

SOUTH AFRICA / JUDGMENT

Van Den Berg and Others v Firststrand Bank Limited t/a Wesbank (A170/2015)

[2015] ZAGPPHC 967 (25 November 2015)

[2015] ZAGPPHC 967

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius, W Tlhapi, N Ranchod

CASE / FILE NUMBER

A170/2015

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

Case number: A170/2015**Date: 25 NOVEMBER 2015**

In the matter between:

JOHANNES LODEWIKUS VAN DEN
BERG.....FIRST
APPELLANT
ELIA CHRISTIAAN
LANDMAN.....SECOND
APPELLANT
JOHANNES RUDOLPH
VISAGIE.....THIRD
APPELLANT
And
FIRSTRAND BANK LIMITED T/A
WESBANK.....RESPONDENT

JUDGMENT

PRETORIUS J.

- (1) This is an appeal against a judgment delivered in this court after the court a quo had decided the issues that were presented in a stated case. The only issue which had to be decided was whether or not two deeds of suretyship complied with the provisions of section 6 of the General Law Amendment Act, 50 of 1956 (“the Act ”). The court a quo did not grant leave to appeal and this appeal comes before us by leave of the Supreme Court of Appeal granted on 13 February 2015.
- (2) The pertinent issue is whether or not the alleged sureties can be identified where their identities do not appear from the documents themselves, although their signatures appear on the documents.
- (3) Section 6 of the Act provides:
“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...”
- (4) The question of law in the stated case was formulated:
“The only question of law in dispute between the parties is the question whether or not the purported deeds of suretyship complied with the provisions of section 6 of the General Law Amendment Act, 50 of 1956, in that the documents were signed in blank, with specific reference to the names of the sureties.”
- (5) It was common cause that at the time the appellants signed the purported deeds of suretyship, their names had not been completed and filled in. They had signed the so-called deeds of suretyship, without printing their names next to the signatures. Only afterwards, without the appellants being present did the representative of the respondent, Mr Awie de Jager, print their names on the deeds of suretyship and added their addresses.
- (6) The respondent contended that even where the forms were signed in blank, they complied with the provisions of section 6 of the Act. The appellants contended that the documents were signed in blank and thereafter there was non-compliance with the provisions of section 6. The crisp issue is whether the sureties are identifiable as they had signed the deeds of suretyship when their names did not appear thereon when they had signed it. There is no allegation that the deeds of suretyship had been completed contrary to what the parties had intended and had agreed to.
- (7) The court a quo found that the identity of the appellants were clearly determinable as the respondent’s representative had inserted their names and addresses afterwards next to their signatures.

- (8) Section 6 requires that the document be signed but does not set out how and where it should be signed. The deed of suretyship reads as follows:

“Ek/Ons, die ondergetekendes...verbind myself/onself hiermee gesamentlik en afsonderlik as borg en as medehoofskuldenaar...” (Court’s emphasis)

- (9) A deed of suretyship is valid if it contains the identity of the creditor, the identity of the surety, the identity of the principal debtor and the identification of the principle debt. According to the appellant’s counsel the identity of the surety was lacking, although they had signed the documents.

THE LAW:

- (10) In *Fourlamel (Pty) Ltd v Maddison* 1977(1) SA 333 (A) at 342 - 3

Muller JA found that the object of enacting section 6 of the Act was: “However many objects the Legislature may have had in mind in enacting section 6 of Act 50 of 1956, one of them was surely to achieve certainty as to the true terms agreed on and thus avoid or minimise the possibility of perjury or fraud and unnecessary litigation... The Legislature may also have been influenced by other considerations, for example, that suretyship being an onerous obligation, involving as it does the payment of another’s debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after their undertaking had been recorded in a written document and signed by them or on their behalf ” (Court’s emphasis)

- (11) The signature of the sureties in the present instance is not in issue as they had admitted it was their signatures on the sureties in issue.

- (12) In *Sapirstein & Others v Anglo African Shipping Co (SA) Ltd* 1978(4) SA 1 (A) it was held at 12 B - D:

“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, unless the leading of such evidence can be said to amount to an attempt to supplement the terms of the contract by testimony as to some negotiation or consensus between the parties which is not embodied in the written agreement” (Court’s emphasis)

- (13) That is exactly what the issue is presently. There can be no doubt that the terms of the contract will not be altered in any way by testimony as to the identity of the sureties.

- (14) In Caney’s *The Law of Suretyship in South Africa*, 6th Edition, CF Farsyth & JT Pretorius, the learned authors deal with the situation where a document is signed “in blank” and pose the question at page 77 para (e) “But suppose the document is after signature properly filled in as intended; does it comply with section 6?”

- (15) In the Fourlamel case (supra) the Supreme Court of Appeal held that section 6 required the surety to sign a written document which embodied the contract of suretyship. Miller JA held at 342:

“In the case of an agreement which is not by law required to be in writing, it may be that a document signed by a party before the terms of the agreement had been embodied therein would be binding upon him in the absence of fraud or error in connection with the recording of the terms subsequent to his signature... But, where the terms of a contract are required by statute to be embodied in a document and signed by a

particular party as a manifestation of his assent to such terms, there are considerable difficulties, both notionally and practically, in the way of acceptance that insertion by another of the terms of the agreement after the party has appended his signature to a blank piece of paper, constitutes compliance with such statute.” (Court’s emphasis)

- (16) In the present instance all the terms of the surety were embodied in the document and signed by the sureties as acceptance of the contents of the surety document. It was clear from the outset that they confirmed by their signatures as to what was set out at the start where they declared:

“Ek/Ons, die ondergetekendes...verbind myself/onself hiermee gesamentlik en afsonderlik as borg en as medehoofskuldenaar... ”

- (17) In *Jurgen & Others v Volkskasbank Ltd* 1993(1) SA 214 (A) at 220 D - F Hoexter JA found:

“.. it is quite immaterial whether the surety signs the document only after all the material terms have been written therein or whether the surety signs the documents first and thereafter, by his own hand or that of his agent, completes the document by filling in the material terms. In either case the surety’s signature serves to authenticate the document...” (Court’s emphasis)

- (18) The authors in Caney’s book come to the conclusion at paragraph 79:

“What must be made clear is that, while the completion of a suretyship may be a process rather than a single event, and it may be “immaterial” which event in that process occurs first, the process must be complete before delivery of the suretyship to the creditor.” (Court’s emphasis)

- (19) In *Industrial Development Corporation of SA Ltd v See Bee Holdings (Pty) Ltd & Others* 1978(4) SA 136 (C) at 138 the Grosskopf J held:

“When properly analysed, the question for decision is not one of form, ie whether the required formalities of a contract of

suretyship have been complied with... but one of substance, namely, whether the parties intended that an enforceable contract would be established even if one or more of the proposed sureties did not consent to the proposed contract. This question would have arisen even if no formalities had been required for the validity of contracts of suretyship.” (Court’s emphasis)

- (20) The facts in the present matter are distinguishable from that in *Fourlamel (Pty) Ltd v Penguin Heating and Air Conditioning (Pty) Ltd and Others* 1975(4) SA 501 WLD where the court held that by signing the deed of suretyship the defendants were authorising the other intending party to complete the document in due form and to hold them liable according to section 6 of the Act.
- (21) In the present instance the appellants conceded that they appended their signatures to the deeds of suretyship in their plea as well as in the notice in terms of Uniform Rule 33(1) and (2). There is thus no doubt that they had signed the deeds of suretyship.
- (22) In this case the terms and conditions of the suretyship is not in issue, the only question is whether the suretyship is valid if the names and addresses were added after the suretyship had been signed by the appellants.
- (23) In *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) the court discussed the state of the law presently and found:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective.

A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.” (Court’s emphasis)

- (24) If this court applies these principles as enunciated by Wallis JA to the facts of the present case and construe the meaning of the words at the start of the surety document and take the signatures at the end of the document in consideration, the findings of the court a quo were correct.
- (25) The fact is that a common sense approach should be followed when deciding whether the signatures in these circumstances comply with section 6 of the

Act and whether the suretyships are therefor valid.

- (26) The extrinsic evidence of the appellants' admitting their signatures identifies the sureties, although their actual names had not appeared on the suretyship when they signed it. Even if this court disregards the extrinsic evidence, it is quite clear that the appellants had the intention to sign as sureties, which they did. It is immaterial whether their names were printed next to their signatures. Their statement declaring to bind themselves as sureties is unambiguous and should be read with the signatures.
- (27) Therefore the court, after having listened to argument by counsel, considering the authorities and applying the principles to the present facts can come to no other conclusion but that the question of law whether the purported deeds of suretyship complied with the provisions of section 6 of the Act, must be answered in the affirmative.
- (28) The following order is made:
1. The appeal is dismissed with costs;
 2. The costs will include the costs pertaining to the leave to appeal in the court a quo, as well as the costs of the application for leave to appeal to the

Supreme Court of Appeal.

Judge C Pretorius We agree.

Judge W Tlhapi

Judge N Ranchod

Case number : A710/2015

Matter heard on : 11 November 2015

For the Appellants : Adv. Cilliers SC; Adv Els

Instructed by : Thomas & Swanepoel Incorporated

For the Respondent : Adv JA du Plessis

Instructed by : Hack Stupel & Ross Inc.

Date of Judgment 25 NOVEMBER 2015

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