IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 2006/8251

JOHANNESBURG

2007-08-06

In the matter between:

WALLACE, WILLIAM FRANCIS Plaintiff

and

1662 G & D PROPERTY INVESTMENTS CC Defendant

JUDGMENT

LEVENBERG, AJ

I. THE SEPARATE ISSUE TO BE DECIDED UNDER RULE 33(4)

1] In this action the Plaintiff sues on two practically identical deeds of suretyship, one concluded in 1995 and one concluded in 2001

(collectively "the suretyships").

2] Neither of the two deeds of suretyship identifies *"the debtor"* by name. The failure to identify the principal debtor by name pertinently in any of the two suretyships raises the question whether the two suretyships are valid in the sense that they comply with section 6 of the General Law Amendment Act, No 50 of 1956 ("the Act").

3] The Defendant requested that the issue of the validity of the suretyship should be determined separately under Rule 33(4). After some discussion, the Plaintiff agreed to this procedure. The parties also agreed that the question presented for decision under Rule 33(4) was whether:

> "The suretyships comply with section 6 of the General Law Amendment Act, No. 50 of 1956."

4] The parties also agreed that, if I came to the conclusion that the suretyship did not comply with section 6 of the General Law Amendment Act, the Plaintiff's claims would be unsustainable.

Accordingly, the parties agreed that, if I determined that the suretyship did not comply with section 6 of the General Law Amendment Act, the Plaintiff's claims should be dismissed with costs.

II. THE LANGUAGE OF THE SURETYSHIPS AND THE PARTICULARS OF CLAIM

5] The Plaintiff alleges that the two suretyships were signed by the Defendant on 21 November 1995 ("the first suretyship") and 16 March 2001 ("the second suretyship"). The first and second suretyships are attached to the particulars of claim respectively as Annexures "P1" and "P2".

6] The second suretyship is identical to the first suretyship, except that the signatory for the Defendant is different in each instance. Moreover, the second suretyship contains the additional words set forth in bold below.

> "I/We 1662 G&D Property Investments CC CK92/33430/23, the undersigned, bind and oblige myself/ ourselves, jointly as well as severally, as surety/sureties and co-principal debtor/s *in solidum* for the repayment on

demand of all or any sum or sums of money which the debtor may now or from time to time hereafter owe or be indebted to William Francis Wallace, whether such indebtedness arises from money already advanced or hereafter to be advanced plus interest to be calculated at money market rates.

I/We acknowledge that this document is an unconditional suretyship. Furthermore, for the purpose of the suretyship and of any proceedings that may be instituted by virtue hereof, I/we have chosen *domicilium citandi et executandi*at 26 Allen Grove Road, Bedfordview.

It is acknowledged that the amount of the debt including interest on 28 February 2001 is R1 874 696,46."

[emphasis added]

7] It is common cause that the ***"the debtor"*** is not expressly named in either of the two documents. For the remainder, there is no dispute that the suretyship identified both the creditor and the surety.

8] The Plaintiff has formulated separate causes of action on each of the first and second suretyships respectively. The claims are not formulated in the alternative, although I assume that that was what was intended as both claims appear to relate to the same principal debt.

9] In each instance, the Plaintiff has alleged that it was an *"express, alternatively implied, further alternatively tacit"* term of each of the suretyships that the surety bound itself as surety and co-principal debtor for all amounts which Graham Michael Wallace ("the alleged debtor") owed to the Plaintiff. Apparently the Plaintiff and the alleged debtor are father and son.

10] In the alternative, it is alleged that, if the Court holds that either suretyship *"does not comply with section 6 of the General Law Amendment Act",* the relevant suretyships should be rectified to insert the words *"Graham Michael Wallace"* after the words *"all or any sum or sums of money which the debtor"* where they appear in the third line of the first paragraph of each deed of suretyship.

11] During the course of argument, the Plaintiff's counsel very properly conceded that the issue of rectification could not arise unless I held the suretyships to be formally valid – i.e. in compliance with section 6 of the Act. To put it another way, if the suretyships are not valid, rectification cannot save them from invalidity.

III. SECTION 6 OF THE ACT

12] Section 6 of the Act provides that:

> "No contract of suretyship entered into after the commencement of this Act [i.e. 22 June 1956] shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: …"

13] In *Fourlanel (Pty) Limited v Maddison* **1977 (1) SA 333 (A), 342-3**, Miller JA held:

> "However many objects the Legislature may have had in mind in enacting sec 6 of Act 50 of 1956, **one of them was surely to achieve certainty as to the true terms agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary**

> **litigation**. … The Legislature may also have been influenced by other considerations, for example that suretyship being an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after the undertaking had been recorded in a written document and signed by them or on their behalf."
>
> [emphasis added]

IV. THE RELEVANT CASE LAW

14] In a very able argument, the Plaintiff's counsel, Mr Barlow relied for the efficacy of the suretyship on two decisions – *Sapirstein and Others v Anglo-African Shipping Co. (SA) Ltd* **1978 (4) SA 1 (A)** and *Credit Guarantee Insurance Corporation of SA Ltd v Schreiber* **1987 (3) SA 523**.

15] In *Sapirstein*'s case (**p10**) the suretyship identified five potential creditors and eight potential debtors/sureties by name. The document then provided that debtor/sureties:

> "do each of us hereby bind ourselves to you as sureties

> for and co-principal debtors *in solidum*with **each and every of the other of us, so that each one of the undersigned hereby binds itself/himself to you as surety for and co-principal debtor *in solidum* with each and every of the other of the undersigned**, the principal debtor in relation to each of the undertakings as surety and co-principal debtor being hereinafter styled 'the debtor', for the payment on demand of all sums of money which the debtor may have in the past owed or may presently or in the future owe to each of you separately and individually or to your successors-in-title or assigns, whether such indebtedness arises from money already or hereafter to be advanced. …"
>
> [emphasis added]

16] The Defendant/surety in that case argued that the document was *"invalid ab initio by reason only of the fact that, at the time when the guarantee [was] given, the principal debt [had] not yet come into existence and the identity of the principal debtor and of the sureties [had] not yet been ascertained."* (**p11E**)

17] In dealing with this contention, Trengove AJA held (**p12B**):

> "The provisions of s 6 of Act 50 of 1956 do not invalidate a contract of suretyship of this sort provided, of course, such contract is embodied in a written document, and is

signed by or on behalf of the surety. What s 6 requires is that the 'terms' of the contract of suretyship must be embodied in the written document. It was contended by counsel for plaintiff that this meant that the identity of the creditor, of the surety and the principal debtor, *and* the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, **by extrinsic evidence of identification other than evidence by the parties** (i.e. the creditor and the surety) **as to their negotiations and consensus**. I agree with this contention. **In my view there can be no objection to extrinsic evidence of identification being given, either by the parties themselves, or by anyone else, unless the leading of such evidence can be said to amount to an attempt to supplement the terms of the written contract 'by testimony as to some negotiation or consensus between the parties which is not embodied in the written agreement'**. (See *Van Wyk v Rottcher's Saw Mills (Pty) Limited* 1948 (1) SA 983 (A) at 991).

I am satisfied that the contract of suretyship in the present instance complies with the requirements of s 6. **In terms of the contract each of the promissors is both a potential principal debtor and a potential surety. The liability of the promissors, as sureties under the contract, does not arise until the principal obligation**

has been contracted and then, as soon as any one of the promissors becomes indebted to the plaintiff, such promissor becomes the principal debtor and each of the other promissors then becomes liable to the plaintiff as surety for the principal debt thus created. The incurring by any one of the promissors of a debt to the plaintiff defines his position *vis-à-vis* plaintiff and the other promissors; he becomes the principal debtor and the other promissors then become the sureties. The transaction between the creditor and the principal debtor which gives rise to this result, does not amount to a negotiation or consensus between the creditor and any of the sureties, for, as counsel rightly pointed out, the result of that transaction is that the promissor in question ceases to be a potential surety and becomes the principal debtor. The legal position arising out of the contract under consideration seems to me to be precisely the same as it would have been if the plaintiff had entered into a separate written contract with each of the promissors, in terms of which such promissory bound himself (or itself)

> as surety and co-principal debtor for any indebtedness which any of the other promissors might in future incur, as principal debtor, to the plaintiff."
>
> [emphasis added]

18] In my opinion, the facts of ***Sapirstein*** are distinguishable from the facts of the present case. In ***Sapirstein*** there were a limited number of persons who could be potential debtors, all of whom were identified with certainty. It simply required evidence of a subsequent transaction in order to establish which of those entities in fact became a principal debtor.

19] In the present case, the suretyship documents make no effort to identify *"the debtor"*. In response to a question that I put to the Plaintiff's counsel as to what extrinsic evidence he would seek to lead to identify the debtor, he answered that he would ask the party: *"Who is the debtor referred to in this suretyship?"*

20] In my opinion, this is precisely the type of evidence that the Legislature intended to exclude when it enacted section 6 of

the Act. It is an attempt to lead evidence of the consensus between the parties rather than admissible evidence of an identificatory nature. If the Plaintiff's contention is correct it would create significant potential for fraud and perjury and subvert the underlying policy of the Act.

21] Moreover, the type of evidence that the Plaintiff wishes to introduce appears to me to be evidence of negotiations between the parties and their *consensus* – *i.e.* what they had in mind when they referred to *"the debtor"* in the documents.

22] If the Plaintiff's proposition were taken to its logical conclusion, a suretyship for *"the debtor"* who is not named or identified in any other way in the instrument, executed in favour of a bank would be valid notwithstanding its failure to name the debtor. This would create the possibility of a virtually unlimited number of potential *"debtors"* with respect to whom the unfortunate signatory to the deed of suretyship might have gone surety. This cannot be what the statute intended.

23] The Plaintiff's counsel developed his argument by relying on the judgment of Flemming, J (as he then was) in the *Credit Guarantee Insurance* case. At **p525** the Court stated:

> "If the parties find it impossible, impractical and inconvenient to reflect what the surety is undertaking except by an express statement of the name of the principal debtor and a definitive identification of the guaranteed debt, the parties will no doubt mention these features. **But I should not commence the enquiry as if the statute insisted that a specific feature must be explicitly stated and exhaustively described. If the parties succeed in reflecting the 'terms' of the contract without mentioning *e.g.* the debtor's name, they have a valid contract**. This is illustrated by *inter alia* valid suretyship in the *Sapirstein*case which, despite additional itemisation, really related to 'any indebtedness which any of the other promisees might in future incur'. The suretyship in the *Fourlamel* was also in wide terms similar to contracts which are frequently enforced in favour of banks and other institutions. It is equally well known what an employer has taken upon himself if he binds himself as surety to a specific hotelier for the bills of each of his employees or perhaps for such bills incurred during a specific period, even if extrinsic evidence has to prove that it is an employee who incurred the debt of the agreed nature."

[emphasis added]

24] As I understand the judgment in *Credit Guarantee*, the learned Judge was merely stating that one should not start off on the premise that, if the debtor is not named in the suretyship, the suretyship is invalid. With this I agree. The test is whether, on a reading of the document as a whole, the principal debtor is established with sufficient certainty, or can be established with sufficient certainty through the introduction of admissible extrinsic evidence that is clearly linked to the debtor sought to be identified in the suretyship and not to a potentially unlimited group of debtors.

25] The facts of this case are analogous to those in *Fourlamel*. In that case, in the context of a summary judgment application, the validity of the suretyship had to be determined on the basis that the space that provided for the identification of the principal debtor had been left blank.

26] At **p345F**, Miller JA held:

> "It is a condition of the incorporation of other writing into a written document required by law to contain the terms of the contract, if such contract is to have validity, that such other writing be referred to in the written document. *Certum est quod certum reddi potest*. It is true that the document with which you are now concerned refers in the final paragraph thereof to 'the leased premises referred to in the deed of lease annexed hereto', but that paragraph deals exclusively with the selected *domicilium*and is in no way linked with any debt or debts for which respondent was to be a surety. Nor does the fact that the deed of lease requires the lessee to furnish the lessor with a guarantee in the form of a standard suretyship deed, achieve the necessary link. The object of the appellant in attempting to read the deed of lease in the document is to establish in writing the identity of the creditor and principal debtor, left blank in the document as signed by the respondent. The mere fact that the lease is referred to in the context of a *domicilium executandi*provision in the document, does not by any means, without evidence of the verbal agreement of the parties, establish that the lessee described in the deed of lease is the principal debtor in respect of whose debts the respondent was undertaking to be a surety. Nor would the annexation of the deed of lease to the document (if, indeed, it was annexed thereto) remove this difficulty in the way of the appellant's attempt to fill the voids in a document by incorporating therein an agreement of lease."

27] In the present case, there is not even the possibility of linking the

suretyship to a written document that identifies a lease agreement in its *domicilium* clause. Accordingly, no extrinsic evidence is in the present case admissible to supplement the omission to identify the principal debtor in the suretyships.

28] A case where the principal debtor was not named in the particulars of claim, but was identified with sufficient certainty that extrinsic evidence was permitted to save the suretyship from invalidity is *Industrial Development Corporation of SA (Pty) Limited v Silver* **2003 (1) SA 365 (SCA)**. At **para [2]** of the judgment (**p368**), Scott JA held:

> "[2] The appellant sued the respondent in the Court below for payment of the sum of money said to be due and payable to it by the respondent as surety and co-principal debtor in terms of a deed of suretyship dated 10 December 1999. **The document specified the amount of the principal debtor's indebtedness, that such indebtedness was in respect of money to be lent and advanced by the appellant to the principal debtor in terms of an agreement**(defined as 'the loan agreement') **and the loan agreement was to be entered into simultaneously with the signing of the deed of suretyship. But it did not reflect the name of the**

principal debtor; a space left for the insertion of the latter's name was left blank.

[3] The appellant annexed to its summons a copy of a loan agreement entered into between it as lender and a company, Auto Spares and Accessories (Pty) Ltd trading as Engineplan ('Engineplan') as borrower and alleged in its declaration that this was the loan agreement referred to in the deed of suretyship. It followed, so it was alleged, that the principal debtor was Engineplan. **From the loan agreement it appears that the loan was for R6 million, being the same amount referred to in the deed of suretyship, and that it was signed by the respondent both on its own behalf and on behalf of Engineplan on the same day as the deed of suretyship was signed, *viz.* 10 December 1999**. The loan agreement provided further that any advance in pursuance of its terms was conditional upon the Respondent first guaranteeing the obligations of Engineplan under the loan agreement in the form and subject to such terms as the appellant reasonably required. …

[5] … What the section requires is that the 'terms' of the contract of suretyship are to be embodied in a written document. Those terms are not limited to the essential terms but would include at least the material terms of the contract. … Although it may at first blush appear not to be the case, the identity of the principal debtor is undoubtedly a material term of a contract of suretyship. … Unless, therefore, the identity of the principal debtor is embodied in the written document, the contract of suretyship will be invalid. **In the present case the appellant relies on the reference in the deed of suretyship to the loan agreement which in turn discloses the identity of the principal debtor. It is contended that the loan agreement was incorporated by such reference into the deed of suretyship and that there was accordingly compliance with the section despite the blank space where the name of the principal debtor ought to have been inserted**.

> [6] Incorporation by reference, as the name implies, occurs when one document supplements its terms by embodying the terms of another. Leaving aside for the moment the admissibility of extrinsic evidence that may be necessary to complete the identification of a document whose terms are sought to be incorporated, the first enquiry is whether the deed of suretyship may be supplemented in this way."
>
> [emphasis added]

29] The Court held in that case that the deed of suretyship could be supplemented by extrinsic evidence identifying the loan agreement as the one referred to in the suretyship. The loan agreement, itself **a written instrument**, did identify the debtor.

30] The *Industrial Development Corporation* case distinguished the facts in that case from those in *Fourlamel v Maddison* on the following basis (**p371*I***):

> "What emerges from this passage [i.e. p345G of *Fourlamel v Maddison*] is that it was not apparent *ex*

> *facie*the deed of suretyship that the deed of lease sought to be incorporated was the document giving rise to the indebtedness incurred by the suretyship. This meant that not only would it have been necessary to adduce evidence identifying the deed of lease as the one referred to in the deed of suretyship but, in addition, evidence would have been necessary to establish that the debt created by that deed of lease was the debt being secured in terms of the deed of suretyship. **The additional evidence would have been evidence of the verbal agreement of the parties and was therefore inadmissible**."
>
> [emphasis added]

31] In my opinion, the facts of the *IDC* case are very different from the facts of the present case. In that case, extrinsic evidence was permissible to identify a written instrument which in its turn identified the debtor. To put it another way, the principal debtor was identified in a written instrument.

32] In the present case no such certainty can be found. Even the second suretyship, which refers to an **indebtedness** in a specified amount, does not refer to a written document in which that indebtedness is recorded along with the identity of the **principal debtor**.

33] Accordingly, both suretyships fall foul of section 6 of the Act and are invalid by reason of the documents' failure to record an essential term of the suretyship – i.e. the identity of the debtor.

34] The suretyships are therefore invalid as no extrinsic evidence can be led either to identify the principal debtor or to rectify the suretyships by identifying the principal debtor.

35] Accordingly, I make the following order:

1. Both of the suretyships attached respectively as Annexures "P1" and "P2" to the particulars of claim are invalid as they do not comply with section 6 of the General Law Amendment Act, 50 of 1956.

2. The action is dismissed.

3. The Plaintiff is ordered to pay the costs of the action.

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P.N. LEVENBERG, AJ
ACTING JUDGE OF THE HIGH COURT