REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 43686/2019

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

21 August 2020 .....

Date **LT KILLOPS**

In the matter between:

INVESTEC PROPERTY FUND LTD	**PLAINTIFF**
And	
LE PHENIX STUDIOS (PTY) LTD	**FIRST DEFENDANT**
AES CAPITAL INVESTMENTS (PTY) LTD	**SECOND DEFENDANT/ EXCIPIENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 21 August 2020.

KILLOPS AJ

[1] This is an exception raised by the second defendant against the plaintiff's particulars of claim. The second defendant's ground of exception is based on the particulars of claim failing to disclose a cause of action against the second defendant.

[2] I will refer to the Plaintiff as Investec, the first defendant as Le Phenix Studio, and the second defendant as AES.

[3] Investec, being the registered owner of a property, and Le Phenix Studio entered into a lease agreement on 17 January 2019, in which Le Phenix Studio hired a commercial premises, being a shop at The Firs Centre, Rosebank. A copy of the signed lease was annexed to the Particulars of Claim as annexure "A".

[4] In terms of the lease agreement, Le Phenix Studio agreed to pay *inter alia*, for rental of the shop, rental of a storeroom, parking rental and pro rata of monthly rates and taxes. The leased period would commence 1 May 2019 and terminate on 30 April 2022.

[5] According to paragraph 8 of the lease agreement, Standard suretyship would be signed by the second defendant, AES Capital Investments (Pty) Ltd, and Chantal Francis ("Francis") in her personal capacity. The suretyships consisted of two separate documents, one for each of them. These suretyship agreements were attached as "Annexure D - Deed of Suretyship" to the lease agreement.

[6] The copy of Francis' suretyship agreement which is attached to the particulars of claim is incomplete and unsigned by her, whereas AES' is signed by Andrew Standring, a representative of AES.

[7] Le Phenix Studio failed to make monthly payments and fell into arrears.

[8] Investec issued summons against Le Phenix Studios and AES. Investec relies on the agreement of lease, with certain annexures to find its cause of action against the Le Phenix Studio, and the deed of surety entered into by AES in Investec's favour (annexed as B to the particulars of claim) securing AES' liability up to the sum of R499 600.00.

[9] Investec is persisting with its claim against AES in terms of the suretyship agreement. Paragraph 8 of the particulars of claim sets out

"8. *During or about January 2019 and within the jurisdiction of this Honourable Court, the second defendant, duly represented by the authorised official, agent and/or employee bound itself, jointly and severally to the landlord, as surety and co-principal debtor in solidum with the first defendant for the due payment of a limited suretyship, of which such liability is limited to the amount of R499,600.00 (excluding VAT), which may now or at any time become owing by the first defendant to the landlord arising out and in terms of the lease agreement. A copy of the deed of suretyship is attached and incorporated as annexure "B" (Annexure "D" to the lease agreement)."*

[10] The Particulars of Claim were met with an exception by AES on the grounds that they do not disclose a cause of action against them. The paragraphs read as follows:

"2. Clause 8.1 of the agreement refers to standard sureties being provided by second defendant, and Chantel Francis ("Francis").

3. There are two suretyships annexed to the agreement, one for the second defendant, and one for Francis.

4. The suretyship designated for Francis's signature is unsigned, and consequently void for non-compliance with section 6 of the General Law Amendment Act, 50 of 1956.

5. As a consequence, second defendant's suretyship is void due to the voidness of Francis' suretyship, being a simultaneously granted suretyship for the same debt."

[11] The test on an exception, that the particulars of claim fail to disclose a cause of action, is said to be whether on all possible readings of the facts, no cause of action is made out.

[12] In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and particular document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld[1]. The court should look at the pleadings as it stands and no fact outside those stated in the pleading can be brought into issue.

[13] AES claims that Francis and AES intended to be bound as co-sureties (as opposed to independent sureties) for the debt to Investec, and that the agreement of lease and suretyship agreement clearly indicates that AES and Francis intended to be co-sureties. On this basis and because Francis has failed to sign her suretyship agreement, AES cannot be held liable for the debt.

[14] According to AES, the question for decision is whether Francis and AES intended to bind themselves as co-sureties, and if so, whether the absence of Francis' signature renders the surety document signed by AES invalid. The question of whether the parties intended to be bound as co-sureties must be considered against the analysis of the agreement of suretyship, as embodied in the agreement of lease.

[15] AES contends that to determine the intention of the parties, the test is not a subjective one (what either party may have had in mind) but must be

[1] Theunissen v Transvaalse Lewendehawe Ko-op Beperk 1988 (2) SA 493 (A) at 500 E-F

objectively determined from the language used in the document[2]. The Court only deviates from this approach where the ordinary meaning of the words in the suretyship leads to absurdity or anomaly[3].

[16] AES set out several objective *indicia*, apparent *ex facie* the annexures to the particulars of claim, that AES and Francis intended to be co-sureties and not independent sureties[4]. These include the heading of the lease clearly incorporating "A SURETYSHIP"; clause 8.1 of the lease requiring 'standard suretyship' to be signed by AES and Francis; clause 8.3.4 stating that annexure D "Deed of Suretyship" forms part of the lease and annexure D including a "Deed of suretyship" which includes AES and Francis' deed of suretyship.

[17] According to AES's counsel, Mr van Eetveld, the most 'forceful' sign indicating the parties' intention to be co-sureties is the fact that both AES and Francis, *ex facie* annexure D to the lease, renounced the *beneficium divisionis*. Only co-sureties are liable *in solidum* and have the benefit of the division of the debt (*beneficium divisionis),* unless they renounce the benefit. It is evident from both AES's signed surety, and Francis' unsigned surety document, that both renounced the benefit. Had they been independent sureties, they would not have been entitled to renounce the *beneficium divisionis* at all, as one cannot give up something one does not have.

[18] As pointed out in the case of *Nelson v Hodgetts Timber (East London) (Pty) Ltd* 1973 (3) SA 37 (A), a case referred to by Counsel for both AES and the Investec, "*there are cogent considerations why a surety should want to be joined by a co-surety and why he should intend to enter into a contract of joint surety.*"[5]

---

[2] Nelson v Hodgetts Timber (East London) (Pty) Ltd 1973 (3) SA 37 (A) 45 B-C, relying on Worman v Hughes and Others 1948 (3) SA 495 (AD) 505

[3] Nelson 45C-D, relying on Trollip v Jordaan 1961 (1) SA 238 (AD) 245

[4] Excipient's Heads of Argument, page 5 par 14

[5] *Nelson v Hodgetts Timber (East London) (Pty) Ltd* 1973 (3) SA 37 (A) at 46

[19] On the other hand, Investec argues that that to decide whether there is a need for a valid signature by Francis for AES's surety to be valid, one has to consider if the sureties wanted to be joint sureties or co-sureties.

[20] Investec argued that it must be clear from the document itself, being the suretyship document only, that the parties intended to be bound only if all the parties concerned signed the document, as the surety is self-contained.

[21] As is apparent from clause 12 of the suretyship agreement signed on behalf of AES, the agreement contains a clause stating that the suretyship document contains the entire agreement between the parties and that there are no conditions precedent suspending the operation thereof.

[22] Counsel for Investec, Mr Dobie, argued there can be no possibility of one party not being bound if the other does not sign, if the parties sign in separate documents, each of which contain the abovementioned clause. The parties therefore intended to sign as independent sureties, and the particulars of claim therefore give rise to a valid cause of action.

[23] It is for the excipient (AES) to satisfy the court that the facts pleaded by Investec cannot be supported by any reasonable interpretation of the particulars of claim.[6] For this purpose the facts pleaded in the particulars of claim are accepted as correct.[7] There was no dispute between the parties that this approach was correct. The court is to take as true all the allegations as pleaded by Investec and to assess whether they disclose a cause of action or not.

[24] If one considers the suretyship document signed by Mr Standring on behalf of AES, it is clear therefrom that AES bound itself "jointly and severally" in favour of Investec as surety for the debt of Le Phenix.

---

[6] *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318D-E; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965 para 6.
[7] *Marney v Watson* 1978 (4) SA 140 (C) at 144F-G; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at 143I-J.

[25] According to the definition of "severally"[8], (meaning separately or individually), AES bound itself individually for the debt of Le Phenix and is therefore not dependant on Francis signing her surety.

[26] Considering the argument by Investec, and what is set out above regarding the definition of *severally*, on the interpretation of paragraph 8 of the particulars of claim, if the facts are accepted as true and correct, I accept that there is an acceptable and plausible interpretation of the agreement and the suretyship, that AES bound itself as an independent surety. A cause of action is therefore established. AES signed a suretyship document binding itself individually as surety for the debt of Le Phenix due to Investec.

[27] The interpretation (as per AES) that Francis and AES intended to bind themselves as co-sureties (as opposed to independent sureties), and thus, the absence of Francis' signature renders the surety document signed by AES invalid, is one possible interpretation. The court cannot find that this is the ONLY interpretation of the facts as pleaded by Investec. It would require the court to ignore the possibility that AES signed the suretyship agreement binding itself as an independent surety to Investec, which cannot be excluded.

[28] Furthermore, there is nothing pleaded by either party regarding whether or not Francis has or has not signed her suretyship agreement.

[29] Accordingly, there appears to be no defect in the pleading as it stands. AES has failed to persuade the court that the interpretation of the pleading in question does not establish a cause of action on every interpretation that can reasonably be attached to it.

---

[8] See: Oxford dictionary severally

/ˈsɛv(ə)r(ə)li/

Learn to pronounce

adverb

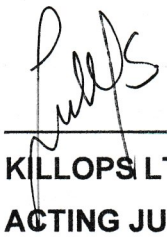
1. separately or individually; each in turn.
"the partners are **jointly and severally** liable"

COSTS

[30] The plaintiff has been successful herein and is thus entitled to the costs of suit. Mr Dobie argued that the costs should be on a scale as between attorney and client because of clause 38.5 of the lease agreement which allows for same. There is no similar clause in the deed of suretyship. I do not think that a punitive scale of costs is appropriate in this matter. The plaintiff is thus entitled to the ordinary scale of costs, that is costs on a party and party scale.

[31] In the circumstances, I make the following order:

1. The exception is dismissed with costs on the ordinary scale.



KILLOPS LT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Date of hearing:	**29 July 2020**
Date of Judgment:	**21 August 2020**
For the Excipient:	**Adv. H van Eetveldt**
Instructed by:	**Andrew Stewart Attorneys** **Tel: 082 781 7402** **Email: andrew@stewartattorneys.co.za**
For the Plaintiff:	**Adv. G Dobie**
Instructed by:	**Reaan Swanepoel Attorneys** **Tel: 011 431 3834** **Email: reaan@iutweb.co.za**