for the appellant. That was the time when counsel for the appellant should have stated to the Court that his client repudiated her signature. Failure to do so at that time amounted to a tacit acknowledgement of her signature by the appellant precluding her from disputing its authenticity at a later stage. The following excerpt from Encyclopédie Dalloz. Droit

Civil. Verbo Preuve 1979 Edition. paragraph 814 - is in point:-

> "814 ..... La reconnaissance volontaire d'une écriture privée peut-être expresse; elle est le plus souvent tacite. Elle résulte notamment du silence gardé par le souscripteur lorsque l'acte est produit en justice. (Beudant et Lerebours - Pigeonnière, t. 9, par Perrot No 1215; Planiol et Ripert t 7 par Gabolde No 1481; Aubry et Rau t 12, par Esmein para 756 p 176). Plus précisément, la reconnaissance résulte de l'absence de dénégation de la part du signataire prétendu, qui ne peut se borner à émettre des doutes sur l'authenticité de son écriture ou de sa signature. S'il ne désavoue pas formellement la signature, il est réputé la reconnaître (Civ. 21 févr. 1938 D.H. 1938. 226; Planiol et Ripert,op. et loc. cit.)."

There is a further procedural reason why objection to the authenticity of the writing or signature must be taken at the time when the document is sought to be produced in evidence if the issue as to authenticity has not already been raised in the pleadings.

A document under private signature has probative force as against a party who is alleged to have written or signed the document so long as the party acknowledges it or it is proved before the Court that the party wrote or signed it, in which case the document is legally presumed as acknowledged. (Article 1322 paragraph 1). If the party formally repudiates the handwriting or signature on the document, the probative force of the document is temporarily suspended until proof of authenticity is made as outlined under Article 1324. The issue of authenticity must be tried as an issue in limine litis, if the point has been raised in the pleadings, or, in a trial within a trial, if objection to the production of the document has been taken in the course of the trial. The reason for the necessity of an early decision is that the document is valueless until its authenticity is established. The burden of proof on the issue of authenticity will rest on the party who wants to avail himself of the document. What is said above applies equally in the case of heirs or assigns of a party who has allegedly written or signed a document. However in their case they need not go as far as repudiating the handwriting or signature. They may only declare that they do not recognise the handwriting or signature of the party. (Article 1323). The following excerpts from Encyclopédie Dalloz. Droit Civil.

Verbo Preuve 1979 Edition Paragraphs 815, 818 and 819 support the above propositions.

> "815. ..... S'il ne reconnaît pas la sincérité de l'acte, il doit la dénier formellement. Cette dénégation se fait par une simple déclaration. Elle suffit à retirer provisoirement à l'acte toute force probante (Lyon. 14 janv. 1952, Mon. jud. Lyon, 21 oct.). Provisoirement, car celui qui entend se prévaloir de l'écrit peut faire établir la sincérité de celui-ci en justice (Planiol et Ripert, t. 7. par Gabolde, no. 1480; V. infra. nos. 818 et s.)
> ... ...
>
> 818. Il faut supposer que celui à qui l'acte est opposé dénie sa propre signature ou affirme ne pas reconnaître celle de son auteur: cette simple déclaration ruine provisoirement l'efficacité probatoire de l'acte qui, jusqu'à preuve contraire, est réputé ne pas émaner du signataire prétendu et donc être un faux (Com. 2 juin 1975, Bull. civ. IV, no. 150). Mais une telle situation ne doit pas durer: il faut établir objectivement la sincérité ou la fausseté de l'acte et cette recherche doit se faire en justice (C. civ., art. 1324).
>
> 819. C'est au demandeur qui se prévaut de la sincérité de l'acte, et non au défendeur qui nie ou méconnaît l'écriture, qu'il incombe de prouver la vérité de son affirmation (Civ. 21 févr. 1938, D.H. 1938.226; 7 juin 1963, Bull. civ. I, no. 293, D. 1964, Somm. 2: 12 nov. 1969, Bull. civ. I, no. 339; 17 mai 1972, ibid. I, no. 132; Soc. 14 nov. 1973, ibid. V. no. 567; Com. 1er déc. 1975, ibid. IV. no 286). Mais il a été jugé que la vérification en justice de l'écriture devait être ordonnée ou opérée d'office par le juge, même lorsque les parties n'y ont pas conclu, l'article 1324 du code civil imposant une telle vérification lorsqu'une partie a désavoué son écriture ou sa signature (Soc. 13 juin 1952, Bull. civ. III, no. 525)."

In this case the learned trial Judge was too lenient to have entertained the submission of Mr. Boullé on behalf of the appellant made at the end of the case that the signature on Exhibit 7 was not the signature of the appellant and to have taken the trouble to make a decision thereon in his judgment. However since the respondent has not complained about such leniency, I have reviewed the whole of the evidence on record, including the signatures of the appellant appearing on her defences in limine litis and to the amended plaint at pages G and H of the record. I find that the learned Judge had ample evidence both oral and documentary on which to make a proper and reasonable finding that the signature on Exhibit 7 was that of the appellant. The most telling

evidence, as the learned Judge pointed out, was the payment of the sum of R.1,500 by the appellant on November 5, 1979 in strict compliance with the terms of Exhibit 7. If that document were a forgery how could the appellant have come to know of it and abide by its terms?

This ground of appeal must therefore fail.

Ground 2

The document, Exhibit 7, was typewritten and the appellant signed it. That document offended against the provisions of Article 1326 of the Code in that apart from her signature the appellant had not written in her own hand the formula "valid for" or "approved for" followed by the amount in letters of the debt due. The learned trial Judge found that Article 1326 did not apply in this case as it fell within the exception expressed at the end of the Article, namely:-

> "This requirement shall not apply to tradesmen and employees acting within the scope of their trade or employment."

In dealing with the submission of counsel for the appellant that the document, Exhibit 7, was invalid in terms of Article 1326 of the Code, the learned Judge had this to say:-

> "The defendant Mrs. Port-Louis was in fact the only "face" that Cam Group and "Boutique des Jeunes" had and the only person who had represented them in their dealings with the plaintiff company. Both the lessor and lessee to the lease are "tradesmen" in terms of Article 1326 and the defendant was acting within the scope of her trade or employment when she signed the note as surety. Article 1326 therefore has no application to this case."

With respect, this finding of the learned Judge is rather confused. He did not find that the appellant was a "tradesman" acting within the scope of her trade or an "employee" acting within the scope of her employment when she signed the note as surety, as would be necessary to take the case out of Article 1326.

The appellant signed Exhibit 7 in her personal name and capacity and not as agent on behalf of Cam Group. Although it is clear that Cam Group falls within the term "tradesman" in Article 1326 as it was that private company

which was selling articles to the public from the Boutique des Jeunes, the appellant as manager or agent of Cam Group would not fall within that term, unless it were proved that she was a "tradesman" independently from that private company. The following excerpt from Dalloz. Juris-Classeur Civil Articles 1326-1327 (abrogé) Contrats et Obligations (En Général) Fasc 141 Paragraph 49 is in point.

> "Cass com 19 mai 1954: Bull civ. III, n. 187, d'où il ressort que le gérant d'une société à responsabilité limitée n'accomplissant pas en cette qualité d'actes de commerce pour son propre compte, la reconnaissance de dette qu'il a signée à titre personnel ne bénéficie pas de la dérogation prévue à l'article 1326, alinéa 2 du Code civil."

There is no evidence that the appellant signed Exhibit 7 as a "tradesman" within the scope of her trade.

Can it be said that the appellant signed Exhibit 7 as an employee acting within the scope of her employment. Apart from knowing from the evidence of Mrs. Gayon that the appellant was the manager of Boutique des Jeunes and acted as agent for Cam Group there is no evidence as to the appellant's exact relationship with that private company. In the circumstances therefore it cannot be said that the appellant would fall within the term "employee" and that Article 1326 would not apply to this case.

Mr. Shah submitted that as Exhibit 7 witnessed the obligation of suretyship which was a collateral obligation to the principal contract of lease, Article 1326 did not apply to it. In support of his submission he cited Dalloz, Codes Annotés. Nouveau Code Civil Article 1326 paragraph 64 which runs as follows:-

> "64. Suivant un autre système, l'art. 1326 s'applique seulement aux obligations principales, et non aux engagements accessoires, tels que le cautionnement; en conséquence, le cautionnement fait par acte sous seing privé est valable, bien qu'il ne contienne pas le bon ou approuvé exigé par l'art. 1326."

This paragraph expresses the minority view. The majority view however is to be preferred as it is consonant with the wording of paragraph 1 of Article 1326. The majority view is contained in paragraph 58 Op. Cit. as follows:-

"58. D'après l'opinion dominante, le cautionnement, constituant un acte unilatéral de la part de la caution, n'est valable qu'autant qu'il est revêtu du bon ou approuvé exigé par l'art. 1326."

Article 1326 of the Code must be taken to apply in this case. That does not mean that the document, Exhibit 7, is to be considered null and void to all intents and purposes. The document is valid as providing initial proof under Article 1347 of the Code. Oral evidence and presumptions would then complete the proof of the transaction. This has been achieved by the evidence of Mrs. Gayon and the production of the document, Exhibit 7. (Vide Rayfield v. Temooljee & Co Ltd 1963 M.R. 21, 35 to 37). The following passage from Dalloz, Nouveau Répertoire Pratique, Verbo Preuve, paragraph 170 quoted in the Rayfield case (supra) is illuminating.

"S'il existe un commencement de preuve par écrit, la preuve testimoniale, ou par présomptions, est admissible ..... Puisque la preuve par présomptions devient possible, le commencement de preuve par écrit équivaut, en réalité, à une preuve complète toutes les fois que le juge l'estime suffisant. Cependant il présente avec l'acte instrumentaire régulier cette différence essentielle qu'il peut être combattu non seulement par un autre écrit mais encore par témoins ou présomptions ....."

In this case the document, Exhibit 7, as completed by the evidence of Mrs. Gayon which stands uncontradicted establishes the indebtedness of the appellant towards the respondent.

There is therefore no merit in this ground of appeal.

Ground 3

This ground of appeal complains about the following passage of the learned judge's judgment:-

"Mr. Boullé has made a number of submissions with regard to the amount for which his client is liable on the note in the event of her being liable at all. The main point he has submitted is that only the sum outstanding as at October 5, 1979 less payment is payable. I do not think I can sustain this argument in the face of the wording of the note itself which is clear that the promisor "(undertook) to repay all sums which remain due and outstanding by virtue of an underpayment of the rental and charges under a lease agreement with Central Stores Development Limited for the shop No 1 in Victoria House Arcade."

In other words the learned trial Judge held that when the appellant signed Exhibit 7 she was undertaking to pay all past as well as future arrears of rental and charges incurred by Cam Group under the lease agreement.

With respect this interpretation of the document Exhibit 7 does not accord with its wording and with the evidence given by Mrs. Gayon on behalf of the respondent. Mrs. Gayon said:-

> "The tenant was not regular with the rent and service charge. Statement of account was submitted to the tenant on 5/9/79 and the claim was R.73,623.74 cts. and it was despatched to the tenant. I produce the statement. Exh. 3."

and later

> "After the statement of 5th September 1979, Exh. 3, Mrs. Port-Louis signed a note to undertake to pay all underpayments of the rental charges under the lease. This was registered on the 8th October. Exh. 7. It is upon that note that the company is now claiming the sum of money from Mrs. Adelina Port-Louis."

It is to be observed that Exhibit 7 is made up of the document signed by the appellant and of a copy of the statement Exhibit 3 which had been sent to the appellant on the 5th September 1979. The document specifies that the repayment will be by monthly instalments of R.1,500 with effect from the first day of October 1979.

From the above it is clear that the appellant in signing Exhibit 7 on the 5th October 1979 undertook to repay the sum of R.73,623.74 as set out in the statement, Exhibit 3. This was inclusive of rent and service charges up to and including the month of September 1979.

There is no evidence on which it can be held that the personal undertaking of the appellant in the document, Exhibit 7, was substituted for and extinguished the debt which Cam Group had towards the respondent for arrears of rent and service charge up to and including September 1979. In other words there is no evidence that a novation was effected as provided for under the second paragraph of Article 1271 of the Code. According to Article 1273 of the Code novation shall not be presumed. Moreover an intention to effect novation does not clearly result from Exhibit 7 and the evidence of Mrs. Gayon.

In the circumstances therefore, the evidence is to the effect that the appellant acted as surety towards the respondent for the outstanding debt of R.73,623.74 which Cam Group had contracted under the lease agreement, if Cam Group failed to pay such debt. (Article 2011 of the Code).

The question which now arises is whether the payment by the appellant of the sum of R.1,500 on 5th November 1979 and the sum of R.14,801.46 after December 1979, has any effect on the obligation she contracted towards the respondent in Exhibit 7.

Cam Group vacated the shop premises they were renting from the respondent at the end of December 1979. Apart from the sum of R.73,623.74, details of which are set out in Exhibit 3, they then owed the respondent rent and service charge for the months of October, November and December 1979 amounting to the sum of R.14,801.46. It should be observed that the monthly rate of rent and service charge during the year 1979 was constant, amounting to R.4,933.82 per month.

Articles 1253 to 1256 of the Code deal with the appropriation of payments. These Articles apply in the case where the same debtor owes different debts to the same creditor. When the debtor makes part payment it is necessary to determine to which debt the payment is to be appropriated. It should be observed here that the wording of the first paragraph of Article 1256 of the Code is different from the French version of the Civil Code as in force before 1.1.1976. I believe there must have been a mistake made as to the meaning of "intérêt" in the French text. Fortunately this has no effect on this case.

In this case we are faced with the following problems:-

(a) There were two debtors, Cam Group and the appellant.

(b) The appellant acted in two capacities:
  (i) in her own name; and
  (ii) as agent of Cam Group.

(c) Cam Group had several debts towards the respondent, that is, under the lease agreement at the beginning of every month the monthly rent and service charge became due. Those debts were of the same nature and did not bear interest.

(d) The appellant had only one debt towards the respondent

that is, she was responsible to pay R.73,623.74 to the respondent if Cam Group did not pay. The payment of that debt was to be effected at the rate of R.1,500 as from 1.10.1979.

I shall deal with the first payment of R.1,500 on 5.11.1979. The amount paid and the date of payment cannot but point to an intention of the appellant to comply with the terms of her undertaking in Exhibit 7. It is therefore right to appropriate such payment to the personal debt of the appellant mentioned in paragraph (d) above.

I now turn to the payment of R.14,801.46 after December 1979. That payment was in respect of 3 months rent and service charge at the rate prevailing all through 1979. From Exhibits 8 and 9 one can deduce that the payment of R.14,801.46 was made before the 6th February 1980 which was the date of the letter, Exhibit 9. On that date only R.4,500 was due by virtue of the appellant's personal undertaking in Exhibit 7. It is therefore right to infer that when the appellant was paying that sum, she was acting on behalf of Cam Group and not in her own personal capacity. She was then paying the arrears of rent and service charge under the lease agreement on behalf of Cam Group. The question then arises as to which months must the appropriation of the payment be made? It is there that the provisions of Article 1256 of the Code apply, as there is no evidence that appellant when she made payment of that sum declared which debts she intended to discharge, as she was entitled to do under Article 1253, and no receipt was produced in evidence bearing any indication as to appropriation.

In terms of Article 1256, the debts of Cam Group for arrears of rent and service charge being of the same nature, although accrued due at different dates, appropriation must be made for the oldest, that is those falling within the statement in Exhibit 3 rather than for the months of October, November and December 1979. That being the case the sum of R.14,801.46 must also be deducted from R.73,623.74.

In the result the appellant is indebted to the respondent under the document, Exhibit 7, to the extent of R.57,322.28 only.

I would allow the appeal on ground 3 and order that the judgment of the Supreme Court be amended by substituting the sum of R.57,322.28 for the sum of R.67,189.92. I would also order the respondent to pay half the appellant's costs of this appeal.

Delivered by me. A. Sauzier

A. Sauzier
Justice of Appeal

IN THE SEYCHELLES COURT OF APPEAL.

Adelina Port Louis ... ... Appellant

- v -

Central Stores (Development) Limited ... Respondent

Civil Appeal No. 10 of 1984.

Mr. K. Karan for the appellant
Mr. K. Shah for the respondent.

Judgment of LAW.J.A.

I have had the advantage of reading in draft the judgment prepared by Sauzier J.A. which fully sets out the law, the facts and the background relating to this appeal. There is little that I can usefully add.

As regards the first ground of appeal, it claims that the authenticity of the appellant's signature on a written promise to pay debts owing to the respondent company by the Cam Group was not established on a balance of probabilities. The amended plaint had specifically pleaded that the appellant had signed that document dated the 5th.October,1979. This allegation was not denied formally in the defence, and must be taken to have been admitted (see Millery -v- Stevenson-Delhomme, S.L.R. Vol.1, 1955, page 283 at page 296.) The appellant had a further opportunity to repudiate her signature when the document was tendered in evidence, but did not do so. The issue did not then have to be decided. " Si le defendeur garde le silence, la piece est tenue pour reconnue." There is no merit in this ground of appeal, nor in the second ground challenging the finding that the appellant was acting within the scope of her employment when she signed the document as surety for the debts of her employers. There was ample uncontradicted evi-

dence that it must be regarded as [illegible] did not give evidence, or call witnesses, to rebut the evidence against her, although she was apparently available to do so.

The third ground of appeal was that the judge's finding that the appellant was liable for rent and charges incurred by the lessee (the Cam Group) after the date of the note signed by her was wrong and unreasonable. The appellant, on 5th.October,1979, had undertaken to repay " all sums which remain due and outstand-

ing " from the principal debtor, the Cam Group, by monthly instalments of R.1,500. On the 5th. November, 1979, she paid R. 1,500. This was clearly one of the instalments due from her under her agreement of 5th. October. Then on the 6th. February, 1980, the appellant paid to the respondent the sum of R. 14,801/46. This is exactly the amount which the Cam Group was liable to pay for three months' rent and service charges. I can only assume that the R. 14,801/46 was paid by the appellant, presumably as manager and agent for the Cam Group, and not in her personal capacity under her written undertaking of 5th. October. The said payment, being in respect of rent and charges, must accordingly be appropriated, in terms of Article 1256 of the Civil Code, to the oldest in date of the Cam Group's debts, which ante-date the appellant's personal liability under her agreement of 5th. October, 1979. It follows that the appeal succeeds on this ground, and that the judgment of the Supreme Court must be amended by substituting the sum of R. 57,322.28 for the sum of R. 67,189.92 actually awarded, with costs and interest. I agree with Sauzier J.A. that the respondent should pay half the ~~xxx~~ appellant's costs of this appeal.

Delivered at Victoria this 30th day of [illegible] 1985

(E.J.E.Law.)