IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A174/2017

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

29/11/2019 .....

In the matter between:

PS VAN HEERDEN N.O.	First Appellant
J VAN HEERDEN N.O.	Second Appellant
FC FOUCHE N.O.	Third Appellant
KP VAN HEERDEN N.O.	Fourth Appellant
and	
DANWET NO.131 (PTY) LTD (IN LIQUIDATION)	Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The appellant appeals, with leave from the Supreme Court of Appeal on petition to it, against the whole judgment and order delivered by Tuchten, J., in the court *a quo*.

[2] The court *a quo* dismissed the action with costs, after holding that the appellants had not proven a suretyship granted by the respondent in their favour.

[3] The issue on appeal is crisp. It turns on the interpretation of a document entitled "notarial surety bond" allegedly granted by the respondent. The appellants contend that the notarial surety bond registered in the Deeds Office constitutes a standalone surety agreement granted by the respondent in favour of the appellants.

[4] The appellants, as trustees of the Piet van Heerden Family Trust (the Trust), relied on the evidence of one witness, one Johan Georg van Heerden (van Heerden). Despite the similarity of the surname, there is no relationship with the trustees of the Trust. The said van Heerden (the Debtor) signed an acknowledgement of debt in favour of the appellants. He is also the majority shareholder of the respondent. The acknowledgement of debt is in respect of an amount of R1 500 000.00 loaned to him, in his personal capacity, by the Trust. The Debtor signed the acknowledgement of debt on 8 December 2008. The notarial surety bond dated 11 December 2008. The latter was in respect of an amount of indebtedness of R4 000 000.00.

[5] The canons of construction of a document, of whatever nature, have over the years been set and restated by the courts. The principles of interpretation are trite and requires no further consideration or restatement.[1]

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[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA)

[6] The appellants contend that applying the principles of interpretation, as amplified by the evidence presented, it is clear that the said notarial surety bond constitutes a distinct standalone surety agreement by the respondent.

[7] The said contention of the appellants flies in the face of the construction and wording of the notarial surety bond and is not supported by the evidence led, for what follows. It also defies logic.

[8] In the first instance, the acknowledgement of debt is signed by the Debtor on 8 December 2008. The alleged notarial bond is dated 11 December 2008. The appellants contend in this regard, that the date of 8 December 2008 must be incorrect (no reasons are advanced) and is to be read as 11 December 2008. They further contend that it is common cause. The respondent's contention is that it matters not which date is used, the notarial surety bond remains flawed on the proper interpretation to be afforded thereto. There is thus no common cause between the parties on this issue.

[9] Secondly, the notarial surety bond records that a written resolution was signed on a date that is not entered and further records that it was so signed at a place that is not identified. Mr Leathern SC, who appeared on behalf of the appellants, submitted that the document was registered in the Deeds Office and hence is "valid". The mere registration of an incomplete document in the Deeds Office does not of necessity become "valid". Furthermore, Mr Leathern submitted, with reference to the evidence of the Debtor, that he had discussed the granting of a notarial surety bond over the respondent's movable assets with his co-shareholder and co-director and that his co-shareholder/co-director had agreed thereto. The respondent, or mortgagor, is a company registered in terms of the Company Laws of the Republic. That is common cause. The respondent is in liquidation. That too is common cause. Mr Leathern readily conceded that the normal practice would be that the resolution is to be in writing. Which it

is not. It is common cause that no written resolution was passed to so authorise.

[10] Further in support of the contention that the said notarial surety bond constitutes a distinct standalone surety agreement, Mr Leathern submitted that the first part of the document, constituting the pre-amble, be ignored and only the part relating to indebtedness of the respondent be considered. No authority was quoted for that submission. I know of no such authority. The principles of interpretation are clear. The document must be read as a whole and in its entirety. Furthermore, each paragraph, each sentence and each word of the document must be afforded a meaning. It cannot simply be ignored.

[11] Mr Bezuidenhout, who appeared on behalf of the respondent, submitted that the first part of the said document, commencing with the words "WHEREAS" and "AND WHEREAS", constitutes the primary clauses of the document. That part upon which Mr Leathern seeks to rely and commencing with the words "NOW THEREFORE", constitutes the secondary clauses. I agree. The tertiary clauses are made up of the other relevant terms contained in the document that relate *inter alia* to costs, interest, *domicilium citandi et executandi*, and the like. It follows that the whole document requires consideration, if only in view of its construction.

[12] It is gleaned, on a purposive reading of the whole document, that the primary clauses introduce the premises upon which the secondary clauses are to be read and understood. The first primary clause records that the Debtor is truly and lawfully indebted and held and firmly bound unto, in favour and on behalf of the Trust in terms of an acknowledgement of debt executed by the Debtor as principal debtor in favour of the mortgagee (the Trust) at Roodepoort on 8 December 2008. The second primary clause records that the mortgagor (the respondent) bound itself in the said acknowledgement of debt as surety

and co-principal debtor *in solidum* for and on behalf of the principal debtor (the Debtor) for due, full and timeous compliance by the principal debtor of all his obligations to the Trust. It is further recorded in the second primary clause that the respondent had undertaken in that acknowledgment of debt to register the notarial surety bond in fulfilment of the said obligations.

[13] The first secondary clause of the notarial surety bond records that the Appeared, i.e. one Herman Carl Coetzee, the person who appeared before the notary on behalf of the respondent, declared that his principal, the respondent, to be truly and lawfully indebted and held and firmly bound to and in favour of the Trust in the sum of R4 000 000.00 or any part thereof

[14] The aforesaid declaration logically and grammatically follows on what is recorded in the primary clauses of the notarial surety bond. To hold otherwise, would render the document non-sensical. It is further common cause that no other acknowledgement of debt had been signed by either the Debtor or the respondent, *in solidum* or otherwise.

[15] The declaration of indebtedness on the part of the respondent is to be read conjunctively with the primary clauses, not disjunctively therefrom. It then follows that the declaration refers back to the second primary clause where it is clearly recorded that the respondent bound itself as a co-debtor and surety in terms of an acknowledgement of debt together with the principal debtor, the Debtor, one Johan Georg van Heerden.

[16] However, when the said acknowledgement of debt is read, there is no reference to the respondent. The only parties recorded in the said document is the Trust and Johan Georg van Heerden (the Debtor) who signed the acknowledgement of debt in his personal capacity. There is also no surety agreement contained in the said document between the respondent and the appellants.

[17] It follows that on a purposive reading of the notarial surety bond, the only probable purpose thereof is to bind the assets of the respondent in favour of the Trust, and not to constitute a surety agreement by the respondent in favour of the appellants.

[18] For all of the aforementioned, the appeal cannot be upheld.

[19] There is a second string to Mr Leathern's bow, namely the evidence of Johan Georg van Heerden which apparently clearly indicates the intention of the parties to constitute a surety agreement through the vehicle of the notarial surety bond.

[20] There is no substance in that submission. The appellants were content on only calling Johan Georg van Heerden as a witness. His evidence is of no consequence. In the first instance, the witness was vague as to dates. The witness was unsure of the content of the two documents, i.e. the acknowledgement of debt and the notarial surety bond. In that respect, the witness was bent on relying on two affidavits filed in other proceedings by the appellants to support his evidence. The affidavit evidence does not support the version put by the witness. It tends to lean to a view that the respondent was the real debtor and not the witness. That much is further gleaned from his evidence where he stated that the respondent was the real debtor and that he, the witness, was the surety. That evidence is in clear contradiction of his evidence under oath also in chief, that he borrowed the money in his personal capacity. Johan Georg van Heerden's evidence is contradictory and of no assistance to the appellants. It follows on the second string, that the appellants have failed to prove the notarial surety bond to constitute a surety agreement.

[21] It follows that the appeal cannot be upheld and stands to be dismissed. There is no reason why costs should not follow the event.

I propose the following order:

The appeal is dismissed with costs.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

I agree and it so ordered

S P MOTHLE
JUDGE OF THE HIGH COURT

I agree

KUMALO
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: D M Leathern SC
Instructed by: TINTINGERS INC

On behalf of Respondent: W J Bezuidenthout
Instructed by: J F VAN DEVENTER INC