IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 3162/2006

In the matter between:

LYNNE & MAIN INCORPORATED Plaintiff

and

JANE LEVEN Defendant

JUDGMENT

MSIMANG, J:

[1] On 29 September 2002 an incorporated company, Nedbank Limited (Nedbank), obtained judgment by default against another incorporated company called Medsolve (Pty) Limited (Medsolve) for payment of the amount of R40 039.23, interest on the said amount at the rate of 22.49% per annum from 10 May 2001 to date of payment plus costs.

[2] During March 2003 Nedbank ceded to the plaintiff all its rights, title and interest in and to, among others, the said amount of judgment and, on 9 March 2005, the defendant concluded a written deed of suretyship in terms of which, *inter alia*, she bound herself jointly and severally as surety and co-principal debtor *in solidum* for the repayment, on demand, of all or any sums which Medsolve may from time to time owe to Nedbank,

together with further sums or interest and costs, including legal fees on the attorney and client scale, as may from time to time accrue and become due and payable, renounced the benefits of excussion and division and agreed that, should any legal costs become due and payable in terms of the deed of suretyship, she would be liable to pay such costs on the attorney and client scale.

[3] It is on the basis of the aforegoing allegations that the plaintiff instituted action against the defendant, contending that the said amount of R40039.23 plus interest thereon calculated at the rate of 20.5% per annum from 10 May 2001 to date of final payment and costs are now due and payable and that, despite demand, the defendant had failed, refused or neglected to pay the same.

[4] Though in her plea the defendant had denied the conclusion of the cession agreement between Nedbank and the plaintiff, the existence of the default judgment and the conclusion of the surety agreement, by the time the matter came to trial she was prepared to and in fact did admit –

4.1 that Nedbank had taken a default judgment against Medsolve for the said amount, interest and costs;

4.2 that Nedbank had ceded to the plaintiff its rights title and interest in and to the said judgment, and

4.3 that she had concluded the said surety agreement.

[5] Notwithstanding aforesaid admissions, she persisted with a denial that she was liable to pay the amount claimed in the summons, submitting that the description of the nature and the amount of the principal debt in the deed of suretyship did not comply with the provisions of Section 6 of the General Law Amendment Act 50 of 1956 and that, in any event, the surety agreement, which she signed and upon which the plaintiff relies, is unconscionable.

[6] Section 6 of the General Law Amendment Act provides that :-

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

[7] Referring to a decision in **Sapirstein and others v Anglo African Shipping Co (SA) Ltd,** [1] the defendant submitted that the terms that should be embodied in the contract are the identities of the creditor, the surety and the principal debtor and the nature and amount of the principal debt.

[8] The deed of suretyship which had been signed by the defendant described the nature and amount of the principal debt, in part, as follows :-

> "…… all or any sum or sums of money which the debtor may now or from time to time hereafter owe or be indebted to the bank …… provided nevertheless that the total amount to be recovered from me …… hereunder shall not exceed, in the whole, the sum of unlimited ……."

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[1] 1978(4) SA 1 (A);

[9] As I understood it, the defendant's attack on this description is two-fold. Firstly, the requirement that the nature of the principal debt should be embodied in the contract means that a *causa* giving rise to a principal debt should be specified. In the description of the nature of the debt in the document signed by the defendant, no such detail is given. That being the position, the description cannot pass muster and therefore falls foul of the provisions of the section. Likewise, the amount of the debt is not specified in the document. The word "unlimited" cannot be sufficient to describe the amount of the debt as required by the provisions of the section.

[10] Both submissions are without merit. Dealing with a situation where an amount of the ceiling had not been inserted, Eloff J remarked as follows in **First Consolidated Holdings v Bissett and others** [2] :-

> "As regards the first of these contentions, it again seems to me that it is not an essential term of suretyship contract that a ceiling should be included therein. That is an incidental term which might or might not be included in a particular deed of suretyship……."

[11] Regarding defendant's argument based on the description of the nature of the principal debt, interpreting a provision couched in the same manner as the provision *in casu,* Southwood J pronounced himself as follows in **Lynn Main Incorporated (supra)** :-

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[2] 1978(4) SA 491 (W) at 496 E; see also page 9 of the decision in the unreported decision in Lynn Main Incorporated v F J Engelbrecht case no: 17107/02 TPD, judgment handed down on 15.3.2007;

> "In my view clause 1 clearly indicates that the surety's liability for the debts of LPT is to be for any *causa* and is to be unlimited .." [3]

[12] During her argument in support of the submission that the surety agreement which she signed was unconscionable, the defendant contended that the cedent bank stood in a more powerful position than she when the agreement was concluded and further that the terms of the agreement are unintelligible.

[13] For the agreement to be declared unenforceable by reason of being contrary to public policy and therefore unconscionable, it must be shown to be :-

> ".…….inimical to the interests of the community…… contrary to law or morality, or run counter to social or economic expedience ……[4]

[14] In determining whether an agreement is contrary to public policy, it must be borne in mind :-

> "…. that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and ….. that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest. [5]

[15] The perusal of the surety agreement upon which the plaintiff relies in the present matter, reveals that it is a readable document couched in the same terms as those commonly used in the surety agreements used by

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3 Lynn Main Incorporated (supra) at page 10;
4 Sasfin (Pty) Ltd v Beukes 1989(1) SA 1 (AA) at 8 c-d;
5 Botha (now Griessel) and another v Finanscredit (Pty) Ltd 1989(3) SA 773 (AD) at 783A;

the banks in their everyday banking activities. In the contents of the document, I could find no provision which could be regarded as being inimical to the interests of the community or as being contrary to law and morality or even as running counter to social or economic expedience. The fact that one of the parties to the agreement is a bank and another is an individual cannot render the transaction improper and clearly no element of public harm is manifest in the transaction.

[16] This argument must accordingly also fail.

[17] Clearly the *in duplum* rule applies to the facts of the present case which will accordingly mean that the plaintiff's claim must be limited to twice the amount of the judgment debt and interest thereon at the rate of 20.5% per annum as from the date of judgment to date of payment.

[18] Regarding the issue of costs, the amount of the claim falls within the jurisdiction of the Magistrate's Court and I am not satisfied that it was necessary to institute the present action in this Court. It accordingly follows that any costs granted to the plaintiff will be taxed in terms of the Magistrates' Courts' tariff.

The order I therefore make is as follows :-

(a) The defendant is ordered to pay to the plaintiff the sum of R80 078.46 together with interest thereon calculated at the rate of 20.5% per annum from the date of this judgment to date of payment;

(b) **The defendant is ordered to pay the costs of the action on the scale as between attorney and client to be taxed in terms of the tariff of costs of the Magistrates' Courts'.**

For the Plaintiff:	Adv. R M van Rooyen (instructed by Lynn & Main Inc)
For the Defendant:	In person
Matter argued:	31 August 2009
Judgment delivered:	9 September 2009