

SOUTH AFRICA / JUDGMENT

Merchant Capital v Cerimaj (2020/41514) [2023] ZAGPJHC 1324 (17 November 2023)

[2023] ZAGPJHC 1324**COURT**

South Gauteng High Court, Johannesburg

BEFORE

R J Moultrie

CASE / FILE NUMBER

2020/41514

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case no: 2020/41514

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

In

the matter between:

MERCHANT
CAPITAL ADVISORY SERVICES (PTY) LTD
Applicant
And
MILAN
CERIMAJ
First
Respondent
DRAGAN
VIDAKOVIC
Second
Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

MOULTRIE AJ

- [1] In this matter, the applicant seeks a money judgment on motion against the first respondent. The cause of action is based on a credit agreement allegedly concluded between the applicant and a now-insolvent company (the principal debtor) together with an alleged suretyship undertaken by the first respondent.
- [2] Although the application was opposed and an answering affidavit was deposed to by the first respondent, and although heads of argument were filed on his behalf, there was no appearance for him when the matter was called. This was despite the fact that the notice of set down appears to have been duly served. Furthermore, the first respondent's attorneys were sent a copy of the allocated opposed motion roll by the secretary of the senior motion court judge for the week. The failure of a respondent to appear despite having been duly notified does not, however, entitle an applicant to its order: the court must still be satisfied that a case is duly made out on the papers for the relief sought.
- [3] I requested Mr Jacobs, who appeared for the applicant to address me on various aspects of the application. The responses furnished to my queries were satisfactory regarding the factual allegations supporting the applicant's contention regarding the inapplicability of the National Credit Act, 34 of 2005 (which had been met with a bare denial on the first respondent's part) and in relation to the date from which interest should be ordered to run should the money judgment be granted.
- [4] The remaining concern was what appears to be dispute on the papers as to whether the first respondent signed the deed of suretyship and, if so, how best to deal with it,[1] recalling that section 6 of the General Law Amendment Act, 50 of 1956 (the GLA Act) stipulates that in order to be valid, a contract of suretyship must be "embodied in a written document signed by or on behalf of the surety".
- [5] In paragraph 23 of the founding affidavit, the applicant's deponent alleges that "on or about 20 November 2019 and at Sandton, and in writing the First and Second Respondents bound themselves jointly and severally as sureties and co-principal debtors with the Principal Debtor A copy of the suretyship is annexed hereto, marked as annexure "FA7"".
- [6] The first respondent's answer to this paragraph is contained in paragraph 22 of his answering affidavit and is as follows:

“The allegations are denied. The First Respondent denies having signed the suretyship in respect of the Principal Debtor. The only persons that signed the contract was Natalie Walker and the Second Respondent. The First Respondent denies any liability as the First Respondent denies having signed the contract.”

- [7] In my view, the first respondent’s allegation that he did not sign the suretyship is neither a bald denial, nor is it vague and insubstantial.
- [8] In the first place, it is not a denial at all, but a positive averment. The founding affidavit contains no pertinent allegation that the first respondent signed the document contended to embody the suretyship, and makes no reference to the fact that the document purports to bear his signature. It is beyond me how it can be contended that the first respondent’s case on the signature could be regarded as a bald denial.
- [9] Secondly, the allegation is not vague and insubstantial. It is unequivocal. And indeed, the applicant itself clearly understood it, as it found it necessary to say the following in reply to paragraph 22:

“The allegations are denied. As demonstrated, the Respondents have signed the suretyship by means of an electronic signature as envisaged in Section 13 read in conjunction with Section 1 of the Electronic Communications and Transactions Act, 25 of 2002. The denial is intended to be a red herring and is without substance”.

- [10] The words “as demonstrated” indicate that this paragraph must be read together with paragraph 17.2.2 of the replying affidavit, in which the applicant alleges as follows:

“The Court will have observed that the Respondents have signed the ... suretyship in their capacities as sureties, which schedule was appended as a schedule to the principal agreement”.

This is evidently a reference to the fact that FA7 bears three signatures each of which appears under the words “DocuSigned by”, and one of which has the first respondent’s name next to it.

- [11] The applicant continues as follows in paragraphs 17.3 and 17.4:

“... the suretyship was executed by means of an electronic signature as envisaged in Section 13 read in conjunction with Section 1 of the Electronic Communications and Transactions Act, 25 of 2002. ... In corroboration of this fact, the Court is referred to the certification in terms of Section 15(4) of the ECT Act, appended as annexure ‘RA2’”.

- [12] Annexure RA2, in turn, is in the form of an affidavit deposed to by one of the applicant’s directors, who states that it “serves as certification” in terms of Section 15(4) of the Electronic Communications and Transactions Act, 25 of 2002 (the ECT Act), that the principal agreement to which the deed of suretyship was allegedly attached as a schedule “was electronically signed within the purview of section 15 of the ECT Act”,^[2] and that the electronic signature itself constitutes a data message.

- [13] Apart from the fact that the first respondent had no opportunity to respond to these allegations in the replying affidavit, they do not demonstrate that his clear and unambiguous assertion in the answering affidavit that he did not sign the document is “without substance”, as the applicant contends.
- [14] Reference to the document itself and the mere fact that it contains the first respondent’s name next to a signature is insufficient. the first respondent’s allegation cannot be rejected simply on that basis – there could be a number circumstances under which it could still be true despite the appearance of his name next to a signature on the document. And paragraphs 17.3 and 17.4 of the replying affidavit and Annexure RA2 thereto take the matter no further. In particular, even if RA2 were to be accepted as a valid certificate under section 15(4) of the ECTA Act and that the signature itself (as opposed to the deed of surety) is a data message (I express no view in this regard), that would merely mean that the signature is admissible in evidence as “rebuttable proof” that the document bears a signature. In other words, it is to be treated no differently from a pen and ink signature on a piece of paper. This does not nullify or give the lie to the first respondent’s clear allegation that he did not sign the surety, using any method.
- [15] While of course no finding can be made that the first respondent’s contention that he did not sign is factually correct, my

conclusion

is that there is a real, genuine or bona fide dispute of fact on the papers as to whether or not the first respondent signed the surety and, as such, that the applicant cannot be granted the final relief that it seeks on motion.[3]

- [16] I raised with Mr Jacobs what the appropriate order should be in the event that I were to reach the conclusion (as I have) that the dispute as to signature is a material one. In particular, I indicated that I was concerned that the replying affidavit and RA2 raise more questions than answers regarding the suretyship. Section 13(1) of the ECT Act provides that “[w]here the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used”, and the GLA Act does not specify the type of signature required. Since there is no evidence that the “electronic signature” used in this instance is an “advanced electronic signature” (indeed, Mr Jacobs candidly informed me from the bar that it isn’t), it would seem to me that, even on the applicant’s own version, the deed of surety is invalid, as was undisputed in Massbuild,[4] to which Mr Jacobs quite properly referred me.

[17] Mr Jacobs however pressed referral of the issue of signature to oral evidence on the basis that, if signature in the manner alleged by the applicant were to be proved, then the suretyship might nevertheless be enforceable. For this submission, he relied upon *Borcherds v Duxberry*,^[5] where it was held that the undisputed electronic signature of a contract for the sale of land by means of the “DocuSign”

application constituted compliance with section 2(1)(a) of the Alienation of Land Act, 68 of 1981. As with section 6 of the GLA Act, the Alienation of Land Act requires such a contract to be signed by the parties.

[18] However, the *Borcherds* decision is clearly distinguishable from the current case. There was no consideration in that matter of section 13(1) of the ECT Act, which the court found not to apply in view of its reading of section 4(3) read with Schedule 1 thereof. Unlike the Alienation of Land Act, the GLA Act is not mentioned in Schedule 1 to the ECT Act. In those circumstances no purpose would be served by referring to oral evidence the issue of whether the deed of suretyship was in fact signed in the manner contended for by the applicant, and the application falls to be dismissed. There is no reason why costs should not follow the result.

[19] The application is dismissed with costs.

R. J. MOULTRIE

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

DATE HEARD: 14 November 2023

JUDGMENT DELIVERED: 16 November 2023

JUDGMENT REVISED: 17 November 2023

APPEARANCES

For the applicant:

Mr S Jacobs of Stupel & Berman Inc.

For the respondent:

No appearance on behalf of Krishnee Pillay Attorneys

[1] *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh* NO 2022 (4) SA 420 (SCA) para 43.

[2] Notably, there is no reference in the document to section 13 of the ECT Act, and even if there was, that would be irrelevant,

there is no scope for the peremptory requirements of section 13(1) to be overcome by means of a certificate under section 15(4).

[3] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another

[2008] ZASCA 6; 2008 (3) SA 371 (SCA) ([2008] 2 All SA 512; [2008] ZASCA 6) para 13.

[4] Massbuild (Pty) Ltd t/a Builders Express, Builders Warehouse and Builders Trade Depot v Tikon Construction CC and Another (6986/2017) [2020] ZAGPJHC 441 (14 September 2020) paras 25 to 34 and 49. The remainder of this judgment seems distinguishable,

because the issue for decision was a highly fact-specific (albeit ultimately unsuccessful) contention of the plaintiff.

[5] Borchers and Another v Duxbury and Others 2021 (1) SA 410 (ECP) paras 22 & 27 to 39.

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