



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 9676/2014

In the matter between:

**AIRPORTS COMPANY SOUTH AFRICA LIMITED**

Plaintiff

and

**MASIPHUZE TRADING (PTY) LIMITED**

First Defendant

**JOHN RUSSEL GOLDREICH**

Second Defendant

**NTAVHANYENI ALBERT NEMUKULA**

Third Defendant

**WILLIAM PATRICK O'DRISCOLL**

Fourth Defendant

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Coram: Koen J

Heard: 7, 8 and 10 May 2018

Delivered: 15 June 2018

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**ORDER**

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1. The Plaintiff's claim against the Third Defendant is dismissed with costs.
2. The application for default judgment against the Second and Fourth Defendants is adjourned *sine die* with no order as to costs.

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## JUDGMENT

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**Koen J**

### **Introduction**

[1] This is an action in which the Plaintiff seeks to hold the Second, Third and Fourth Defendants liable as sureties and co-principal debtors for various amounts<sup>1</sup> alleged to be owed to it by the First Defendant<sup>2</sup> as principal debtor in respect of a written lease agreement concluded between the Plaintiff and the First Defendant.

[2] At the trial only the Third Defendant was present and represented. The attorneys for the Second and Fourth Defendants withdrew as their attorneys of record on 2 May 2018, two court days before the action was due to commence. The notice of withdrawal as attorneys of record for the Second and Fourth Defendants furthermore does not comply with the provisions of rule 16(4). The late withdrawal by attorneys as attorneys of record for litigants, as in this case in respect of the Second and Fourth Defendants, falls to be deprecated as it leaves them in an unenviable position where they might not receive the notification to appoint alternative

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<sup>1</sup> The Plaintiff's claims extend to: (a) arrear minimum rental, turnover rental, water and electricity charges, utilities and fines and other charges allegedly due in terms of the lease agreement; (b) Interest thereon at 3% above the prime rate of Nedbank Limited in terms of the lease agreement; (c) Confirmation of the cancellation of the lease, the Plaintiff's attorneys having cancelled the lease due to the First Defendant's default in payment on 14 August 2014; (d) Holding over damages from the date of cancellation of the lease until the First Defendant vacates the property; (e) Interest on such damages also at 3% above Nedbank's prime rate; and (f) Costs on the attorney and client scale.

<sup>2</sup> The First Defendant has been placed under business rescue. In terms of s 133 of the Companies Act 71 of 2008, the Plaintiff was accordingly precluded from proceeding against it. That is however no bar to proceeding against the sureties. Clause 11 and 11.1 of the suretyship sought to be enforced expressly provides that 'the Lessor shall without in any way affecting its rights against us or diminishing or otherwise affecting our obligations to it, be entitled to ... give time to or compound to make any other arrangements with the Lessee ...' In *Cape Produce Co (PE) (Pty) Ltd v Dal Maso NNO* 2002 (3) SA 752 (SCA) paras 11 – 12 at 762 – 763 the Supreme Court of Appeal held that a similar clause in the suretyship permitted the creditor to give time to the principal debtor and to release it from liability, without prejudice to its rights to seek repayment from the sureties. In *New Port Finance Co (Pty) Ltd v Nedbank Ltd* 2016 (5) SA 503 (SCA) para 10, the Supreme Court of Appeal considered the liability of sureties where the debt with the principal debtor was compromised in the form of a business rescue plan and held that these provisions in the suretyship were drafted to cater for this every eventuality and were a bar to a claim by a surety, that their liability was equally compromised.

representatives timeously, if at all. The Plaintiff sought default judgment against the Second and Fourth Defendants. I was not prepared to accede to that request, as much as the circumstance in which the Second and Fourth Defendants find themselves is not of the Plaintiff's making. The claims against the Second and Fourth Defendants must accordingly be adjourned *sine die* for adjudication in due course after adequate notice to them.

[3] The trial accordingly proceeded against only the Third Defendant.

[4] It is trite law that the onus rests on the Plaintiff to allege and prove a valid contract of suretyship,<sup>3</sup> as well as the amount of the indebtedness of the principal debtor.<sup>4</sup> The primary issue for determination in this trial was whether the Third Defendant was bound by the suretyship which the Plaintiff relies upon. Some evidence was also adduced as to the amount of his indebtedness if the suretyship was found to be enforceable against him. Various potential problems however exist in respect of that issue. These include whether some of the charges sought to be recovered were due in terms of the lease, whether VAT claimed thereon was in fact payable, the extent of the alleged damages for holding over, and the like, to mention a few. In view of the conclusion I have reached it is not necessary to consider the correct computation of any alleged indebtedness. This judgment deals only with the primary issue namely whether the Third Defendant is legally bound as surety to the Plaintiff.

### **The Conclusion of the Lease Agreement and Deed of Suretyship**

[5] The suretyship which the Plaintiff seeks to enforce against the Third Defendant was attached as an annexure<sup>5</sup> to the written lease agreement concluded between the Plaintiff and the First Defendant.

[6] The relevant background to the dispute includes the following. The First Defendant was awarded a tender to run a Wimpy outlet at King Shaka International Airport ('the airport'). This resulted in the lease agreement being concluded between

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<sup>3</sup> *Di Giulio v First National Bank of SA Ltd* 2002 (6) SA 281 (C) para 26.

<sup>4</sup> *Millman and another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (under curatorship) and others* 1997 (1) SA 113 (C).

<sup>5</sup> It was annexure 5 to the lease.

it and the Plaintiff. Prior to this award the First Defendant had operated a coffee shop in the old Durban International Airport ('old airport') until the old airport was closed, similarly from premises which it leased from the Plaintiff. No evidence was adduced that the Third Defendant had bound himself as a surety in respect of the lease at the old airport.

[7] The Second, Third and Fourth Defendants were at the time of the conclusion of the lease for the Wimpy outlet all directors<sup>6</sup> of the First Defendant. The Third Defendant was aware of the tender put forward on behalf of the First Defendant but did not have sight of it.

[8] Upon the award of the tender, an administrative officer of the Plaintiff delivered the proposed lease agreement with its annexures to the Fourth Defendant, on behalf of the First Defendant. The date upon which the draft unsigned lease agreement, following the template generally used by the Plaintiff, was delivered and the manner and form in which it was delivered were not confirmed by any evidence.<sup>7</sup> It appears however that the documents must have been delivered at some stage before 10 July 2009, as the conclusion of the lease was referred to in a resolution of the board of directors of the First Defendant reflecting that date. Mrs Horn, an employee of the Plaintiff, confirmed that, other than a standard covering letter (which was not produced), neither the terms of the lease agreement nor those of the suretyship are explained to potential tenants. Further, there is no time period within which a lease agreement is to be signed by the tenant. The lease must however be signed prior to the tenant commencing trading, in the present case, on 1 May 2010.

[9] The agreement of lease document is a 36-page document comprising various terms and conditions. Attached to it are seven annexures. The entire bundle comprising the agreement of lease with the annexures thereto is headed 'Agreement

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<sup>6</sup> The Third Defendant was a non-executive director and the Second and Fourth Defendants were executive directors. The Third Defendant has subsequently resigned as a director of the First Defendant. His resignation is however irrelevant to this judgment.

<sup>7</sup> The evidence by Mrs Winnie Horn of the Plaintiff was that lease agreements are usually accompanied by a covering letter which calls upon the tenant to sign and initial the lease agreement and to fill out and sign the deed of suretyship. No such covering letter was discovered by the Plaintiff and Horn testified that she would have to search through the documents at the office to see whether such a letter had in fact been sent. She had not done this exercise at the time she gave evidence.

of Lease between Airports Company of South Africa Limited and Masiphuze Trading (Pty) Limited'. The second page of the lease agreement consists of a contents page which refers to the various clauses of the lease agreement and identifies the annexures thereto. Annexure 1 relates to 'Further material terms of lease', Annexure 2 makes provision for a 'Resolution of the Lessee',<sup>8</sup> Annexure 3 refers to 'a Plan of the leased premises', Annexure 4 contains a 'Draft payment guarantee in lieu of payment' which the evidence established would have to be completed in that form should security be required, Annexure 5 a blank 'Deed of Suretyship', Annexure VII(4) which was not referred to in the index comprises the 'Abridged ACSA House Rules', Annexure 6, a 'Service Standard Agreement', and Annexure 7 a draft 'Debit order instruction'. Provision was made on page 36 of the lease agreement for signature by the lessee.

[10] The schedule to the lease stipulates the minimum rentals payable and also specified that security in the amount of R263 538 was required. A payment guarantee for a security deposit in the amount of R263,538.00, as required by the lease, was obtained in the form of annexure 4 to the lease agreement. When the First Defendant defaulted with its obligations, that amount was released to the Plaintiff on 10 October 2014 and allocated to some of the First Defendant's earliest arrears. Regarding the extent of security required, the evidence established that the Plaintiff did not specify that any particular sureties bind themselves to it in respect of the liability of the First Defendant, but that the number of sureties and their identities were to be inserted at the discretion of the lessee, who could insert the names of such sureties as it saw fit.<sup>9</sup> That is unusual if not extraordinary.

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<sup>8</sup> An extract of the minutes of the Board of the First Defendant signed by the Second, Third and Fourth Defendants purporting to reflect a decision which on the uncontroverted evidence of the Third Defendant was obtained by round robin resolution, dated 10 July 2009 is annexed to the cover page providing for this annexure.

<sup>9</sup> The evidence given by Mahesh Govind on behalf of the Plaintiff was that this lease agreement and the suretyship are standard documents which are prepared by the Plaintiff's legal department in conjunction with the retail department. This standard lease is concluded with all retail outlets in the ACSA airports throughout the country. The details of the individual tenants, rental and the terms of the lease are inserted into the template which is then delivered to the tenant for consideration and signature. The details of the sureties are not completed by the Plaintiff when the lease is delivered to the proposed tenant as the Plaintiff is unaware who the individual sureties will be. Those details are to be inserted by the tenant or the proposed sureties.

[11] None of the Plaintiff's employees and/or representatives was present at the time the lease documents were signed. The Third Defendant's unchallenged evidence was that the lease and annexures thereto were presented to him as a non-executive director by the Second and Fourth Defendants, who are executive directors of the First Defendant, at a board meeting of the First Defendant held at the Greyville Race Course in Durban. That meeting probably took place on 20 July 2009. The Third Defendant was told that the document was the lease with the Plaintiff. According to his evidence, the lease had already been signed and initialled by the Second and Fourth Defendants. He was advised that he also needed to sign and initial the documents wherever they had done so. He did so without reading the documents as he trusted his fellow directors. He was never told by them that he was binding himself as surety on behalf of the First Defendant. Although he did not read the documents<sup>10</sup> he did notice that it did not contain the handwritten insertions now appearing on the documents annexed to the particulars of claim, which reflect the names of the sureties and their *domicilia citandi et executandi* in annexure 5 in manuscript. No evidence was presented to gainsay his version that when he signed the document, irrespective of his reasons for or belief in signing it, the documents were blank. Further, there is no evidence of (nor was it put to him) that there was any agreement between any of the parties regarding the insertion of the identities of the alleged sureties or any other of the manuscript variations of the document. The Third Defendant did not recognize and could not say whose handwriting now appeared on the documents. Manuscript insertions on a document amount to alterations to that document. There was no proof or signature reflecting or confirming that such alterations were effected with the Third Defendant's consent.

[12] The lease documents annexed to the particulars of claim reflect what was identified as the Fourth Defendant's signature at the end thereof where provision is made for a signature 'for and on behalf of the LESSEE'. The Third Defendant signed as the 'first witness' and the Second Defendant as the 'second witness'. The lease

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<sup>10</sup> The Third Defendant testified that he has signed many lease agreements with the Plaintiff in the past as he is involved in a number of businesses which operate from various airports throughout the country. He could not recall how many leases he had signed but estimated that there were over ten such agreements, as leases must be periodically renewed. He did not read any of these lease agreements before he signed and initialled them. When it was put to him that if he did not read them, there was a possibility that he may have signed a suretyship he conceded that he may have. He maintained however, that he would not have signed a suretyship and never had.

reflects that this was apparently done at Durban on 20 July 2009. Every page of the lease and the annexures thereto was initialled by the Second and Fourth Defendants, as well as by the Third Defendant (save that the copy annexed to the particulars of claim on pages 59 to 65, which include the draft suretyship agreement, do not reflect initials of the Third Defendant).<sup>11</sup> The fourth page of the suretyship document ends with clause 17 approximately half way down the page. It is followed by a page making provision for five signatures without any indication as to whether it is part of the suretyship, or in which capacity any signatory would sign.<sup>12</sup> There was furthermore no evidence as to where this page might have appeared in the series of pages when it was signed, specifically whether it followed immediately at the end of the draft suretyship, or might have appeared elsewhere. The Third Defendant simply signed where his two co-directors indicated he should sign.

[13] As the signing of the documents which included the lease was not supervised by the Plaintiff, the Plaintiff could not contradict the evidence of the Third Defendant on the above.

[14] The documents were subsequently returned to the Plaintiff and eventually only submitted to the Plaintiff's authorised signatory, Mr Govind, on or about 13 January 2010 (some 6 months later). That date appears on an internal covering letter which accompanied the lease documents when they were sent to Mr Govind to sign for and on behalf of the Plaintiff.<sup>13</sup> Mr Govind did not date the agreement when he signed it and it appears that Mrs Horn had signed as sole witness before his signature was appended. Mr Govind says he checked that the document was *ex facie* its contents complete. He noticed that the name of the principal debtor had

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<sup>11</sup> Nothing seems to turn on that as the Third Defendant in his plea admitted that he signed the annexure containing the suretyship document, and simply denied that it had been completed in manuscript at that stage to reflect any names or any chosen *domicilia citandi et executandi*, which now appear for the Second, Third and Fourth Defendants in manuscript.

<sup>12</sup> This position must be contrasted to an earlier suretyship which the Third Defendant admitted he had signed on 23 April 2007 in favour of the Plaintiff in respect of any indebtedness of Airport Retail Concession (Pty) Ltd t/a CAN (Duty Free) at O.R. Tambo International Airport. That suretyship was signed by the Third Defendant and above his signature the printed form indicated that he was signing as 'Surety'.

<sup>13</sup> Neither Mr Govind nor Mrs Horn could independently recollect when exactly they signed the agreement of lease. Mr Govind recalled that he signed it in 2009 and Mrs Horn testified that it would have been signed soon after it was received, but the letter dated in January 2010 suggested that the lease agreement had only been sent to Mr Govind to sign in January 2010.

been inserted on the suretyship as a surety, which would be an error, but did nothing further about it as three further names appeared thereon.

[15] The lease agreement does not reflect in its heading that it is a Lease Agreement incorporating a deed of suretyship. The deed of suretyship is however headed in bold font, 'Deed of Suretyship. It provides that the sureties:

'do jointly and severally bind [themselves] to Airports Company South Africa Limited "the Lessor" and its successors and assigns as surety for and co-principal debtors with [INSERT DETAILS] ("the Lessee") for the due and punctual fulfilment and performance by the Lessee of all its obligations to the Lessor in terms of the lease agreement to which this suretyship is attached ("the lease agreement") ...'

[16] The Third Defendant evidence that the Deed of Suretyship was blank at the time he signed the lease agreement (in that the sureties' details at page 48 of Exhibit A and the details at pages 50 and 51 thereof were left blank) could not be challenged, which *prima facie* rendered the Deed of Suretyship invalid and/or unenforceable. The plaintiff led no evidence whatsoever on this aspect.

[17] The Third Defendant further testified that had he realised or known that the documents contained a Deed of Suretyship he would not have signed in the manner which he did at page 52.

## **Discussion**

### **Section 6 of the General Law Act No. 50 of 1956**

[18] The deed of suretyship does not record the name of the principal debtor but simply records:

'[INSERT DETAILS].  
("the Lessee")'

Section 6 of the General Law Amendment Act<sup>14</sup> requires that the terms of the contract of suretyship must be embodied in a written document, which terms include the identity of the creditor, the surety, and the principal debtor, and the nature and

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<sup>14</sup> Act 50 of 1956.



amount of the principal debt.<sup>15</sup> If a suretyship does not identify the surety it does not prima facie comply with the statute.<sup>16</sup>

[19] The Third Defendant argued that no evidence was led by the Plaintiff to identify the principal debtor or to rectify the Deed of Suretyship by identifying the principal debtor in circumstances where extrinsic evidence would be admissible to establish such identity. He referred to the decision in *Fourelmel (Pty) Limited v Maddison*<sup>17</sup> where the Court found the Deed of Suretyship to be invalid as it did not contain the name of the principal debtor, and it was concluded that the plaintiff was estopped from relying on extrinsic evidence in order to cure such a material defect. The facts in that matter however were that it was not apparent *ex facie* the Deed of Suretyship that the deed of lease sought to be incorporated was the document giving rise to the indebtedness secured by the suretyship. That is not the case in this matter. In *Industrial Development Corporation of SA (Pty) Ltd v Silver*<sup>18</sup> the Supreme Court of Appeal held that the terms of a suretyship may be supplemented to identify the principal debtor by incorporation by reference.<sup>19</sup> That principle would apply in the present dispute. The alleged suretyship is an annexure to the lease agreement which in its terms describes inter alia the identity of the lessee. There can therefore be no uncertainty when reading the lease agreement with its annexures in their entirety as to which lease agreement and hence which principal debtor annexure 5 intended to refer to.

[20] However, there was no evidence that the Deed of suretyship reflected the name of the Third Defendant at the time the documents were signed by the Third Defendant. There was also no evidence that he had authorised anyone to insert his name in the suretyship document after his signature was appended to the documents. That is fatal to the Plaintiff's claim.

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<sup>15</sup> *Sapirstein and others v Anglo African Shipping Co (SA) Ltd* [1978] 4 All SA 474; 1978 (4) SA 1 (A).

<sup>16</sup> *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989. See generally Forsyth and Pretorius *Caney's The Law of Suretyship* 6 ed at 75.

<sup>17</sup> 1977 (1) SA 333 (A).

<sup>18</sup> 2003 (1) SA 365 (SCA).

<sup>19</sup> *Silver* n18 para 9. See also *Trust Bank of Africa Ltd v Cotton* 1976 (4) SA 325 (N) at 329E-H, and *F J Mitrie (Pty) Ltd v Madgwick and another* 1979 (1) SA 232 (D) at 235B-E.

[21] The documents must further be read as a whole, and not only those parts which benefit the Plaintiff. Although the Third Defendant did not read the document, to the extent that he might have signed the suretyship, he would by fiction of law be deemed to be bound to the terms thereof as if he had read same.<sup>20</sup> All the terms of the lease incorporated by reference and establishing that the principal debtor is the First Defendant as 'lessee', must apply. As A J Kerr states, 'It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.'<sup>21</sup> In this matter the heading to the lease documents did not indicate that it contained a suretyship in respect of those who may append their signatures thereto. In *Brink v Humphries & Jewell*<sup>22</sup> the Court held that it was misleading if the prominent heading of the document in question did not state that it was also a personal suretyship. The Third Defendant's version must prevail in this regard.

[22] The terms of the lease documents delivered by the Plaintiff, did not specify that any named sureties had to commit themselves, and specifically did not expressly require the Third Defendant to commit himself as surety. He signed the documents at a time when his name was not inserted as surety. There was no evidence to contradict that. Whatever cynical view one might take of his evidence that he had not read the terms of the lease, the terms of the lease only required that security be provided in the form of cash or a payment guarantee, which had to be in the form of Annexure 4. The security amount expressly required was indeed provided in the form of Annexure 4 to the lease agreement.

[23] Clause 9.6 of the lease went further to provide:

'9.6 Furthermore and where the Lessor so requires, the shareholders or members of the Lessee (as the case may be) as listed in Annexure "5" (deed of suretyship) shall, on written request by the Lessor, execute the deed of suretyship as further security for the due and punctual payment by the Lessee of all moneys which are due and owing by the Lessee to the Lessor from time to time in terms hereof.'

No 'written request by the Lessor' to the Third Respondent to execute a deed of suretyship in the form of Annexure 5 to the lease as further security was produced.

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<sup>20</sup> The maxim *caveat subscriptor* - a person who signs must be careful remains valid.

<sup>21</sup> AJ Kerr *The Principles of the Law of Contract* (2002) 6 ed at 102.

<sup>22</sup> 2005 (2) SA 419 (SCA).

[24] Finally, it was submitted that the Third Defendant was at pains to point out how many lease agreements he had concluded with the Plaintiff and therefore that he would be no stranger to the requirement of a personal surety, or the standard terms contained therein.<sup>23</sup> The difficulty with that submission is firstly that it seeks to rely on similar fact evidence which is generally inadmissible because it requires the investigation of collateral issues in respect of each such prior instance. There was no evidence on that. Indeed, the reference to the CNA lease, being the only other lease produced demonstrated that where a suretyship was required from the Third Defendant he was required to sign the suretyship where his signature was clearly indicated to be as 'surety'.

[25] The facts in the present case are not similar to those in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*<sup>24</sup> where the deed of suretyship was also an annexure to a lease agreement, was headed as such and the signatory did not read but was prepared to sign the lease and the deed of suretyship without requiring an explanation.<sup>25</sup> In casu the uncontroverted evidence of the Third Defendant was that the documents which he signed, although he had not read same, did not contain any manuscript insertions and hence his name as surety when he signed it.

## **Conclusion**

[26] The Plaintiff's claim based on the alleged suretyship therefore cannot succeed.

[27] The following order is accordingly granted:

1. The Plaintiff's claim against the Third Defendant is dismissed with costs.
2. The application for default judgment against the Second and Fourth Defendants is adjourned sine die with no order as to costs.

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<sup>23</sup> *Langeveld* n28.

<sup>24</sup> 2000 (1) SA 167 (W).

<sup>25</sup> *Tesoriero* n31 see the description of the facts at 176C-G.

**APPEARANCES**

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