IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Case number: 47986/2012

Date: 19 March 2014

In the matter between:

EDAN VEHICLE & ASSET FINANCE (PTY) LTD Plaintiff

And

ORTHOSMART (PTY) LTD First Defendant

(Registration number: 2010/003991/07)

DR. RUMBIDZAI ESINATH MASHAYAMOMBE Second Defendant

JUDGMENT

PRETORIUS J,

[1] The plaintiff claims confirmation of the cancellation of the rental agreement;

payment of the amounts of: R82 580.00 in respect of claim

1; R173 280.00 in respect of claim 2 and R10 485.38 in respect of claim 3 and ancillary relief.

[2] Counsel for the defendants conceded that default judgment should be granted at the outset against the first defendant for payment as set out in the above prayers.

[3] The second defendant is cited as having entered into a suretyship agreement. Counsel for the second defendant argued that a suretyship document must comply with section 6 of the General Law Amendment Act 50 of 1956 which provides:

> *"6 Formalities in respect of contracts of suretyship No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments. "*

[4] According to counsel for the second defendant the suretyship document in this case lacks the principle document debtor's name as principal debtor. Therefor the document is invalid and unenforceable against the second defendant.

[5] Mr Venables gave evidence on behalf of the plaintiff. According to him the suretyship document related to a contract to rent two trailers to the first defendant. He identified the Vehicle Hire Agreement between the plaintiff and the first defendant. His evidence was that the rental agreement was marked 0206-EV and that the same two trailers are identified in the surety document as is done in the rental agreement. He testified that it is clearly set out in the deed or suretyship that the suretyship related to *"Rental Agreement Number 0206-EV."*

[6] It is further evident that the surety document reads as follows:

> *"I Dr Rumbidzal Esinath Mashavamombe, I.D. Number: 83…… of 27 San V…….. 5th Street, H…….. G……., 1……., the undersigned, do hereby bind myself as Surety and Co-Principal Debtor .....*"

[7] The problem in the document is that the principal debtor's name is not inserted as the principal debtor, but it is mentioned. The name of the first defendant does appear on the document and the creditor is identified as such in the document.

[8] Mr Venables' evidence concluded the case for the plaintiff, after the second defendant's counsel chose not to cross-examine him. The second defendant chose not to lead any evidence and closed its case.

[9] It is of importance that the second defendant did not deny that he had signed the suretyship in his personal capacity, or that he had signed on behalf of the first defendant.

[10] In paragraph 17 of the particulars of claim it is averred:

> *"The second defendant confirmed that when they signed the suretyship (Annexure "F1-3") the plaintiff had explained to him the contents of the suretyship and the second defendant* was *advised to get independent legal advice to make sure that he understood his commitment as surety. "*

[11] The second defendant chose not to plead to this paragraph at all and the court has to take the contents of the paragraph into consideration when deciding the case.

[12] In the leading case of **Sapirstein and Others v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A)** Trengrove AJA held at p 12 A - C :

> *"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 it 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 of 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 (ie 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,..."*** (Court's emphasis)

[13] In **Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A)** at 342 H - 343 A Miller JA found:

"Concerning that aspect of the problem which relates to what it is that is required to be signed, I am unable to find any essential or material difference between a requirement that the agreement is to be "embodied in a document" signed by the surety and a requirement that the agreement is to be "entered into in writing" and signed by the buyer. In either case, the party concerned is required to manifest his assent to the agreement as recorded in a written document, by appending his signature to such written document. ***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.'' (Court's emphasis)

[14]In **Caney's The Law of Suretyship, 5th edition by CF Forsyth** and JT Pretorius this *dictum* was confirmed as the correct position.

[15]Caney's book set out that the courts take a common sense approach to the interpretation of section 6, as set out in **Credit Guarantee Insurance Corporation of South Africa Ltd v Schreiber 1978 (3) SA 523 W.**

[16]The essential terms of the surety must be properly identified, although extrinsic evidence may be used to identify the terms of the surety. I find that it is clear that the essential terms of the surety have been identified properly, if the above *dicta* are applied to the present case.

[17]The Supreme Court of Appeal held in **Inventive Labour Structuring (Pty) Ltd v Corfe 2006 (3) SA 107 (SCA)** dealt with rectification. The court found at paragraph 11:

> *"[11] In a case where the contract being construed is capable of more than one interpretation, one meaning leading to invalidity and the other not, preference must be given to the latter meaning in order to save the contract from invalidity.* ***That much***

is trite. Therefore, the present suretyship - when properly construed - complies with the formal requirements in s 6 of the Act. " (Court's emphasis)

[18]This approach confirmed the stance of the SCA in **Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA)**

where Smalberger JA held:

"Likewise a deed of suretyship, in my view, ought not be held to be formally invalid where ex facie the document it is reasonably capable of an interpretation consistent with validity. "

[19]These principals should be applicable in the current case before me. It is so that the second defendant had set out in the document that he binds himself as surety and co-principle debtor, although it was not set out in this paragraph that it was the principal debtor's debt that he bound himself for. From the deed of surety, it is quite clear that the surety referred to the rental agreement with the correct number and particulars of the rental agreement. There can be no doubt that it refers to the rental agreement. The creditor is set out as the plaintiff and there can be no doubt who the creditor is. The document was signed by the second defendant and no evidence was led to contradict Mr Venables' evidence that the document was signed by the second defendant.

[20] In these circumstances I have considered all the evidence and find that if the principals as set out in the authorities are applied, that the deed of surety has been proven.

[21] Therefore I make the following order against the first and second defendants, the one to pay the other to be absolved:

1. Confirmation of cancellation of the agreement;
2. Payment of:
    2.1 R82,580.00 in respect of claim 1;
    2.2 R173,280.00 in respect of claim 2;
    2.3 R10,485.38 in respect of claim 3;
3. Interest on the above amount at 15.5% per year from 17 April 2012 till date of final payment;
4. Costs of the action.

Jud(Je C Pretorius

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Heard on : 12 March 2014

For the Applicant / Plaintiff	: Adv De Beer
Instructed by	: Vezi & De Beer
For the Respondent	: Mr Saddler
Instructed by	: F J Cohen
Date of Judgment	: 19 March 2014