



THE SUPREME COURT OF APPEAL  
OF SOUTH AFRICA

Not Reportable

**CASE NO. 31/2005**

**In the matter between**

**INVENTIVE LABOUR STRUCTURING  
(PTY) LIMITED**

**Appellant**

**and**

**DENNIS CORFE**

**Respondent**

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CORAM: SCOTT, JAFTA JJA and CACHALIA AJA

HEARD: 9 NOVEMBER 2005

DELIVERED: 18 NOVEMBER 2005

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Summary: Deed of suretyship – mistake – rectification thereof can only be ordered if the contract complies with the formality requirements.

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## JUDGMENT

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### JAFTA JA

[1] This appeal concerns a default judgment, the granting of which depended upon the rectification of a deed of suretyship. During September 2004 the appellant instituted an action against the respondent in the High Court, Pietermaritzburg, for the rectification of a deed of suretyship and payment of the sum of R240 119,93 with interest and costs. The respondent did not defend the action and the appellant applied for a default judgment and rectification of the contract of suretyship. The court *a quo* (Theron J) refused the prayer for rectification and dismissed the application for default judgment. With leave of the court *a quo* the appellant contests that refusal and the dismissal of the application for default judgment.

[2] In essence the appellant's case, as set out in the particulars of claim, is the following:

- (a) a close corporation called D & R Distributors CC was indebted to the appellant in the amount of R240 119,93 plus interest at the rate of 2.5% per month from 16 October 2003 to date of payment;

- (b) on 5 August 2003 the respondent executed a deed of suretyship in terms whereof he bound himself as surety and co-principal debtor for D & R Distributors CC's indebtedness to the appellant;
- (c) by error common to both parties and contrary to their intention, the respondents name was inserted as the principal debtor instead of D & R Distributors CC;
- (d) accordingly the deed of suretyship must be rectified by deletion of the words 'Dennis Corfe' in their reference to the principal debtor and be substituted with the words 'D & R Distributors CC'.

[3] When the matter came before the court *a quo* counsel who then appeared for the appellant, drew its attention to the fact that two decisions of that court stood in the way of the relief sought. Those decisions are *Republican Press Ltd v Martin Murray Associates CC* 1996(2) SA 246 (N) and *Nuform Farmwork and Scaffolding (Pty) Ltd v Natscaff CC* 2003(2) SA 56(D). Holding the view that it was bound to follow these decisions, the court *a quo* declined to authorise rectification and dismissed the request for a default judgment.

[4] It is now settled that a deed of suretyship which is invalid for want of compliance with the formal requirements of s 6 of the General Law Amendment Act 50 of 1956 ('the Act') cannot be rectified so as to make it comply (*Intercontinental Exports (Pty) Ltd v Fowls* 1999(2) SA 1045

(SCA) at 1051 C-G). Section 6 of the Act, insofar as it is relevant, provides:

‘No contract of suretyship entered into after the commencement of this Act, should be valid, unless the terms thereof are embodied in the written document signed by or on behalf of the surety ....’

[5] In the past, the word ‘terms’ in the section has been construed to include the identification of the three necessary parties, ie the creditor, the principal debtor and the surety (*Fourlamel (Pty) Ltd v Maddison* 1977(1) SA 333(A) at 345A-D and *Intercontinental Exports (Pty) Ltd* (supra) at 1051B). If any one of the three parties is not identified *ex facie* the contract, it will be invalid for want of compliance with statutory requirements.

[6] As a general rule the determination of whether rectification of a suretyship should be ordered or not involves a two-stage enquiry. The first is to determine whether the formal requirements contained in s 6 are met. The focal point at this stage is whether the written document, on its face, constitutes a valid contract of suretyship or not. If it does not, the enquiry ends there. If it does, then the enquiry moves to the second leg which focuses on whether a proper case for rectification has been made out. If the answer to the latter question is in the affirmative, an order for rectification must be granted.

[7] Against this background I shall now consider whether rectification should have been granted in the present case. The relevant part of the contract of suretyship reads as follows:

‘I, the undersigned Dennis Corfe do hereby bind myself jointly and severally in favour of:

Inventive Labour Structuring

(hereinafter called “the Creditor”)

as surety for and co-principal in solidum with:

Dennis Corfe

(hereinafter called “the Debtor”)

for the due payment of every sum of money which may now or at any time hereafter be or become owing by the Debtor to the Creditor from whatsoever cause or causes arising, and for the due performance of every other obligation, howsoever arising, which the Debtor may now or at any time hereafter be or become bound to perform in favour of the Creditor.’

The underlined names are inserted in handwritten form to a typed document and the suretyship is signed at its end by the surety, Dennis Corfe.

[8] Bearing in mind that at this stage one is confined to looking only at the document constituting the suretyship to see if it contains the necessary formalities, I am of the view that the present suretyship does, on its face, identify the creditor, the principal debtor and the surety. However, it is clear that the names of the surety and the principal debtor are the same and they are names of a natural person. This renders the suretyship capable of

at least two possible interpretations. The first is that the surety and the principal debtor are one and the same person. The second is that they are two parties with identical names.

[9] The first interpretation would certainly lead to non-compliance with the necessary formal requirements because in our law a person cannot stand surety for his or her own debt (*Nedbank Ltd v Van Zyl* 1990(2) SA 469(A) at 475E-I). On this interpretation the suretyship would fail to identify the principal debtor and the surety as two distinct parties.

[10] But the second reveals the identities of both the principal debtor and the surety as two parties with identical names. On this interpretation the suretyship contract is formally valid. In *Intercontinental Exports (Pty) Ltd* Smalberger JA, in a similar but not identical context, said at 1053D-F:

‘The principal debtor is referred to in clause 1.2 of the suretyship as “Mr Frank Fowles”. The name of the surety is reflected as “Frank Turner Fowles”. The names, though similar, are not identical, and *ex facie* the suretyship do not necessarily refer to the same person. Even if the two names were identical, it would not follow as a matter of course that they referred to the same person. The parties might for instance, be father and son who happen to have the same names, a not uncommon occurrence. In those circumstances, and a *fortiori* in the present, a deed of suretyship would be capable of being construed *ex facie* the document itself as reflecting a creditor, principal debtor and surety and would be formally valid on that score.’

[11] In a case where the contract being construed is capable of more than one interpretation, one meaning leading to invalidity and the other not,

preference must be given to the latter meaning in order to save the contract from invalidity. That much is trite. Therefore, the present suretyship - when properly construed - complies with the formal requirements in s 6 of the Act.

[12] I turn to the second leg of the enquiry. As previously stated, it is alleged that both parties in this matter had intended that the respondent would stand surety for D & R Distributors CC's indebtedness to the appellant. The respondent's name was mistakenly inserted in the suretyship agreement as referring to the principal debtor. As a result the suretyship agreement failed to reflect the parties' common intention. These facts constitute a sufficient basis for granting rectification. It follows that the court *a quo* erred in declining the request for rectification.

[13] In the light of what has been said above, it is not necessary to determine whether *Republican Press* and *Nuform Farmwork & Scaffolding (Pty) Ltd* were correctly decided. Both cases are distinguishable from the present matter.

[14] Since the only difficulty that stood in the way of the relief sought being granted was the question of rectification, it follows that the appeal must succeed. Insofar as costs of the appeal are concerned, it seems to me that it would be fair in the circumstances of this case to make no order as to costs. The respondent did not appear in this court. He informed the appellant's attorneys by way of a letter dated 6 April 2005 that he would

not oppose the appeal. In the court *a quo* the relief sought was refused after the appellant's counsel had referred the court to the decisions mentioned in para [13] above. The court's attention was not drawn to the decision of this court in *International Exports (Pty) Ltd.* Had this been done an order in the appellant's favour would in all probability have been granted.

[16] The following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with the following order:
  - ‘(a) An order is granted for rectification of the deed of suretyship, Annexure B to the particulars of claim, by the deletion of the name “Dennis Corfe” immediately after the words “as surety and co-principal debtor in solidum with” and substituting therefor the name “D & R Distributors CC”.
  - (b) The defendant is ordered to pay the sum of R240 119,93 with interest at the rate of 2.5% from 16 October 2003 to date of payment together with costs. The latter order will operate jointly and severally with



any order issued against D & R Distributors CC arising out of the same debt.’

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**C N JAFTA**  
**JUDGE OF APPEAL**

<b>SCOTT JA</b>	)	<b>CONCUR</b>
<b>CACHALIA AJA</b>	)	