

SOUTH AFRICA / JUDGMENT

Botes v Sandvik Mining RSA (Pty) Ltd (CA&R47/2019) [2020] ZANCHC 29 (12 June 2020) [2020] ZANCHC 29

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Stanton

CASE / FILE NUMBER

CA&R 47/2019

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA&R 47/2019

Court a quo case no: 753/2019

Heard on: 16/03/2020

Delivered on: 12/06/2020

In the matter between:-

WIETS JACOBUS BOTES APPELLANT/DEFENDANT

and

SANDVIK MINING RSA (PTY) LTD RESPONDENT/PLAINTIFF

Coram: Mamosebo, J et Stanton, AJ

JUDGMENT ON APPEAL

STANTON, AJ

INTRODUCTION:-

- [1] The respondent, as plaintiff in the court below, sued the appellant, as defendant in the court below, for payment of R8,300,796.25, plus interest and costs.[1] For the sake of convenience, the parties shall be referred to as plaintiff and defendant.

- [2] On 22 June 2007, simultaneously with the application for credit purchase facilities, dated 22 June 2007 (“the credit application”)[2] the defendant signed the deed of suretyship.[3] The plaintiff’s claim against the defendant is based on the written deed of suretyship (“the deed of suretyship”).[4]
- [3] At the commencement of the trial in the magistrate’s court, the plaintiff and the defendant agreed that the issues of the magistrate’s court’s jurisdiction and the merits should be adjudicated separately and that the quantum would stand over for later determination.[5]
- [4] After hearing evidence, the court a quo found that it has jurisdiction to adjudicate the matter. [6]
- [5] The defendant now appeals against the acting magistrate, Mr EF Davids’s, finding that the magistrate’s court had

jurisdiction to entertain the action. The defendant also appeals the granting of the cost order that was awarded by the court a quo.

GROUND OF APPEAL:-[7]

- [6] The appeal is directed and limited to the findings of fact and the rulings of law that the credit application, with the deed of suretyship, and more specifically clause 8 of the deed of suretyship, is enforceable and effective.
- [7] Despite limiting the grounds of appeal as set out in paragraph 6 above, the defendant elaborately specified the grounds upon which the appeal is noted, as follows, namely that:-

7.1 The learned acting magistrate misdirected himself by finding that:-

7.1.1 it is common knowledge and not in dispute that an agreement had been concluded between the plaintiff and principal debtor and that the initial credit granted to the principal debtor was R400,000.00;

7.1.2 by implication, it was common cause and not in dispute that the deed of suretyship was part and parcel of the credit application;

7.1.3 with reference to paragraphs 4, 5B and 5C of the plaintiff’s particulars of claim and paragraph 2 of defendant’s plea, the credit agreement is not in dispute;

7.1.4 the credit application was accompanied by a deed of suretyship, as opposed to it only being the plaintiff’s averment that the credit application comprised the deed of suretyship and credit application, and by failing to have regard to the significance of the distinction;

7.1.5 it was “well accepted” by the parties to the action that the initial credit was granted and in force;

7.1.6 the testimonies of Messrs Strydom and Hakutangwi's that the principal debtor had succeeded with its application to obtain a credit facility were reliable, whereas the said two witnesses had no personal knowledge thereof and could not testify to that effect; and

7.1.7 the plaintiff had established in evidence that an agreement had been concluded between the plaintiff and the principal debtor in respect of the credit application;

7.2 The learned acting magistrate misdirected himself in law:-

7.2.1 by disregarding the provisions of section 45 of the Magistrates' Courts Act, 32 of 1944 ("the Act"), prior to its amendment (as it applied at the time of institution of the action), which section requires a valid consent to jurisdiction to be mutual and in writing, and by failing to take into consideration that it was the plaintiff's case that the plaintiff had not agreed in writing to the court's jurisdiction, but that it accepted that the credit application incorporating the suretyship was in fact tacit;

7.2.2 by making an adverse inference against the defendant for not having given evidence in respect of "the intention or meaning of the quoted text during the trial" and that the defendant "could have elected to testify about the intention and meaning of the quoted text"; and in so finding, failed to have regard thereto that it is impermissible for a party to an agreement to testify as to the intention of the parties and as to the meaning of the wording of an agreement/alleged agreement;

7.2.3 by finding that the defendant bore the onus to prove that all directors had to sign deeds of suretyship whereas the onus to establish both the existence of a valid agreement and the terms thereof, was on the plaintiff;

7.2.4 by finding that plaintiff's acceptance of the principal debtor's application for credit incorporating the deed of suretyship was not a requirement in law to render the suretyship binding, and by failing to have regard thereto that:-

7.2.4.1 the deed of suretyship did not stand alone but formed part of a document incorporating a credit application;

7.2.4.2 if credit was going to be given in terms of the credit application (and not in terms of defendant's pre-existing trade relationship with SAS Africa), that that acceptance of the application had to be communicated to plaintiff; and

7.2.4.3 that the credit application itself contains a section which had to be completed by authorised personnel of the plaintiff to confirm the approval thereof;

7.3 The learned acting magistrate furthermore erred on the facts and/or in law:-

7.3.1 when finding that the plaintiff had convinced the court that the conduct of the plaintiff, the principal debtor and its senior office bearers had confirmed the granting (accepting) of the credit application (of which the suretyship document formed part) and that the plaintiff and the principal debtor had ratified the alleged agreement by their conduct, despite:-

7.3.1.1 there being no evidence before the court a quo to justify such inference; and

7.3.1.2 the evidence showing that the plaintiff had granted credit without adhering to the credit limits;

7.3.2 when finding that the deed of suretyship, read with the terms of credit application, need not have been accepted in writing, alternatively, need not have been accepted at all, to constitute a valid agreement;

7.3.3 by disregarding the fact that the deed of suretyship had formed part of the credit application and that it had to have been complete and accepted to lend validity to the suretyship;

7.3.4 when finding that the evidence had established that credit was granted in terms of the credit application;

7.3.5 by disregarding the fact that the plaintiff had not presented any evidence that it had considered, let alone accepted, the (incomplete) credit application received from the principal debtor;

7.3.6 by disregarding the fact that the plaintiff had not presented any evidence to indicate an acceptance of the (incomplete) credit application made by the defendant, as is confirmed by the fact that the plaintiff had relied solely on an alleged tacit agreement in its particulars of claim;

7.3.7 by disregarding the evidence that, due to the internal restructuring of transactions within the group of companies, the plaintiff had merely taken over the principal debtor's usual business with the plaintiff's associate company, SAS Africa, with whom the principal debtor had already established a sound credit relationship, as confirmed by the fact that the plaintiff had stepped into the shoes of SAS Africa, thereby transferring the transactions to the plaintiff's books;

7.3.8 by failing to find that the facts before the court showed that the plaintiff had merely taken over SAS Africa's business with the principal debtor in order to peruse the plaintiff's books, and had paid no attention whatsoever to the credit application;

7.3.9 by finding that the conduct of the plaintiff, principal debtor and its senior office bearers, when requesting and approving increases to the credit limit, had confirmed the granting of the credit application, or the ratification of the agreement, and failing to have regard thereto that:-

7.3.9.1 there was no evidence that these office bearers had any knowledge of the defendant having to sign a credit application with suretyship and that they accordingly intended to ratify any such agreement;

7.3.9.2 the trade relationship was merely a continuance of a pre-existing and already established trade relationship with the Plaintiff's associate company, SAS Africa;

7.3.9.3 the earliest application for an increase to the credit facility was made only some three years after the credit application had been signed (which would imply and confirm that the credit application had not been accepted for a period of three years);

7.3.9.4 there is no evidence of an application for an increase of R400,000.00 to the credit limit as relied upon by the plaintiff;

7.3.9.5 no evidence was tendered that the plaintiff had applied its mind in order to accept the credit application incorporating the deed of suretyship, and that such a decision had been taken by an authorised person or persons;

7.3.10 by finding that it was well accepted that the initial credit had been granted and thus in force, when there was no evidence to substantiate this;

7.3.11 by finding that the factual position had contradicted the defendant's plea;

7.3.12 by disregarding that the deed of suretyship and the application for credit formed one document and was subject to acceptance by the plaintiff in order for the document as a whole to gain validity;

7.3.13 by failing to have regard thereto that if the credit application was not accepted (and the conditions therein not complied with), then the entire document, including the deed of suretyship, was invalid;

7.3.14 by finding that the principle recorded in the head note of the judgment in *Federated Timbers (Pretoria) (Pty) Ltd v Fourie* [8] applied to the facts of this matter when they were distinguishable from those to which that principle was applied;

7.3.15 by finding that the words “separate documents to be completed by each partner/member/director of the principal debtor” did not constitute a term of the deed of suretyship and by finding that the said words simply meant that when a partner/member/director provides a suretyship, he must complete his own deed of surety; and further:-

7.3.15.1 by not applying these words as a term and condition of the deed of suretyship, according to their ordinary meaning; and

7.3.15.2 by ascribing a meaning to these words contrary to – and inconsistent with their ordinary meaning;

7.3.16 by not finding that this term provided both the plaintiff and the defendant with benefits, safeguards and protection in law; and

7.3.17 by not finding that the application for credit and the deed of suretyship signed by the defendant would only be complete and valid:-

7.3.17.1 if separate suretyship documents had been completed and signed by each of the principal debtor's directors; and

7.3.17.2 if the complete application for credit was accepted (and in writing) by the plaintiff; and

7.3.18 by disregarding the evidence of the plaintiff's witness, Mr Hakutangwi, that he would not have considered any credit application as complete if all the directors of the applicant company had not each completed and signed separate suretyship documents when seized with such a task on behalf of the plaintiff;

7.3.19 by disregarding that Mr Hakutangwi's evidence had confirmed that the plaintiff's historical actions were consistent with interpreting the aforesaid words according to their ordinary meaning and as constituting a pre-condition for a valid acceptance of the credit application (incorporating the suretyship(s)), as contended by the defendant;

7.3.20 by failing to consider Mr Hakutangwi's evidence as significant in the factual matrix in which the agreement had to be interpreted;

7.3.21 by failing to apply the contra preferentum rule against the plaintiff by finding ambiguity in the words;

7.3.22 by finding that the words in the agreement simply were:-

“to avoid a deed of co-suretyship; and/or it was further only a guideline in completing the deed of suretyship; and/or not a term and condition of the relevant deed of surety bringing forth certain rights and obligations; and/or it did not bring forth a suspensive condition”; and

7.4. The learned acting magistrate had erred in both fact and law by finding that the deed of suretyship was not rendered invalid due to non-compliance with section 6 of Act 50 of 1956.

ISSUE FOR CONSIDERATION IN THIS APPEAL:-

- [8] Despite the plethora of grounds of appeal, the crisp issue for consideration by this Court is to determine whether the plaintiff had proved that the court a quo had the jurisdiction to determine the action in terms of section 45(1) of the Act.
- [9] In essence, the question to be answered is whether the plaintiff had proved that the deed of suretyship was valid and therefore conclusive proof of written consent to the jurisdiction of the magistrate's court.
- [10] At the commencement of the argument of the appeal, Mr CJ Nel, acting on behalf of the defendant, and Adv LLeR Pohl SC, acting on behalf of the plaintiff, were ad idem that the appeal is limited to the issue of the court a quo's jurisdiction.
- [11] We will accordingly deal with each and every ground of appeal collectively as they pertain to the issue in question. The gist of the defendant's case is that the credit application and the deed of suretyship is a single combined agreement, and consequently,

if the credit application is void for any reason whatsoever, the deed of suretyship is also invalid and therefore no valid consent to the jurisdiction of the magistrate's court could be given. This Court therefore considered the grounds of appeal raised in respect of the validity of the deed of suretyship and the validity of the application for credit.

LEGISLATIVE CONTEXT:-

[12] This appeal should be determined in accordance with the following legislation:-

12.1 Section 45(1) of the Act, in its present form, which reads as follows:

“Subject to the provisions of section 46, the parties may consent in writing to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29(1)”;

12.2 Section 45 substituted by section 3 of the Courts of Law Amendment Act, 7 of 2017 (“the Amendment Act”) with effect from 01 August 2018;

12.3 Prior to 01 August 2018, section 45(1) which read as follows:-

“Subject to the provisions of section 46, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: provided that no court other than a court having jurisdiction under section 28 shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in such matter”;

12.4 Section 15(1) of the Amendment Act provides that all legal proceedings, instituted, but not concluded prior to the commencement of the Amendment Act, must be continued and concluded in all respects as if the Amendment Act had not been passed; and

12.5 Section 6 of the General Law Amendment Act, Act 50 of 1956, which provides as follows:-

“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 the surety.”

THE PLEADINGS:-

[13] The plaintiff relies on the terms of clause 8 of the deed of suretyship averring that the magistrate’s court had jurisdiction by written consent.[9] According to the plaintiff’s particulars of claim, the application for credit was concluded simultaneously with the execution of the deed of suretyship and that the deed of suretyship forms part of the credit application.[10]

[14] The following admissions made by the defendant in his amended plea[11] are relevant to the determination of the appeal, namely:-

14.1 The defendant admits that on 22 June 2007 Blue Chip Mining and Drilling (Pty) Ltd (registration number 2003/023295/07) (“the principal debtor”) duly represented by the defendant in his capacity as operational director of the principal debtor, made a credit application for R400,000.00 to enable the principal debtor to procure the purchase and delivery of mining and drilling goods and/or the rendering of related services from time to time from the plaintiff ;[12]

14.2 Save to deny that the application for credit was executed in favour of Sandvik Group South Africa (but in favour of Sandvik Mining and Construction (RSA) (Pty) Ltd) the defendant admitted that the document comprised the following:-

14.2.1 the Sandvik Group South Africa application for credit purchase facility, incorporating the Sandvik Group South Africa conditions of sale;^[13] and

14.2.2 the written deed of suretyship, executed by the defendant in favour of Sandvik Group South Africa.^[14]

14.3 The plaintiff forms part of Sandvik Group South Africa and had changed its name from Sandvik Mining and Construction (RSA) (Pty) Ltd to Sandvik Mining RSA (Pty) Ltd;^[15]

14.4 On 22 June 2007, simultaneously with the conclusion of the application for credit, the defendant executed the deed of suretyship in favour of Sandvik Group South Africa.^[16] The defendant however, pleaded that the deed of suretyship would only be of force and effect if the credit application was accepted and approved by the plaintiff and the other directors of the principal debtor had bound themselves as sureties and co-principal debtors;^[17] and

14.5 The material terms of the deed of suretyship, which included paragraphs 8, insofar as it was not contradicted by the contents of the Plea.^[18]

^[15] Pointedly, the defendant admitted that he had agreed and consented to the plaintiff being entitled to institute any legal proceedings

arising from the deed of suretyship in any magistrate's court, notwithstanding the possibility that the claim could exceed the jurisdiction of such court, but on condition that it was not contradicted by the contents of the plea.^[19]

^[16] Significantly, clause 15 of the application for credit contains a consent to the jurisdiction of the magistrates' court. The defendant, in his capacity as a director of the principal debtor, had signed the application for credit.²³

^[17] It is common cause that the other two directors of the principal debtor had not signed the deed of surety.

VALIDITY OF THE DEED OF SURETYSHIP:-

^[18] The attack on the acting magistrate's findings pertaining to the deed of suretyship is multi-fold, but the question of substance is whether the parties had intended to establish an enforceable contract, even if one or more of the proposed sureties had not consented thereto in writing.

^[19] Mr CJ Nel argued that the heading at the top of the deed of suretyship, namely "Separate documents to be completed by each Partner/Member/Director of the principal debtor" was an express term and condition of the deed of suretyship, which had not been complied with and thus the deed of suretyship could not be enforced. In support of this argument, he referred the Court to the judgment in *Nelson v Hodgetts Timbers (East London) (Pty)*

Ltd[20], where an application for summary judgment was refused in an appeal to the Appellate Division where two sureties named in the deed of suretyship purported to bind themselves as sureties and co-principal debtors. Only one of the two intended sureties, the defendant, had signed the deed of suretyship.

[20] Rumpff JA, found that the deed of suretyship did not comply with the provisions of section 6 of Act 50 of 1956 and could not be sued upon because ex facie the agreement with which the parties intended to enter into a joint contract of co-suretyship was lacking the other intended surety's

signature.

[21] Rumpff JA, having dealt with the legal relationship between co-sureties and the benefits for sureties flowing from a co-surety

situation, expressed the following principle:-[21]

"As indicated above, there are cogent considerations why a surety should want to be joined by a co-surety and why he should intend to enter into a contract of joint suretyship, and if the words of a contract clearly indicate that such was the intention of the parties, effect must be given thereto. In the result I am of the opinion that, in the absence of the signature of Van der Merwe, the deed of suretyship does not comply with the provisions of sec. 6 of Act 50 of 1956 and cannot be sued upon."

[22] Mr CJ Nel submitted that the facts and the ratio of the judgment in Société Commerciale de Moteurs v Ackermann[22] are apposite to the facts in casu, where Galgut AJA held as follows:-

"In the present case we have a very different set of circumstances. Annexure "C" is a document typed specially for the

occasion. It asks, as we have seen, for an indulgence and the six persons named were parties to the requests. It goes on to set out the names of six persons who 'do hereby bind ourselves jointly and severally to honour the repayments tabulated above.' Only two of the six persons have signed. The other four have not signed. Annexure "C" indicates an intention that all six persons should sign the document. Their names were inserted, not left blank when the document was prepared. Hence the difficulties, quoted above, which existed in the Johnston case does not exist here. A positive conclusion can be drawn from the document itself. A further feature which bears on the interpretation of annexure "C" is the fact that its very form indicates that it was intended to be a contract between the plaintiff on the one hand and the company, Peughold, and the six named persons on the other. Whatever rights plaintiff may have had against any one or all six sureties, the rights of sureties inter se are, as stated in Nelson's case sup cit, of great importance. The omission of their signatures constitutes an omission not merely of a material term but the omission of essentialia, viz the parties to the contract. In all these circumstances it is clear that annexure "C" is incomplete and does not comply with section 6 of Act 50 of 1956.

“The suggestion mentioned earlier that by the use of the phrase ‘jointly and severally’ those who signed intended to be bound individually takes the matter no further. Co-sureties always intend to be bound individually without losing their right of recourse against the co-sureties. The issue in this case is whether the document indicates the intention that if only one of the proposed co-sureties signs he alone is bound even if one or more of the others failed to sign. As pointed out in Nelson’s case sup cit at 46: ‘There are cogent considerations why a surety should want to be joined by a co-surety and why he should intend to enter into a contract of joint suretyship.’”

[23] Mr CJ Nel also argued that the entire credit application forms part of the suretyship document and constitutes the “written document” envisaged by section 6 of Act 50 of 1956. He accordingly submitted that the acting magistrate erred in finding that it had complied with section 6 of Act 50 of 1956 and that the lack of signed deeds of suretyship of the other directors, had rendered the document incomplete and invalid as a deed of suretyship for purposes of section 6 of Act 50 of 1956.

[24] In support of this argument Mr CJ Nel relied on the judgments of *Sneech v Hill Kaplan Scott & Partners*[23] and *Theunissen en Andere v Transvaalse Lewendehawe Ko-op Bpk.*[24]

[25] *Sneech v Hill Kaplan Scott & Partners Cillé, J.A* held as follows:-

“By signing his name at the foot of annexure A the appellant entered into a second contract, the particulars of which are to be found in the entire document. That contract identifies a surety, a principal debtor and a creditor; it contains particulars of the nature and amount of the debt in question and how it was to be liquidated. Those are the essential terms of a contract of suretyship.

(See *Sapirstein v. Anglo African Shipping Co. (S.A.) Ltd.* 1978 (4) S.A. 1 (A.D.) at p. 12.) Annexure A therefore embodies the terms of a contract of suretyship, is signed by the surety and complies with the requirements of section 6 of the Act.”

[26] In *Theunissen en Andere v Transvaalse Lewendehawe Ko-op Bpk*, the principal debtor applied in writing for credit facilities. The application comprised a collection of pages consisting of an

introduction and various schedules thereto marked “A to G”. Schedule “G” consisted of a suretyship agreement in terms of which four named individuals had signed as sureties and co-principal debtors in solidum. The name of the creditor was omitted from the suretyship schedule, but it did appear elsewhere in the bundle of documents. The

Defendants raised an exception on the basis that the written suretyship did not comply with the requirements of section 6 of Act

50 of 1956 in that the creditor had not been identified therein. In further particulars provided, the plaintiff alleged that the various schedules constituted a unit and had to be read together as such. The Appellate Division found that, both by its content and its physical attributes, the various parts did form a unit and therefore qualified as a “document” for purposes of section 6 of Act 50 of 1956.

[27] Mr LLeR Pohl SC conceded that the document used by the plaintiff is clearly a standardised form because it makes provision for a partnership and/or a close corporation and/or a company (whichever is applicable) and that it was not drawn and designed with this specific defendant in mind. He however added that it is clear from the wording in brackets that it was not intended to be a contract of co-suretyship, but merely a reference to separate documents to be completed and that the deed of suretyship itself only provides for one surety to sign the deed of suretyship. In support of his argument, he relied on clause 12 of the deed of suretyship, which provides as follows:-

“12. I acknowledge that at the time of signing this deed of suretyship, this document was complete in all respects in that all the terms contained in this document were embodied herein at the time of signing as required in terms of the provisions of section 6 of the General Law Amendment Act, no. 50 of 1946 (as amended).”

[28] Mr LLeR Pohl, also relied on the decision in *Nelson v Hodgetts Timbers (East London) (Pty) Ltd*,^[25] where the Court found that the parties had intended to enter into a joint contract of co-suretyship. He argued that it is clear from the use of the words “I” and “myself” that the matter before us is clearly distinguishable from the one that served before the Court in the Nelson case, *supra*.

[29] In the matter of *Industrial Development Corporation of SA Ltd v SEE BEE Holding (Pty) Ltd and Others*,^[26] a deed of suretyship had made provision for signature by ten intended sureties. The document was signed by, or on behalf of, all but one of them. The question for decision was whether the absence of the one’s signature had rendered the entire document invalid? In this case the Court also distinguished the Nelson case, *supra* and found that the reliance on Act 50 of 1956 was unnecessary and, indeed, inappropriate. The question before the Court was one of substance, namely whether the parties had intended that an enforceable contract would be established even if one or more of the

proposed sureties had not consented to the proposed contract, which question would have arisen even if no formalities had been required for the validity of contracts of suretyship.

[30] Mr LLeR Pohl SC contended that another clear indicator that the parties had intended the present deed of suretyship to be a separate one as opposed to a deed of co-suretyship is to be found in the provisions of clause 4 of the deed. In this clause the parties had agreed that even if there were other suretyship contracts, the creditor could release any of the sureties without reference or notification to the defendant as surety and that that would not have been the case if this was a deed of co-suretyship.

[31] Despite Mr Hakutangwi’s evidence that all the principal debtor’s directors were required to sign as sureties this Court is persuaded that, *ex facie* the document, the plaintiff did not intend to enter into a joint contract with co-sureties or separate contracts of suretyship. In our view, the form in which the document is cast and the words used are such that it cannot be necessarily inferred that the parties had intended a joint contract of co-suretyship.

[32] This Court is also in agreement that the dicta in *David v Naggyah and Another*[27] constitutes a correct interpretation of section 45(1), where Williamson JP held as follows:-

*“On this passage, which has been quoted with apparent approval in certain other cases put before us, it has been contended that to confer jurisdiction in terms of section 45 of the present Act it is necessary for there to be put before the court a formal agreement executed by both parties. But that is not what section 45 requires. It merely states that the parties must consent in writing; each party may separately consent and there need be nothing in the form of an agreement between them; it is not even required that any such consent need be signed by either party. There must be a writing or writings which constitute proof that each of the parties has consented to the jurisdiction. The consent cannot be a matter of mere legal inference from acts or conduct. If the case of *Dyter & Tiran* or any of the cases in which that decision has been quoted purport to decide any more than that, then I respectfully disagree with such decision or decisions.*”[28]

[33] In *Suid-Westelike Transvaalse Landbou Koöperasie v Kotze*,[29] this Court referred obiter to *David v Nagghya and Another*[30] and *Neale v Edenvale Plastic Products (Pty) Ltd*,[31] with approval.

[34] On the principle expressed in the dicta of Galgut AJA, the deed of suretyship signed by the defendant is valid and enforceable against the defendant and that the defendant had, in clause 8 of the deed of suretyship, consented to the jurisdiction of the magistrates’ court having jurisdiction.

[35] Accordingly, the grounds of appeal relating to the validity of the deed of suretyship stand to fail.

VALIDITY OF THE APPLICATION FOR CREDIT:-

[36] The defendant raised various grounds of appeal pertaining to the acting magistrate’s findings in respect of the validity of the application for credit. The questions to be decided are firstly, whether the plaintiff was required to accept the credit application in writing and secondly, whether the application was void due to the fact that the credit limit specified therein was limited to R400,000.00.

[37] Mr CJ Nel argued that no evidence was led that the credit application was ever considered or accepted by any authorised person(s) on behalf of the plaintiff. He maintained that Messrs Strydom and Hakutangwi’s evidence disavowed any knowledge of the credit application ever having been considered and granted. According to his argument, the credit application is not valid and binding and consequentially, neither is the deed of surety.

[38] According to Mr CJ Nel the plaintiff neither alleged nor proved the minimum requirements prescribed by section 45(1) as it relies on the tacit acceptance of the application for a credit facility.

[39] Mr CJ Nel relied on the dicta in *Federated Timbers*[32] where the Court expressed the qualification that the requirement to communicate acceptance of a suretyship offer is indeed necessary

where the surety's undertaking is in the form of a proposal. He argued that in casu the suretyship formed part of a proposal for a credit facility of R400,000.00, that it was subject to the plaintiff's approval

and that communication of acceptance was also required.

[40] According to Mr CJ Nel, the plaintiff bore the onus to establish on a balance of probabilities not only that it had accepted the defendant's proposal, but also that both parties

had the required *animus contrahendi*.

[41] The plaintiff's case, as set out in its particulars of claim, is that the credit application was tacitly accepted and thereafter increased on request.

[42] Mr LLeR Pohl, also with reference to the *Federated Timbers* case, maintained that section 6 of Act 50 of 1956 does not require any action on the part of the creditor. He added that an allegation that the advantages of the suretyship should be accepted by the plaintiff is, as was found by the Court in the *Federated Timbers* case, *supra*, superfluous and not a prerequisite for the plaintiff's cause of debt.

[43] Mr LLeR Pohl, further referred the Court to the judgments in *Dyter & Tiran v Vorster N.O.* [33] and *Senekal v Trust Bank of Africa Limited*[34] and argued that the plaintiff had made out a *prima facie* case for the Court *a quo* having jurisdiction which, in the absence of evidence in rebuttal thereof from the defendant, became sufficient proof of such jurisdiction and that the plaintiff had accordingly discharged the onus of proof in this regard.

[44] In *Senekal v Trust Bank of Africa Limited*, the Supreme Court of Appeal held as follows:-

"At the end of the case, when all the evidence (which includes the certificate) is in, the Court must decide whether the party upon whom the onus rests has discharged it on a balance of probabilities. As was pointed out by Stratford JA in Ex Minister of Justice : in re : R v Jacobson and Levi 1931 AD 466 at 478:-

'*Prima facie* evidence, in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. If the *prima facie* evidence or proof unrebutted at the close of the case, it becomes 'sufficient proof' of the facts (on the issues with which it is concerned) necessarily to be established by the party bearing the onus of proof, (*Salmons v Jacoby* 1939 AD 588 at 593).

There is no question of the certificate transferring the onus in the full sense of the word, to the Appellant but in the light of the provisions of the certificate clause in the Deed of Suretyship, the Appellant could only, at his peril refrain from giving or leading evidence to counter the prima facie proof of the amount of indebtedness afforded by the certificate.”

[45] This Court is in agreement with the judgment in *Federated Timbers (Pty) Ltd v Fourie*, [35] where it was held that:-

“Myns insiens was geen aanvaarding in die huidige geval nodig nie. Aanvaarding sou in enige geval geïmpliseer word deur die feit dat die Eiser op die borgakte dagvaar. Artikel 6 van Wet 50 van 1956 stel die vereistes van ‘n dokument deur die borg geteken te word en maak nie voorsiening vir enige handeling aan die kant van die krediteur of skuldeiser nie. Die bewering dat die voordele van die borgakte deur die Eiser aanvaar is, is, myns insiens, oorbodig en nie ‘n vereiste vir die Eiser se skuldoorsaak nie.”

[46] In casu, the surety’s undertaking is not in the form of a proposal. We are satisfied that it was, accordingly, not necessary for the plaintiff to expressly communicate the acceptance thereof.

[47] A number of the defendant’s grounds of appeal pertain to the acting magistrate’s findings in respect of the increased credit facility.

[48] According to the defendant, the plaintiff did not present any evidence as to the actual credit limit imposed.

[49] Mr LLeR Pohl, with reference to the decision of *Nyandi v Natal Motor Industries Limited*, [36] maintained that, if one has regard to paragraph 4 of the defendant’s plea it is clear that its case is not that there was no valid suretyship, but that the suretyship was limited to R400,000.00.

[50] It is trite that the purpose of pleading is to clarify and delineate the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.[37]

[51] In view of the defendant’s plea we are accordingly not persuaded that this appeal should be upheld on the basis of the

number of the credit facilities granted or the increase in amounts thereof.

[52] The acting magistrate found that the plaintiff had ratified the application for the credit application. Ratification, however, played no part in the case presented by the plaintiff nor was it part of the defendant’s plea. A finding on this ground of appeal is accordingly irrelevant.

[53] A few of the defendant’s grounds of appeal pertain to the acting magistrate’s findings in respect of the evidence and his findings of fact presented during the trial.

[54] We are in agreement with Mr LLeR Pohl that this Court should evaluate the evidence and the findings of fact in view of the Supreme Court of Appeal's judgment in *Rex vs Dhlumayo and Another*[38], where the following dicta appears:-

"I summarise the conclusions to which I have come with regard to the principles which should guide an appellate court in an appeal purely upon fact as follows:

1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.
2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular case before it.
3. The trial Judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.
8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.
10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter,

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgement can ever be perfect and all embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.
13. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case.
14. Subject to the difference as to onus, the same general principles will guide an appellate court both in civil and criminal cases.
15. In order to succeed, the appellant has to satisfy an appellate court that there has been 'some miscarriage of justice or violation of some principle of law or procedure'.
16. The English practice in regard to 'concurrent findings of fact by two courts' has no application in South Africa."

[55] Mr Strydom testified that the principal debtor's director, Martin van Zyl, had presented him with a letter. In this letter

reference is made to Blue Chip's "Current Credit Limit" and a request that same be increased. In our view, it can only mean that there was an existing agreed limit.

[56] Mr Hakutangwi testified that he had received the letter, in which the financial manager of Blue Chip once again requests an increase in the current credit limit from R2,500,000.00 to R10,000,000.00. He testified that he had personally approved that request. Once again, this can only mean that there was an agreed credit limit in place.

[57] In our view, the direct, credible factual evidence of Messrs Strydom and Hakutangwi, coupled with the factual contents of the

abovementioned exhibits and the defendant's plea, demanded some rebuttable evidence from the defendant. In the premises, this Court draws an adverse inference from the defendant's failure to do so.

[58] Section 20(7) and (8) of the Companies Act, Act 71 of 2008, provides as follows:-

"(7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all the formal and procedural

requirements in terms of this act, its memorandum of incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company with any such requirement.

(8) Sub-section 7 must be construed concurrently with and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers."

[59] The provisions of Section 20(7) and (8) of the Companies Act, Act 71 of 2008, are a codification of the Turquand rule in which it was held that people transacting with companies are entitled to assume that the internal company rules are complied with, even if they are not.

[60] Mr LLeR Pohl SC referred this Court to the decision of Bagport (Pty) Ltd v South African Express Airways SOC Limited[39] where it was held as follows:-

“[8] The Respondent’s reliance on internal procedures not having been followed, as a ground for invalidating the settlement agreement, is misplaced. Section 20(7) and (8) of the Companies Act, 71 of 2008, expressly provide that an outsider dealing with the company, is entitled to presume that the company in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of the act, its memorandum of

incorporation and any rules of the company...” Moreover, the well entrenched Turquand rule expounded in ROYAL BRITISH BANK v TURQUAND, safeguards persons contracting with a company in good faith, against the company resiling from an agreement on the ground of non-compliance with internal management rules and requirements.”

[61] Paragraph 2 of the written deed of suretyship provides that the defendant binds himself jointly and severally with the principal debtor for:-

“The due and punctual performance by the principal debtor of all debts and/or monies and/or obligations of whatever nature and however

arising which the principal debtor now or from time to time hereafter owes to the creditor.”

[62] This Court agrees that as and when the increases in the credit limit were requested by Martin van Zyl and/or the other chief financial officers of the principal debtor, the plaintiff was entitled to assume that Blue Chip Mining had complied with all its internal requirements.

[63] In the matter of Nedbank Limited v Wizard Holdings (Pty) Ltd and Others,[40] the Court rejected the respondents’ defence on the grounds that the limitation of indebtedness was not an essential term of an agreement of suretyship and that the parties had in fact intended the suretyship to be unlimited, so that the deed correctly reflected their intention, with or without the insertion of the word “unlimited”.

CONCLUSION:-

[64] It is clear that the defendant in casu bound himself in the deed of suretyship to any further increases in the credit limit by the principal debtor. The grounds of appeal incidental to the increase in the credit, are accordingly not upheld.

COSTS:-

[65] Mr CJ Nel submitted that the issue of costs should, even on the acting magistrate's interim findings on the merits, have been reserved until finalisation of the action, as the separation of the merits and quantum in the magistrates' court provides

insufficient grounds to deviate from the established principle that a cost order be made only at the end of the action.

[66] The matter in casu should be distinguished from an appeal in respect of an application pertaining merely to the separation of quantum and merits; which is not appealable.[41] A decision by a magistrate's court that it has jurisdiction by consent has the effect of a final judgment and is, therefore, in terms of section 83(b) of the Act appealable.

[67] The acting magistrate considered the aspect of jurisdiction and had found in favour of the plaintiff. The issue of jurisdiction was final in that it was not susceptible to alteration by the court of first instance. We agree that it was definitive of the rights of the parties and that it had disposed of a substantial portion of the relief claimed.

[68] This Court agrees that as the plaintiff was successful in respect of the issue of jurisdiction, the appeal against the magistrate's

order as to costs should also be dismissed.

[69] We find no reason why the costs in this appeal should also not follow the result, with the defendant paying the plaintiff's costs. In the absence of any request or reason that the costs should be awarded on an attorney and client scale, a cost order on a party and party scale is appropriate.

We make the following order:

"The appeal is dismissed with costs and it is declared that the Magistrates' Court has jurisdiction to adjudicate this matter."

A STANTON

ACTING JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I concur.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

For the Plaintiff: Adv. LLeR Pohl SC

oio Hugo Mathewson & Oosthuizen Inc.

For the Defendant: Adv. C.J. Nel

oio Duncan & Rothman Inc.

- [1] VOLUME 1: Page 15
- [2] VOLUME 1: Page 11, para 13
- [3] VOLUME 1: Page 22 - 23
- [4] VOLUME 1: Page 24 - 25
- [5] VOLUME 7: Page 624
- [6] VOLUME 8: Pages 770 - 771
- [7] VOLUME 8: Pages 774 - 789
- [8] 1978 (1) SA 292 (T)
- [9] VOLUME 1: Page 13 para 14.6
- [10] VOLUME 1: Page 11 para 13
- [11] VOLUME 6: Page 531 - 540
- [12] VOLUME 6: Page 533
- [13] VOLUME 1: Page 19-23
- [14] VOLUME 1: Page 24-25
- [15] VOLUME 6: Page 533
- [16] VOLUME 6: Page 535 para 11
- [17] VOLUME 6: Page 535 paras 11.2.1. AND 11.2.2.2
- [18] VOLUME 6: Page 537 para 12
- [19] VOLUME 6: Page 537
- [20] 1973(3) SA 37 (A)
- [21] at page 46E-F
- [22] 1981(3) SA 422 (A) T 440E
- [23] 1981(3) SA 332 (A) at 338G - 339A at 501L
- [24] 1988
- (2) SA 493 (A)
- [25] 1973
- (3) (SA) 37 (A) Page 44

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- [26] 1978(4) SA 136 (C)
- [27] 1961 (30 SA 4 (N) at 6D-F
- [28] at p 6; Also see *Neale v Edenvale Plastic Products (Pty) Ltd* 1971
- (3) SA 860 (T) at 866G-H
- [29]
- [2000] 1 ALL SA 170 (NC) AT
- [30] 1961
- (3) SA 4 (N) at 6D - F
- [31] 1971
- (3) SA 860 (T) at 866G - H
- [32] at 297 A-B
- [33] 1922 OPD 218 at 222
- [34] 1978
- (3) SA 375 (A) AT 382 – 383; *Voortrekker Apteek (Edms) Beperk v Serfontein* 1979 (3) SA 906 (O) at 913
- [35] 1978(1) SA 292 (T) at 297; *Nelson v Hodgetts Timbers (East London) (Pty) Ltd*, supra 1973 (3) SA 37 (AD) AT 44E-G
- [36] 1974
- (2) (SA) 274 (D)
- [37] 1974
- (2) (SA) 274 (D) at Page 279
- [38] 1948
- (2) SA 677 (A) at Pages 705 - 706
- [39] (GSJ) (44591/2016) [2018] ZAGPJHC 127 (9 May
- 2018) [SAFLII]
- [40] 2010
- (5) SA 523 (GSJ) para [8]
- [41] *Steenkamp v South African Broadcasting Corporation*, 2002 (1) SA 625 (SCA)

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