



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2012/22072

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

15 FEBRUARY 2017

DATE

SIGNATURE

In the matter between:

**SERVOCHEM (PTY) LTD**

**Plaintiff**

and

**GELDENHUIS JOHANNES STEFANUS**

**1<sup>ST</sup> Defendant**

**GELDENHUIS JOHANN**

**2<sup>ND</sup> Defendant**

**VIEW CREST TRADING 10 (PTY) LTD**

**3<sup>RD</sup> Defendant**

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**JUDGMENT**

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**MATOJANE J:**

[1] On 14 June 2012, the plaintiff issued a summons against the defendants for payment of the sum of R6 595 249.03.

[2] The plaintiff subsequently received a dividend of R1 208 059.45 from the insolvent estate of the third defendant. At the pre-trial conference held on 19 November 2016, the defendants admitted that the amount owing, due and payable to the plaintiff by Community Paints (Pty) Ltd ("Community Paints"), after crediting the dividend is R5 305 458.87, together with interest thereon at the rate of 11.5% per annum from 25 June 2012 to date of payment. The plaintiff is claiming this reduced amount.

[3] The plaintiff relies on a deed of suretyship dated June 2011 in terms whereof the first and second defendants bound themselves in writing in favor of the plaintiff, as sureties and co-principal debtors with Community Paints, for the due performance of any obligations of Community Paints and for the due payment to the plaintiff by Community Paints of any amounts, which might then or at any time be or become owing to the plaintiff by Community Paints.

[4] The crux of the defendant's defence is stated as follows in its amended plea:

"It is agreed that the terms of the conditions of trade are those included in the credit application as terms and conditions of sale. It is denied that the personal suretyship incorporated in the same terms and conditions is still applicable. The 1<sup>st</sup> and 2<sup>nd</sup> defendants plead that this suretyship was lifted in negotiations between the plaintiff, the 3<sup>rd</sup> defendant and Community Paints (Pty) Ltd, whereby the 3<sup>rd</sup> defendant stood surety for the account in the signed deed of suretyship."

[5] The first and second defendants admit the allegations in the particulars of claim. They however allege that an agreement was concluded with the plaintiff to release them from the suretyship. The onus therefore lies on the defendants to justify their special defence<sup>1</sup>.

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<sup>1</sup> *Pillay v Krishna and Another* 1946 AD 946, at 952: "Where the person against whom the claim is made is not content with a mere denial of that claim but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld, he must satisfy the court that he is entitled to succeed on it.

### The evidence

[6] The first defendant, who is the father of the second defendant, is the only witness who testified. The second defendant elected not to testify and closed his case. The plaintiff also closed its case.

[7] The first defendant testified that the directors of Community Paints reached an agreement with the plaintiff that various personal suretyships signed by himself and the second defendant over the years were to be uplifted and replaced with a new deed of suretyship wherein the third defendant would become the sole surety.

[8] The plaintiff requested the first and second defendants to furnish further particulars for trial, stating precisely when and where these negotiations took place. The defendants replied that they did not have personal knowledge of when, where and how the negotiations took place.

[9] The first defendant stated further in the reply to the request for further particulars that from the reports he received, he believed that negotiations took place over the phone and email correspondence. He did not have copies of the correspondence but, in the way that the matter was reported to him, it appeared to him to be both verbal and in writing.

[10] The first defendant did not call as witnesses the people he alleges made reports to him, nor did he produce any correspondence to support the allegations in his special plea.

[11] The first defendant admits that he signed the deed of suretyship but disputes the date of its signature. He states that the suretyship could have been signed in 2009, before a shareholders' agreement was concluded. He was referred to an

extract of the register of credit applications showing an entry on 1 June 2010 of the credit application of Community Paints. From this entry, it can be inferred that the credit application containing the suretyship must have been signed after 1 June 2010.

[12] The first defendant testified further that he relies on the shareholders' agreement that requires that he first obtain the consent of the other shareholders before he stood as a surety. He refers, in particular, to clause 8.1 of the shareholders' agreement, which states:

"No shareholder shall issue any guarantee, suretyship or indemnity to third parties for the obligations of the Company, which shall in any way bind the shareholders jointly and severally, unless such suretyship, guarantee or indemnity is finished with a prior written consent of such shareholders, in which event, notwithstanding any individual liability in terms of such guarantee, suretyship or indemnity, the shareholders who consent to the issue of such guarantee, suretyship or indemnity shall bear any loss or damage arising out of or in connection with any guarantee, suretyship or indemnity..."

[13] The difficulty with this submission is that firstly, the shareholders' agreement he relies upon is between the shareholders of Community Paints and is *res inter alios acta* and is not binding on the plaintiff, who was not a party to it.

[14] Secondly, the shareholders' agreement is irrelevant as the suretyship that the defendants signed is the sole memorial of what was agreed between the parties and lastly, the document was never discovered and the first defendant does not explain why it was never produced.

[15] The first defendant, for the first time, alleges that the plaintiff and its representatives did not, at the time of the signature of the deed of suretyship, disclose to him that they removed the clause uplifting previous personal suretyships and replaced it with a clause stating that all previous securities and sureties still

stand, as well as adding a paragraph making the signatories to the document co-principal debtors and sureties.

[16] The first defendant's belated allegation of fraudulent misrepresentation is not pleaded and is based on the draft suretyship that was not discovered. Most importantly, the *caveat subscriptor* rule is to the effect that a party who signs a document containing contractual terms is bound by his or her signature whether he or she read the document or not. There is nothing to suggest that when the first respondent signed the suretyship he did not agree to the terms contained in the document.

[17] In conclusion, I find that the defendants have failed to lead evidence to support their allegation that an agreement was concluded with the plaintiff to release them from the suretyship.

In the result, I made the following order:

The first and second defendants, jointly and severally, are ordered to pay to the plaintiff:

- a) the sum of R5 305 458.87;
- b) interest thereon at the rate of 11.5% per annum from 25 June 2012 to date of payment;
- c) costs of suit.

  
K E Matojane  
Judge of the High Court  
Gauteng Local Division, Johannesburg

**APPEARANCES**

PLAINTIFF: Adv. A Lamprecht  
Instructed by: Fullard Mayer Morrison Inc

1<sup>st</sup> & 2<sup>nd</sup> DEFENDANTS: In person

HEARING DATE: 30 & 31 January 2017

JUDGMENT DATE: 15 February 2017