IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 3459/2013

In the matter between:

GRANT LOGAN WISHART NO:	FIRST APPLICANT
MALCOM GRANT WISHART NO:	SECOND APPLICANT
And	
FIRSTRAND BANK LIMITED	RESPONDENT

JUDGMENT

MADONDO J

[1] This is an application in terms of Rule 31(5) (d) for an order setting aside the judgment the respondent obtained by default against the applicants and Alan David Walker, in their capacities as trustees of Logan Trust, on 31 May 2013 in terms of Rule 31(5) (b) for the payment of the sum of R32, 132, 884.95 together with interest, costs and collection commission. Further, authorising the applicants to defend the respondent's action against them and allowing the costs of this application to stand over for determination by the trial court.

The Parties

[2] The applicants are Grant Logan Wishart NO and Malcolm Wishart NO, adult males cited herein in their capacities as trustees of the Logan Trust under registration number IT450/87 of 3 Chaseford, 300 Old Howick Road, Hilton.

[3] The respondent is First Rand Bank Limited t/a Wesbank Aviation Finance, a Division of West bank, a company duly registered and incorporated according to the Company Laws of the Republic of South Africa, carrying on business as a financial institution at 1 Enterprise Road, Fairland, Randburg, Johannesburg.

Factual Background

[4] On 28 March 2013 the respondent caused the summons to be issued out of this Court under case no 3459/13 against the applicants and one Alan David Walker (Walker), in their capacities as the trustees of Logan Trust ("the trust"), for the payment of the sum of R32, 132,884.45 together with interest, costs and collection commission. The said summons was allegedly delivered at 3 Chaseford, 300 Old Howick Road, Hilton, on the 2nd of April 2013 by placing it in the letter box of the premises in question. However, according to the applicants such summons was never received. The first applicant states that he only became aware of its issue at the time when an application for his personal sequestration was made. However, the writ of execution was served on the first applicant, in his capacity as the trustee, on the 2nd of August2013.

[5] The respondent`s claim arose out of the contract of suretyship entered into between the parties on 27 February 2007 at Durban and in terms of which the applicants and Walker allegedly bound themselves as sureties in solidum for and co-principal debtors jointly and severally with the Eurocoal (Pty) Ltd ("the Eurocoal") for the debts of the Eurocoal to the respondent.

[6] Prior to the conclusion of the contract of suretyship, the respondent and the Eurocoal had entered into a Master Instalment Sale Agreement on the same day and place as the contract of suretyship in terms of which the respondent sold and delivered to the Eurocoal 1998 Beachcraft 1900D aircraft for R36, 1912, 387.75, payable in equal sixty (60) instalments of R212, 607.51 commencing on 15 April 2008 and the final instalment of R23, 434,937.15 was payable on 15 March 2012.

[7] In concluding the aforesaid agreement the respondent was represented by its duly authorised representative and The Eurocoal by the first applicant in his personal capacity. One of the conditions of the agreement to finance the transaction was that both the first applicant, in his personal capacity, as well as the trust should bind themselves as sureties and co-principal debtors with the Eurocoal for payment of the Eurocoal's debts to the respondent.

[8] The first applicant then signed the suretyship contract both in his personal capacity and purportedly on behalf of the trust on 27 February 2007. The first applicant and the trust thereby bound themselves as sureties *in solidum* for and co-principal debtors jointly and severally with the Eurocoal for the debts of the Eurocoal to the respondent. In the contract of suretyship the first applicant chose 3 Chaseford, 300 Old Howick Road, Hilton, which was by then the property of the trust and the first applicant`s place of residence , as the domicilium citandi et executandi address of the trust.

[9] It is not disputed that prior to the first applicant purported signing of the contract of suretyship on behalf of the trust; he had not consulted his fellow trustees in this regard. No

written resolution as contemplated in the Deed of Trust had been prepared and signed by all the trustees authorising the first applicant to bind the trust.

[10] Nonetheless, all the three trustees subsequently signed a resolution on 5 March 2007, six days after the first applicant had signed the contract of suretyship, with the intention to authorise the act of the first applicant retrospectively. It is common cause that only one trustee, the first applicant, signed the contract of suretyship. But, the resolution was signed by all three trustees.

[11] On 12 December 2007 the property chosen as domicilium address of the trust was sold and transferred to Robin Matthews Family Trust. Notwithstanding, the transfer of the said property and its vacation by the first applicant as his place of residence, the trust made no effort to notify the respondent of the change of its *domicilium* address.

[12] The Eurocoal defaulted on its payment obligations and it was liquidated on 13 May 2009. The respondent repossessed the aircraft during 2011. The liquidators sold the goods for an amount of R13, 489,392.00, and the respondent turned to the trust for the payment of the balance owing.

[13] According to the respondent the applicant's application is not *bona fide* but the applicants are thereby merely intended to delay the respondent's claim against them. Further, that the applicants have absolutely no *bona fide* defence to the respondent's claim.

[14] As a defence to the respondent's claim the applicants aver that when the first applicant purportedly signed the contract of suretyship binding the trust, he lacked the

requisite authority to do so since he had not consulted with the other two trustees and nor had they authorised him to bind the trust. Whereupon the respondent replies by contending that the other trustees' subsequent signing of the resolution authorising the first applicant to bind the trust, had the effect of ratifying or approving the act of the first respondent retrospectively.

[15] The issues which are apparently raised by the argument are: whether the summons was served at chosen domicilium address; whether the applicants or the trust received the summons and whether the first applicant validly signed the contract of suretyship on behalf of the trust, and if not, whether the subsequent signing of the resolution by all three trustees authorising the first applicant to bind the trust had the effect of ratifying or approving the act of the first applicant retrospectively.

[16] In order to succeed on their application for rescission of the judgment granted in terms of Rule 31(5) (b), the applicants must show good cause for the rescission, which entails: furnishing a reasonable explanation for the default; showing that the rescission application is brought *bona fide*, and demonstrating that there is a *bona fide* defence, including a *prima facie* case on the merits.
See *Farris and another v First Rand Bank Ltd* 2014 (3) SA 39 (CC) at para 24; see also *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O); *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA *Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9C

EXPLANATION FOR THE DEFAULT

[17] For the defendant to be said to be in default, he must have received the summons and deliberately defaulted to defend the action. The respondent avers that the summons, commencing action against the trust for the balance owing in term of the contract of sale

entered into between the respondent and the Eurocoal, was served at the trust's chosen *domicilium* address. Such address had been furnished to the respondent by the first applicant on behalf of the trust, on conclusion of the contract of suretyship. The respondent`s contention is that such service was sufficient and good and that in the circumstances it is not essential to determine whether or not the applicants did receive the summons. In the respondent's submission the applicants did receive the summons and they deliberately defaulted to defend the action.

[18] The applicants aver that the summons was allegedly served six (6) years after the trust had disposed of the property and vacated it. At the time of service the trust had absolutely no connection with the *domicilium* address. They go on to aver that they have lodged this application within the period prescribed in Rule 31(5) (d) after obtaining the knowledge of the default judgment against the trust. It is their submission that had the trust received the summons; it would not have allowed the matter to go by default.

Was the summons delivered on the chosen domicilium address?

[19] In *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W) at 332G, it was held that where a *domicilium citandi* has been chosen, service there will be good even though the defendant is known not to be living there. The weight of decided authorities also shows that service at *domicilium* address will be good even though the place is vacant.

See *Downey V Downey* (1899) 165C 475*; Pretoria Hypotheek Naatschappij v Groenewald* 1915 TPD 170*; Robinson v Sarif* 1946 WLD*; Sfetsios & Others case, supra; Irons v Freeman & Trock* 1916 WLD 31 (W); *Hollard's Estate v Kruger* 1932 TPD 134*.* The position is the same even though the defendant is known to be resident abroad or has abandoned the property. See *United Building Society v Steinback* 1942 (WLD) 3.

[20] It is common cause that the summons was delivered at 3 Chaseford,300 Old Howick Road , Hilton, being the address chosen on behalf of the trust in terms of clause 2 of the suretyship, by placing it in the post box of the complex building on the premises of 300 old Howick Road. The question then arises whether placing the summons in the letter box of such a complex building constituted a valid delivery. In *Loryan (Pty) Ltd v Sorlash Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (WLD) at 847I, it was held that where delivery of a notice under contract is to be effected at a residence chosen as a *domicilium*, it would not be enough merely to drop the notice over the garden fence or to put it into the hedge. Delivery would have to be made in the manner required by the contract.

[21] According to the contract of suretyship service had to be effected at 3 Chaseford, 300 Old Howick Road, Hilton, which appears to be a specific unit in a complex building, used by the first applicant as his place of residence. It appears from the Return of Service that since there was no one present to accept service of the summons and the principal front door was not accessible as the gates were locked the summons was served by placing it in the letter box at the trust's chosen *domicilium citandi et executandi*, 3 Chaseford, 300 Old Howick Road, Hilton.

[22] In *Cohen and Another v Lench and Another 2007(6) SA 132(SCA),* the chosen address was a specific unit and since the *domicilium* could not be reached due to the fact that the perimeter gate was locked the notice to remedy the breach was attached to the gate of the town house complex. The court held that the chosen *domicilium* address was not the town house complex but a specific unit in the complex. The fact that the *domicilium* could not be reached did not entitle the sellers to choose an alternative place for delivery whether or not

delivery at that place would ordinary bring it to the attention of the addressee. The court, therefore, concluded that the notice to remedy the breach was not delivered at the chosen *domicilium* address. It is worth mentioning that the Gauteng Full Bench in Cohen's case had found that the attachment of the notice to perimeter gate of the town house complex constituted delivery for the purposes of the agreement, whether or not the notice was received.

[23] Where a person chooses a *domicilium citandi et executandi*, the *domicilium* so chosen must be taken to be his or her place of abode within the meaning of the rules of court which deal with the service of a summons. See *Muller's case, supra,* 332G. Where the building is occupied by more than one person or family, "residence" or "place of business" means that portion of the building occupied by the person upon whom service is to be effected. See Rule 4 (I) (ii).

[24] For the service in the present case to be said that it was good, the summons must have been served on a portion of the building or unit occupied by the first applicant. It appears ex facie the return of service that service was effected by placing the summons in the post box of a complex house, occupied by various people. There is nothing to suggest that such post box solely belonged to the unit occupied by the first applicant, which was chosen as domicilium address of the trust. In the premises, it cannot be said with any degree of certainty that the summons was served at the trust`s chosen *domicilium* address. In my opinion it is not sufficient, if there is nobody at the defendant's residence or place of business upon whom service can be effected, to leave the process anywhere on the premises. If the defendant`s whereabouts are unknown, the plaintiff will have to apply to court for directions as to service.

[25] However, in my view, the court should not only content itself with the finding that the service of the process was good since it was effected at a chosen *domicilium* address. It must go on to determine whether the party in question has received the process. A mere conclusion that service was good simply because the process was served at a *domicilium* address without determining whether or not the party has actually received it, may have unfair and unjust results where the party has in fact not received the process. For that reason, in my view, it is not only desirable but also imperative that people should have notice of the proceedings taken against them. See also *Pretoria Hypotheekmaatschappij's case, supra; Cohen`s supra,* at 141J- 142A.

[26] In *Cohen's case,* the Supreme Court of Appeal did not confine itself only to determining whether or not the service of the notice to remedy the breach was proper but it continued to decide whether, as a matter of probability, the purchasers received the notice and it concluded that they did not. It must be noted that in *Cohen`s* case the Supreme Court of Appeal moved away from the general principle or generally held view that in cases of this nature , it is sufficient for the plaintiff to prove that the summons or process was delivered at the chosen domicilium address and that whether or not the defendant received it is immaterial.

Did applicants or trust receive the summons?

[27] The next question for decision is whether the trust or the applicants received the summons and deliberately failed to defend the action. An obligation rests on the plaintiff to ensure that the summons comes to the notice of the defendant. In *Cohen's case supra*, at 136 E-F, it was held that it is convenient first to evaluate the evidence and decide whether it

is established by the plaintiff, who bears the onus, that the defendant probably received the notice or process, and only then to turn to legal issues to the extent that they remain relevant. The evidence can only be properly evaluated by testing it against the inherent probabilities, and the failure to do so constitutes misdirection.

See also *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979I; *Med Scheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA) at 345A-B.

[28] For the defendant to be said that he is in default, he must have received the summons and deliberately defaulted to defend the action. In *casu*, the property chosen as the *domicilium* address of the trust was sold and transferred on 12 December 2007 to a third party. It is not disputed that the summons was delivered six (6) years after the transfer of the said property. As a consequence, the trust had by then no connection, whatsoever, with such house. Further, the summons was allegedly served at the complex building occupied by various people by placing it in the post box of such building, and to which all the residents of the building apparently had an access. This had the effect of reducing the chances of the first applicant and the trust to receive the summons even further. The probabilities in the present case are such that it cannot be said with certainty that the first applicant or the trust received the summons.

[29] It has been contended on behalf of the respondent that it can reasonably be inferred from the trust`s failure to notify the respondent on vacating the property of the change of *domicilium* address that it sought deliberately to avoid its lawful obligations or that it was grossly negligence. The reason advanced for such failure on the part of the trust is that it did not occur to the first applicant that he should notify the respondent of the change of the trust's chosen *domicilium* address. Though the explanation may sound not reasonable the

failure, in my view, could only be attributable to negligence on the part of the first applicant since at the time the Eurocoal had not yet failed to meet its payment obligations towards the respondent in terms of the sale agreement. The first applicant had, therefore, no other meaningful reason for not notifying the respondent of the trust's change of the *domicilium* address than negligence.

[30] Negligence on the part of the trust in failing to notify the respondent of the change of its *domicilium* address cannot, in my view, be said to be of sufficient degree that it can be said that it was of gross nature or wilful so on itself to debar the trust from relief sought. See *Schabort v Pocock* 1946 CPD 363 at 370; *Scott v Trustee, Insolvent Estate Comerma* 1938, WLD 129; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O).It is, therefore, a factor to be considered in the overall determination of whether good cause has been shown for relief sought. See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance co. Ltd* 1994 (4) SA 705 (E) at 709D.

[31] The onus is on the respondent, as the plaintiff, to ensure that the summons was served at the chosen domicilium address and that the trust, as defendant, did receive the summons commencing action, and the respondent has failed to discharge the onus rested on it. As a consequence, I have no doubt that the applicants' explanation for default is reasonable and *bona fide*.

<u>The bonafides of the applicants' application</u>

[32] In the absence of the evidence that the applicants did receive the summons and that they deliberately failed to defend the action, the *bona fide*s of their application cannot be doubted. The applicants acted within the period prescribed in the Rule 31(5)(d) after

acquiring the knowledge of the default judgment. Had it been the intention of the trust to avoid the summons, it would not have lodged the application for rescission of the default judgment. This, in my view, sufficiently demonstrates that had the applicants received the summons they would not have allowed the matter to go by default. They would apparently have entered an appearance to defend. I am therefore satisfied that the applicants have established that they were not in wilful default.

BONAFIDE DEFENCE

[33] The nub of the applicants` defence to the respondent`s claim is that the suretyship was not validly signed on behalf of the trust and that as a consequence it was void ab initio. Actually, the central dispute in this regard revolves around the question whether the signature to suretyship can be considered as an act of the trustees of the trust, and whether such signature complies with the provisions of the Deed of Trust and the requirements of section 6 of Act 50 of 1996 that the documents must be "signed by or on behalf of the surety".

Was suretyship validly signed?

[34] Clause 6.11of the Deed of Trust provides:

> "All deeds, documents or instalments required to be executed by the trustees shall be deemed to have been validly executed if executed in the name of the Trust by any two trustees if duly authorised there to."

[35] Clause 6.9 which empowers the trustees to delegate their power on certain instances provides:

> "The trustees shall have the power to delegate any of their powers to committees consisting of one or more trustees."

[36] The provision in clause 6.2 of the Deed of Trust is to the effect that if there are more than two trustees, as in the present case, the decision of a majority of trustees shall be the decision of them all, except where unanimous decision is called for in terms of the Deed. In terms of the Trust Deed unanimous decision can only be required where there are two trustees.

[37] In terms of the Deed of Trust for the contract of suretyship to have been validly executed on behalf of the trust, it must have been signed by at least two duly authorised trustees. It is common cause that only one trustee, the first applicant, signed the suretyship. Prior to such signing, the trustees had not taken any resolution or given a prior consent to binding the trust as surety for the debts of the Eurocoal to the respondent. Nor had the other two trustees mandated the first applicant to act on behalf of the trust, and thereby bind the trust as surety. The evidence establishes that they were at the time not even aware of the suretyship. It therefore goes without saying that when the first applicant purportedly signed the suretyship on behalf of the trust he, in terms of the Deed of Trust, lacked the requisite authority to do so. As a consequence, an unauthorised signing of the suretyship by the first applicant cannot be said to have been an act of the trust. As it was stated in *Land and Agricultural Development Bank of SA v Parker and others [2004] 4 All SA 261(SCA) at264 para.10,* outside its provisions the trust estate cannot be bound.

[38] The second ground upon which the applicants rely for their contention that the contract of suretyship was not validly signed on behalf of the trust, is that the trustees did not act jointly when the suretyship was signed and hence such signing was not in compliance with section 6 of the General Law Amendment Act, which provides:

> "No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms of thereof are embodied in a written document signed by or on behalf of the surety."

[39] In the applicants' submission section 6 of the General Law Amendment Act No. 50 of 1956 ("the General Law Amendment Act") requires the signature on the suretyship itself by all the parties concerned, that is, both the first and second applicants and Mr Walker were required to sign the suretyship, or a letter of authority authorising the trustee to sign on behalf of others. However, the respondent's argument is that section 6 of the General Law Amendment Act does not require every trustee of a trust to sign a suretyship, "acting jointly" should not be confused with acting at the same time.

[40] Under common law the trustees must act jointly in transactions with third parties and contractual powers must be exercised by all the trustees acting together, save where the trust deed stipulates differently.

See *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 85 A-C; *Steyn and Others v Block Pave (Pty) Ltd* 2011 (3) SA 528 (FSH CB)

[41] In *Steyn and Others' case, supra,* Rampai J held that all trustees must participate or act together either by way of unanimous or majority vote. A decision taken in the absence of third trustee and without her knowledge is irregular. In *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA) at para. 9 the court confirmed the position as follows:

> "It is moreover trite that unless the trust deed provides otherwise, trustees must act jointly. In the absence of a contrary provision in the deed they may, however, authorise someone to act on their behalf and that person maybe one of the trustees."

See also *Niewoudt and another NNO v Vrystaat Mielies (EDMS) BPK* 2004 (3) SA 486 (SCA) paras 16 and 23. Where the Trust Deed is silent on whether a majority vote will hold, the trustees will have to act by unanimous vote. See *Coetzee v Peet Smith Trust* 2003 (5) SA 674 (T).

[42] It is trite that co-trustees must act jointly. See *Land and Agricultural Bank of South Africa' case, supra, .* Acting jointly, however, does not mean that the trustees have to act at the same time but they must act collectively or take a collective decision on a particular matter. For the trustees in the present case to be said to have acted jointly the majority of the trustees must have convened a meeting to discuss and properly resolved to bind the trust as the surety of the Eurocoal`s debts to the respondent and given a prior consent to the signing of the suretyship by the first applicant on behalf of the trust. All the trustees must have either signed the contract of suretyship or duly mandated one of them to act on behalf of the trust. It is common cause between the parties that none of the above had taken place. Nor had the other two trustees, who were then not present during the signing of the suretyship, been consulted about the intended suretyship. Inevitably, the signature on the suretyship by one trustee having not been duly mandated by the other two trustees to act on behalf of the trust, cannot be considered as an act of the trust and demonstrating that the trustees had acted jointly. For the signature of the first applicant to be said to be in compliance with the requirements of section 6 of the General Law Amendment Act, he must have been duly authorised and properly mandated by other trustees to bind the trust as the surety for the debts of the Eurocoal to the respondent.

<u>Did the subsequent signing of the resolution by all trustees have the effect of ratifying and approving the act of the first applicant retrospectively</u>?

[43] Nonetheless, all three trustees signed the resolution; six days after one trustee (the first applicant) had signed the suretyship. It is the respondent's contention that in so doing the trustees ratified and approved the first applicant`s signing of the suretyship. Paragraph 4 of the signed Resolution provides that the trustees had resolved:

> "That in so far as any acts or deeds may have been performed and/or documentation signed in connection with the above transaction/prior to the date of this Resolution, all such acts or deeds and/or signing by or on behalf of the corporation prior to the date of this Resolution be and is hereby ratified and approved."

[44] According to the respondent, the resolution was signed by all three trustees prior to any funds were released in terms of the instalment sale agreement. However, it has been contended on behalf of the applicants that since no meeting of the trustees ever took place to discuss and properly resolved to pass a resolution, such purported resolution by the trustees had no effect at all. Further, that since the trustee that purportedly signed the suretyship on behalf of the trust lacked the necessary authority to do so the suretyship was therefore *void ab initio* and could not be ratified or approved retrospectively. Further, that the other two trustees only signed the resolution, but not the suretyship.

[45] The question arises for decision is whether the subsequent signing by all trustees of the resolution purported to authorise the first applicant to act on behalf of the trust had the effect of ratifying the act of the first applicant, when he signed the suretyship retrospectively. I propose to first deal with the validity and effect of the subsequent resolution signed by all the trustees. Clause 6.8 of the Deed of Trust provides:

> "A resolution in writing signed by all the trustees shall be as valid and effectual as if it had been passed at a meeting of the trustees duly called and constituted."

Since the resolution was signed by all trustees it had the same effect as if it had been passed at a properly convened and duly constituted meeting. Therefore, nothing turns on this.

[46] I now turn to deal with the question whether the subsequent signing of the resolution itself had the effect of ratifying or approving the former act of the first applicant. *In Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A) at 803D-E it was held that where prior consent is a requirement for a transaction and is given in *initio*, it is a valid transaction. However, where the required consent has not been given, it may be given *expost facto* by subsequent ratification by non-consenting member. In which event, the ratification relates back to the original transaction and the position is the same as if consent had originally been given.

[47] The answer to the question whether the resolution signed by all the trustees, purporting to ratify the act of the first applicant had a similar effect will largely depend on what the intention of the parties was when they signed the contract of suretyship, i.e. whether by signing the suretyship document they intended to produce a transaction with immediate effect, or within a specified period of time or upon the fulfilment of a particular condition. However, it has been contended on behalf of the trust that since the first applicant at the time he signed the contract of suretyship he lacked the requisite authority the contract he purportedly signed on behalf of the trust was void. A void act cannot be ratified. In *Van der Merwe en Andere* 2000 (2) SA 519 (C) at 525 C-D, the Learned Judge Griesel said the following in this regard:

> "Indien eenmaal aanvaar word dat 'n ongemagtigde handeling deur `n trustee nietig is, volg dit dat dit nie agterna geratifiseer kan word nie."

[48] It has been argued on behalf of the respondent that only the transaction which is prohibited or made illegal by the statute which cannot subsequently be ratified. In support

thereof reference has been made to the case of *Neugarten and others`case, supra,* at 803C-E.

[49] In *Smith v KwaNonqubela Town Council* 1999 (4) SA 947 (SCA) it was stated that it is a general rule of law of agency that an act of an unauthorised agent can be ratified with retrospective effect. However, such general rule, in my view, cannot hold good in this case since the act complained of was neither sanctioned by the Deed of Trust nor the provisions of section 6 of the General Law Amendment Act. In *casu*, the contract of suretyship had to be signed simultaneously with the sale agreement so to provide immediate security to the respondent. It, therefore, follows that the signing of the suretyship by the parties on 27 February 2007 intended to produce a transaction with immediate effect.

[50] In terms of the Deed of Trust the first applicant, when he purportedly signed the suretyship on behalf of the trust, he did not have the requisite authority to bind the trust. It also stands to reason that, in compliance with the provisions of section 6 of the General Law Amendment Act, in order for the first applicant to validly sign on behalf of the trust as a surety he must have the requisite authority to do so. In the premises the lack of requisite authority to sign on behalf of the trust was fatal to the validity of the contract of suretyship in that such signing could not produce an intended result. As a consequence, the purported subsequent ratification of the first applicant's act by all the trustees was of no effect. This accords with what Cloete JA in *Searle v Van Rooyen No. and others* 2008 (4) SA 43 (SCA) at 50 C said that:

> "…, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent."

[51] If I am wrong in holding that since the first applicant did not have the required authority the signing of the contract of suretyship by the parties could not produce any legal effect, *ipso facto,* it is apparent that the contract of suretyship had to take effect within a fixed period of time. The conclusion of the contract of suretyship together with the sale agreement had to take place before the end of the financial year on 28th February 2007 so to obtain certain tax advantages which would accrue on or before the said date. This is also evidenced by the dating of the resolution, signed by all the trustees, 27 February 2007 whereas it was in fact signed on 5 March 2007; six days after the first applicant had signed the contract of suretyship. In *Fibro Furnishers (Pty) Ltd v Peimer* 1935 CPD 378 at 380 the Full court held:

> "When an act has to be done within a fixed time, performance of the act by an unauthorised agent cannot be ratified by the principal after the lapse of such fixed time to the prejudice of another who has acquired some right or advantage from non-performance within the fixed time."

In *casu*, the circumstances are such that the resolution signed six days after the purported conclusion of the contract of suretyship could not have any retrospective effect.

[52] It is apparent from the above that the invalid act performed by the first applicant on 27 February 2007 could not be ratified beyond the 28th of February 2007. However, full and proper determination of the intention of the parities may be achieved by proper ventilation of the matter at the trial. Nonetheless, it has been contended on behalf of the respondent that the suretyship would only become binding when all three trustees had signed the resolution, authorising the first applicant retrospectively to bind the trust. Indeed, according to the respondent, it was only once the resolution had been signed by all three trustees and received by the respondent at 12h11 on 6 March 2007, was the purchase price provided for in the instalment sale agreement paid.

[53] It is common cause between the parties that funding was only become available to the Eurocoal after the first applicant, in his personal capacity, and the trust had signed the relevant documentation binding themselves in favour of the respondent as sureties for the debts of the Eurocoal. However, the signing of the resolution by all three trustees was never a term of the suretyship and it cannot, therefore, be interpreted as creating a condition precedent to the coming into effect of the contract of suretyship. The intention of the parties was that the contract of suretyship should take effect on 27 February 2007, being the date on which suretyship documenting was signed, or not later than 28th February 2007.

[54] Nevertheless, for the trust to succeed in discharging an onus which rests on it, to show that it has a *bona fide* defence to the respondent's claim, it is sufficient if it makes out a *prima facie* defence which, if established at the trial, would entitle it to relief sought. It need not deal with the merits of the case and produce evidence that probabilities are actually in its favour. See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 475-77.

[55] In my view, the applicants have succeeded to sufficiently demonstrate that they have a *prima facie bona fide* defence to the respondent's claim. I therefore come to the conclusion that the applicants have established sufficient cause for the setting aside of the judgment obtained by default in the present case.

Order

[56] In the result,

(a) The judgment the respondent obtained by default against the applicants and one Alan David Walker on 31 May 2013 in terms of Rule 31(5)(b) is set aside.

(b) The applicants are hereby authorised to defend the respondent's action against them;

(c) Costs of this application shall stand over for determination by the trial court.

Judgment reserved on:	4 August 2014
Judgment delivered on:	28 November 2014
Counsel for the applicants:	Adv Hartzenburg SC
Instructed by:	Venns Inc
	Ref: A Geyser/C Schoon/L400a
Counsel for the respondent:	Adv J Sutton SC / Adv P. Cirone
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