

SOUTH AFRICA / JUDGMENT

**Spark v Hard Hat Equipment Hire (PROPRIETARY)
Limited : In re: Hard Hat Equipment Hire
(PROPRIETARY) Limited v K2014137790
(PROPRIETARY)
Limited (1319/2019) [2022] ZAGPJHC 428 (21 June 2022)
[2022] ZAGPJHC 428**

COURT

South Gauteng High Court, Johannesburg

BEFORE

V Harrison

CASE / FILE NUMBER

1319/2019

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**HIGH COURT OF SOUTH
AFRICA**

**(GAUTENG DIVISION,
JOHANNESBURG)**

Case no: 1319/2019

REPORTABLE: No.

OF INTEREST TO OTHER

JUDGES: No.

REVISED.

DATE: 21 JUNE 2022

In the matter between:

HECTOR

HAROLD SPARK

Applicant

and

HARD

HAT EQUIPMENT HIRE (PROPRIETARY) LIMITED

Respondent

In re: HARD
 HAT EQUIPMENT HIRE (PROPRIETARY) LIMITED
 Plaintiff
 And
 K2014137790
 (PROPRIETARY) LIMITED
 First
 Defendant
 HECTOR
 HAROLD
 SPARK
 Second Defendant

JUDGMENT

1. This Judgment is delivered in response to a request for a written judgment and the reasons therefor by the Respondent's legal representatives, and to clarify the order granted on 10 November 2020.
2. This matter relates to an application which involved two parties. The Applicant in the matter was the Second Defendant in the action, and the Respondent was the Plaintiff in the action. In this Judgment, and for ease of reference, the parties will be referred to as the Plaintiff and the Second Defendant.
3. The Plaintiff's cause of action against the Second Defendant is based on a Suretyship Agreement ("the Suretyship"), which arose out of the Second Defendant signing a customer application.
4. When the matter was argued before this Court, the issue between the Plaintiff and the Second Defendant was whether the Suretyship was valid and enforceable.
5. In this regard Judgment had previously been granted in favour of the Plaintiff against the Second Defendant for the full amount of the Plaintiff's claim plus interest and costs, and the matter against the Second Defendant was postponed sine die.
6. Both parties submitted in argument presented to the Court that the matter was a question of law, and that nothing was triable.
7. In its written Heads of Argument, the Plaintiff further stated that it was common cause that the only remaining issue between the Plaintiff and the Second Defendant was whether the suretyship was valid and enforceable.
8. There were initial disputes between the parties regarding whether or not the Applicant had been entitled to amend his plea in consequence of an amendment to the particulars of claim by the Respondent.

9. As the validity and enforceability of the suretyship, including its rectification, are material to this matter, I will deal firstly with these issues below, and thereafter deal further with the amendments to the Applicant's pleadings.
10. The matter was argued on the basis that the issues between the parties were narrow and turned on a dispute of law, rather than a dispute of fact and Counsel for the Respondent submitted that the only remaining issues to be considered were whether –
 - a. The Suretyship was valid or invalid; and
 - b. If invalid, whether the suretyship fell to be rectified.
11. The wording of the Suretyship reads as follows –

“I, the undersigned Hector Harold Spark, signatory of these terms and conditions do hereby bind myself to the client (the First Defendant)

as surety and co-principal debtor for the due performance by the client's (the First Defendant's) obligations to HH (the Plaintiff) pursuant to these terms and conditions”.

12. In considering whether the Suretyship is valid and enforceable, it is also necessary to consider the issue of rectification.
13. I was referred to the case of *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 (3) SA 107 (SCA) (“the Inventive Judgment”).
14. It was held in this case that as a general rule the determination of whether rectification of a Suretyship should be considered or not involves a two-stage enquiry the first to determine whether the formal requirements contained in section 6 of the General Law Amendment Act 50 of 1956 are met, and the focal point at this stage to determine whether the written document, on its face, constitutes a valid contract of Suretyship or not.
15. If it does not, the enquiry ends there.
16. Only if it does, does the enquiry then move to a second leg, which focuses on whether a proper case for rectification has been made out.
17. Jafta JA in the Inventive Judgment and at [4] stated that “It is now settled that a deed of suretyship which is invalid for want of compliance with the formal requirements of s 6 of the General Law Amendment Act 50 of 1956 (“the Act”) cannot be rectified so as to make it comply, and citing as authority the case of *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) paras [9] – [10] at 1051 C – G.
18. It should be noted that section 6 of the Act provides that:

“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 ...”.

19. In the Inventive Judgment, the surety and the principal debtor were the same and they were names of a natural person, and this rendered the suretyship capable of at least two possible interpretations –
 - a. That the surety and the principal debtor were one and the same person; and
 - b. Secondly that they were two parties with identical names.
20. It was held that the first interpretation would lead to non-compliance with the necessary formal requirements because in South African law a person cannot stand surety for his or her own debt, and on this interpretation the suretyship would fail to identify the principal debtor and the surety as two distinct parties.
21. It was further held that if the second interpretation applied, the suretyship contract would be formally valid.
22. In this case valid in the sense that the suretyship complied “with the formal requirements in section 6 of the Act” and that in this case the facts constituted a sufficient basis for granting rectification.
23. In the case of *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 345 A-D and *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA), it was held that the word “terms” has been construed to include the identification of three necessary parties, being the creditor, the principal debtor, and the surety.
24. The enquiry therefore needs to be whether or not the document properly identifies a creditor, a principal debtor, and a surety.
25. In my view the facts of the application involving the Plaintiff and the Second Defendant are distinguishable from the Inventive

Judgment

where the names of the surety and the principal debtor were the same, but not the names of a natural person.

26. In this matter the Second Defendant’s defence to the Plaintiff’s claim is that the suretyship relied upon by the Plaintiff in claim 2 did not satisfy the provisions of Section 6 of the General Law Amendment Act 50 of 1956 (as amended) in as much as it records that the Second Defendant has bound himself as surety to the First Defendant and not to the Plaintiff.
27. Simply put, and on my reading of the Judgment of Jafta JA in the Inventive Judgment and on a proper interpretation, the present suretyship fails to comply with the provisions of Section 6 of the Act and here, as distinct from the Inventive Labour Structuring matter, -
 - a. We are not dealing with two natural persons;

- b. The First Defendant and the Second Defendant in the matter were separate legal entities, and in my view, a deed of suretyship did not come into force, and for the reasons set out above, and the matter should therefore not proceed to a second leg where rectification might be considered.
28. I turn now to deal with the amendments to the Applicant's pleadings and being the withdrawal of an admission and an amendment to his plea.
29. In this Court's view, and as contemplated in Rule 28 (10) of the Uniform Rules of Court, a court has an inherent discretion at any time before judgment to grant leave to a party to amend its pleadings or documents.
30. It is further this Court's view that the granting of any such amendments in this matter is to restore the real issue between the parties, namely the enforceability of the suretyship discussed above.
31. The Applicant in his pleadings, and up to the amendments contemplated herein, denied that a suretyship agreement was in place between him and the Respondent.
32. In this regard, it was necessary for the Applicant to amend his plea to remedy circumstances that appeared to be inadvertent, and not the doing of the Applicant personally.
33. This was further required to respond to the Respondent's amended particulars of claim, which sought to introduce a new claim of rectification, and in an attempt to overcome what was an invalid deed of suretyship, and necessitating the Applicant to amend his plea.
34. This approach of the Applicant was not inconsistent with his past conduct, and in my view not conduct introducing anything that the Respondent would have been unaware of, or conduct to be regarded as prejudicial, and to reiterate, was required to restate the legal issue between the parties.
35. Accordingly, I confirm that the Applicant was entitled –
- a. To be granted leave to withdraw the formal admissions from his plea dated 17 May 2019 complained of by the Respondent in its Notice of Objection dated 28 January 2020; and
- b. That the Applicant be granted leave to amend his plea dated 17 May 2019 in accordance with the Applicant's notice of intention to amend dated 23 January 2020.
36. As I have stated that the suretyship failed to pass the first stage of the enquiry highlighted above, it is in my view invalid and incapable of rectification.
37. I further confirm the order that the Respondent pay the costs of the Application.

V HARRISON

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

DELIVERED: This Judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

Date of hand down is deemed to be 21 June 2022

Counsel for the Applicant:

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Instructed by:

Attorney D E Bruwer

Counsel for the Respondent: M Cajee

Instructed by:

Farbridges, Wertheim Becker Attorneys

DATE OF HEARING:

13 October 2020

DATE OF ORDER OF COURT: 10 November 2020

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Prepared on 11 October 2026 · Esheria