
SOUTH AFRICA / JUDGMENT

Incredible Sand (Pty) Limited v Bucon Development and Construction (Pty) Limited and Another (90421/2016) [2017] ZAGPPHC 430 (2 August 2017)

[2017] ZAGPPHC 430

COURT

North Gauteng High Court, Pretoria

BEFORE

Kooverjie

CASE / FILE NUMBER

90421/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 90421/2016

DATE

OF JUDGMENT: 2/8/17

Not

reportable

Not

of interest to other judges

Revised

In

the matter between: INCREDIBLE
 SAND (PTY)
 LIMITED Plaintiff
 and
 BUCON
 DEVELOPMENT AND CONSTRUCTION (PTY)
 LIMITED 1st
 Defendant
 ANETTE
 VOS 2nd
 Defendant

JUDGEMENT

KOOVERJIE AJ:

1. The Plaintiff instituted an application for provisional sentence against the Defendants, namely the First and Second Defendants,

jointly and severally in an amount of R163 350.50. The claim against the Defendants were based on two documents, namely an "Acknowledgement of Debt" and a "Suretyship Agreement", annexed to the pleadings as Annexure "A" and "B" respectively.

2. The Second Defendant opposed the provisional sentence application. It raised only one defence which is set out in paragraph 13 of its opposing affidavit, namely:

"13. The contract of suretyship (Annexure "B") relied upon by the Plaintiff does not comply with the provisions of Section 6 of the General Law Amendment Act as it does not contain the identity of the debtor and is void.

14. It follows therefore that the Defendant is not entitled to obtain judgment against members premised on a Suretyship Agreement that is void. Voidness of the Suretyship Agreement based on the fact that the identity of the debtor is not set out therein."

3. Counsel on behalf of the Second Defendant, referred to Section 6 of the General Law Amendment Act No. 50 of 1956 (Section 6), which stipulates:

"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 the section contained shall affect the liability of the finder of an aval under the laws relating to negotiable instruments."

4. Limited reference was made to Sapirstein and others v Anglo African Shipping Company SA (Pty) Limited 1978 (4) SA 1A ("Sapirstein matter") namely that the terms of the contract of suretyship must be in accordance with "Section 6" in that the identity of the creditor, the identity of the debtor, the identity of the surety and the nature and amount of the principal debt must be in writing. Failure to include any of these terms in writing would entail non

compliance with "Section 6", hence making the contract void. However, on a complete reading of the Sapirstein matter, extrinsic evidence was held to be admissible to establish the identity of both the principal debtor and sureties.

5. I was also referred to Fourlamel (Pty) Limited v Madison 1977 (1) SA 333A at 344H 345E ("Fourlamel matter") where the court therein found the Deed of Suretyship to be invalid as it did not contain the names of the creditor, principal debtor and cosurety. It was concluded that, due to the defective nature of the suretyship, the Plaintiff was estopped from relying on extrinsic evidence in order to cure such a material defect. The specific facts in the Fourlamel matter were such 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 secured by the suretyship. The facts of this matter is however distinguishable.
6. I find the Industrial Development Corporation of South Africa (Pty) Limited v Silver 2002 (4) ALL SA 316 SCA at 369 ("DC matter") more on point. There the court of appeal recognised that necessary terms may be incorporated (including the identity of a debtor) by reference to another agreement or document. It defined "Incorporation by reference" to mean when one document supplements its terms by embodying the terms of another.
7. In applying this principle to the facts of the matter, one has to have regard to Annexures "A" and "8" which the Plaintiff relies upon. Ex facie it appears that; the Second Defendant signed both agreements and that both such documents were signed on the same date, namely the 6th of September 2016; the debtor acknowledges that she is indebted to the creditor is identified in an amount of R280 700.50, which is the same amount as set out in the "Acknowledgment of debt" document; and reference to such "Acknowledgment of debt" is made in the "Suretyship Agreement". In this regard I refer to an extract of the "Suretyship Agreement":

"I the undersigned, Anette Vos, with identity number [...] (hereinafter referred to as 'the surety') and Incredible Sand (Pty) Limited (hereinafter referred to as 'the creditor') hereby bind my or ourselves as sureties and coprincipal debtors in favour of it successors in title or assigned, arising from or out of or in terms of an acknowledgment of debt between the creditor and the debtor dated 6 September 2016 in respect of certain monies due and owing and payable in the sum of R280 700.50 (including VAT)."

(My underlining)

8. It is common cause that the Suretyship Agreement lacks the debtor's identity. Similarly, in the IDC matter the court was also required to determine whether a Deed of Suretyship which did not identify the principal debtor could be saved from legal extinction by virtue of its reference to a loan agreement. Such loan agreement identified the principal debtor and reference to such a loan agreement was made in the Deed of Suretyship. In that matter, the Deed of Suretyship specified the amount of indebtedness that such indebtedness was in respect of the money lent and advanced by the Appellant to the principal debtor in terms of the loan agreement and that the loan agreement was to be entered into simultaneously with

the signing of the Deed of Suretyship.

9. The court, in principle, acknowledged that Section 6 of the General Law Amendment Act required that the terms of the contract of suretyship be embodied in the written document. Those terms were not limited to the essential terms, but would include at least a material term of the contract. The identity of the principal debtor was undoubtedly a material term of the contract of suretyship and unless it was embodied in the written document, the contract of suretyship will be considered to be invalid. However, an inquiry may be permitted as to whether the terms of the Deed of Suretyship could be supplemented in terms of "principle of incorporation". The court held:

"That as a general rule, the terms of the contract required by law to be in writing had to appear from the document itself and could not be supplemented by extrinsic evidence. Nevertheless, extrinsic evidence was permitted in a number of situations provided that such evidence was not about negotiations between the parties prior to the execution of the written agreement or about the parties consensus."[1]

10. Consequently the court held that extrinsic evidence was not only admissible, but very often also essential. A written contract was merely an abstraction until it was related by evidence to the concrete things in the material world. The admissibility of extrinsic evidence for this purpose has been consistently recognised. The evidence, whether given by the parties themselves or by another person would be allowed, as long as the evidence is not related to some negotiation of consensus between the parties.[2] It adopted the approach as set out in *Van Wyk v Rottchers' Saw Mills* 1948 (1) SA 983 A at 991 and followed by *Trengrove AJA* in the *Sapirstein* matter. "In my view there can be no objection to extrinsic evidence of identification other than evidence 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."

11. Subsequently in *FJ Mitrie (Pty) Limited v Madgwick and another* 1979 (1) SA 232D the court also adopted the "principle of incorporation". It however qualified the process upon which this principle should be applied, namely that if it can be established if it was clear
 - (a) that the parties intended that the Deed of Suretyship and the Memorandum of Agreement to be read together and (b) that if they were read together there could be no reasonable doubt who the debtor referred to in the Deed of Suretyship was namely, the debtor in respect of whose indebtedness can now claim the amount from the Defendant under the Deed of Suretyship signed by the Defendant.
12. More recently in *Wallace v 1662 G& D Property Investments CC*

[2007] ZAGPHC 135; 2008 (1) SA 300 W at para 24 the court adopted the following test. The test is "whether on a reading of the documents as a whole, the principal debtor is 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."

13. I am of the view there is room for the Deed of Suretyship to be supplemented by extrinsic evidence identifying the "acknowledgment of debt" as the one referred to in the suretyship and such written instrument does identify the debtor. Such identification can only be completed with the aid of extrinsic evidence. It is on this premise that the matter should proceed. Such evidence may have the effect of validating such Suretyship Agreement.

14. I therefore make the following order:

(1) The provisional sentence summons is refused with costs.

KOOVERJIE A.J.

ACTING JUDGE FOR THE HIGH COURT

APPEARANCES:

For Applicant: Adv R Raubenheimer

Of: Rooth & Wessels Attorneys Pretoria

For the Respondents: Adv H van der Vyver

Of: Ayaoob Kaka Attorneys

Johannesburg

[1] Paragraph 5 at page 368.

[2] Paragraph 9 and 10 at 370.

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Prepared on 10 October 2026 · Esheria