THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 482/13

In the matter between

GERHARDUS ADRIAAN ODENDAL & ANOTHER **APPELLANT**

and

STRUCTURED MEZZANINE INVESTMENTS (PTY) LTD **RESPONDENT**

Neutral citation: *G A Odendal v Structured Mezzanine Investments* (482/13) [2014] ZASCA 89 (30 May 2014)

Coram: Ponnan, Maya, Leach, Saldulker and Swain JJA

Heard: **13 May 2014**

Delivered: **30 May 2014**

Summary: General Law Amendment Act 50 of 1956 - s 6 – deed of suretyship - validity of.

ORDER

On appeal from: Western Cape High Court (Gamble J sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

PONNAN et SALDULKER JJA (MAYA, LEACH and SWAIN JJA concurring):

[1] This appeal, with the leave of the court below, concerns the validity of a suretyship. Judgment was granted by the Western Cape High Court (Gamble J) in the sum of R16 631 071,41, together with interest and costs, in favour of the respondent, Structured Mezzanine Investments Limited (SMI), against the first appellant, Gerhardus Adriaan Odendal (Odendal) and the second appellant, Gabriel Joshua Jordaan (Jordaan) in terms of that deed of suretyship (the suretyship) which had been signed by the appellants and Francois Basson (Basson), who were the trustees of FXT Property Trust (the Trust), as security for a loan to the Trust.

[2] On 18 February 2008, SMI, a bridging financier, approved an application by the Trust for a loan facility in the amount of R10 million to partly fund a sectional title development by the Trust in Hermanus. In its letter of approval, SMI recorded, *inter alia*, that as security for the loan a second mortgage bond would have to be registered over erf 10965 Hermanus (the property), the trustees would have to bind themselves as sureties for all of the Trust's obligations, and an irrevocable guarantee would have to be furnished on behalf of the Trust to SMI. The terms and conditions recorded in the facility

letter were accepted by Basson on behalf of the Trust by appending his signature thereto on 7 March 2008. On 16 April 2008 Basson, duly authorised by the Trustees, signed a power of attorney authorising the registration of a mortgage bond over the property in favour of SMI as security for the loan. On the same day Basson signed the suretyship, as a surety and co-principal debtor in respect 'of any sum of money' which the Trust may 'now owe or in the future owe' to SMI arising from the loan agreement concluded between SMI and the Trust in April 2008.

[3] On 24 April 2008 the trustees adopted a resolution authorising the Trust to borrow R10 million from SMI. Basson was authorised in his capacity as trustee of the Trust to settle the terms and conditions applicable to the loan and sign all documentation relating thereto. On the same day the appellants signed the suretyship, which provided in clause 1:

'The payment on demand of any sum of money together with all costs and charges including legal costs as between attorney and own client which the Debtor may now or in the future owe to SMI arising from the Loan agreement concluded between SMI and the Debtor on or about April 2008 (a true copy which (sic) is annexed hereto).'

A further material term of the suretyship was, inter alia:

'4. This suretyship shall remain in force and effect as a continuing covering suretyship for the present and future indebtedness and obligations of the debtor to SMI, notwithstanding any interim fluctuation in the extinction (for any period) or of indebtedness and subsequent incurring of any new indebtedness or obligation by the Debtor to SMI and nothwithstanding the death or other legal disability of any of us until terminated in accordance with the terms hereof.'

[4] On 25 April 2008 Basson, on behalf of the Trust signed a Memorandum of Agreement (the loan agreement), which recorded the undertaking by SMI to lend and advance R10 million to the Trust. The further material terms of the loan agreement were, inter alia:

'3.1.1 the registration of a First or Second Covering Mortgage Bond by the Borrower in favour of SMI over the property to the value of R10 000 000.00 (ten Million Rand)

. . .

3.1.2 A Deed of Suretyship signed by Francois, Gabri and Gerhard in terms whereof they shall jointly and severally have guaranteed the obligations of the Borrower under

this agreement in such form and subject to such terms and conditions as SMI may reasonably require*;* which shall continue to constitute security for all the Borrower's obligations to SMI from time to time including its obligations arising out of this Loan Agreement.

. . .

4.2 Receipt and approval of a Special Power of Attorney signed by Francois authorizing the registration of a First or Second Covering Mortgage Bond in favour of SMI by the Borrower ranking as second charge over the property to the value as set out in clause 3.1.1 above, upon terms and conditions as registered by the attorneys;

4.3 Receipt and approval of resolution by the Borrower [the Trust] authorizing the entering into of this agreement and authorizing Francois to sign all documentation relating hereto on its behalf*;*

4.4 Receipt of an irrevocable undertaking by the transferring attorneys attending to the transfer of the Units in the development, to guarantee payment of the net proceeds of the sale of the Units immediately on date of registration of transfer of the Units to first transferees, to SMI in settlement of the outstanding capital sum due to SMI. . .'

[5] On 8 May 2008 attorneys Jordaan & Associates (per Jordaan) furnished the irrevocable guarantee sought by SMI in these terms:

'1. We have been instructed that you have agreed to loan and advance an amount of R10 000 000.00 (Ten Million Rand) plus costs and interest to [the Trust] on the terms and conditions set out in the Loan Agreement [the loan Agreement] to be entered into between, inter alia, our client and yourselves.

2. We confirm that we have received a written and irrevocable appointment by [the Trust] to attend to the opening of the abovementioned sectional title scheme and to attend to the transfer of the units in the Development from our client to the purchasers thereof.

. . .

4. We confirm that this undertaking may not be revoked.'

[6] On 25 May 2008 the loan agreement was signed on behalf of SMI. On 29 May 2008 SMI advanced the capital sum of R10 million to the Trust. A further sum of R1.4 million was advanced by SMI to the Trust on 27 October 2008. When the Trust defaulted in making payments under the loan

agreement, SMI launched application proceedings against it, as well as the sureties, seeking judgment jointly and severally, for payment in the sum then outstanding of R16 631 071,41.

[7] In an answering affidavit filed on behalf of the appellants, neither the existence of the loan agreement nor the suretyship was disputed. The appellants restricted themselves to two defences, namely, that: 'Applicant [SMI] would be repaid from the development and, although we bound ourselves as sureties, stood no real risk of being called upon to pay'; and, '[t]he interest rate of 1,25% per week, stipulated in the loan agreement, escalated to 1,5% per week in the event of default, is against public policy and should . . . not be enforced'. When the matter came before Van Staden AJ both of those defences were abandoned, and for the first time the validity of the deed of suretyship was placed in issue. Van Staden AJ, who it would appear entertained some reservations as to the validity of the suretyship, entered judgment against the Trust but postponed the application against the appellants and granted leave to the parties to supplement their papers if so advised. SMI duly supplemented its papers. The appellants filed answering affidavits in response, stating that when they signed the suretyship the loan agreement was not then in existence. The matter ultimately came to be argued before Gamble J. By that stage, Basson, whose estate had been sequestrated, had fallen out of the picture. Gamble J found in favour of SMI and entered judgment against the appellants.

[8] The gist of the argument advanced on behalf of the appellants on appeal is that the deed of suretyship did not comply with the requirements of s 6 of the General Law Amendment Act 50 of 1956 (the Act), inasmuch as: first, the principal debt was not in existence at the time of the conclusion of the suretyship; and, second, clause 1 of the suretyship was not a reference to the loan agreement that in due course came to be concluded between the parties. Section 6 is in these terms:

'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:' (The proviso which is not here relevant has been omitted)

As to the first:

[9] As far as the parties in the present proceedings are concerned, the suretyship in essence amounts to a promise by each of the appellants to SMI to guarantee any indebtedness which the Trust may now or in the future incur to SMI. It is indeed so that a contract of suretyship is accessory in the sense that it is of the essence of suretyship that there be a valid principal obligation (that of the debtor to the creditor). But, that the loan agreement between the Trust and SMI had not yet been concluded, is in and of itself no barrier to the potential validity of the suretyship contract. As was pointed out by Corbett JA in *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A) at 584G-H, '…it is not essential that the principal obligation exists at the time when the suretyship contract is entered into. A suretyship may be contracted with reference to a principal obligation which is to come into existence in the future.'

As to the second:

[10] In this instance, in terms of the suretyship, the appellants are potential principal debtors and potential sureties. As sureties, they are liable to SMI for the principal debt created by the suretyship, namely the debt arising from the loan agreement between SMI and the Trust. But, contend the appellants, that agreement, being the one giving rise to the principal debt, is not the one to which reference is made in the suretyship. The suretyship refers to an already concluded loan agreement. But it is undisputed that at the time of the signing of the suretyship and despite the reference therein to an already concluded agreement no such agreement had in fact been concluded. In *Sapirstein & others v Anglo African Shipping Co* (SA) Ltd 1978 (4) SA 1(A) at 12B-D, Trengove AJA stated:

'What s 6 requires is that the "terms" of the contract of suretyship must be embodied in the written document. It was contended by counsel for plaintiff that this meant that the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification other than evidence by the parties (ie the creditor and the surety) as to their negotiations and consensus. I agree with this contention. In my

view, there can be no objection to extrinsic evidence of identification being given, either by the parties themselves, or by anyone else, unless the leading of such evidence can be said to amount to an attempt to supplement the terms of the written contract "by testimony as to some negotiation or consensus between the parties which is not embodied in the written agreement" (see *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 991).'

[11] It is contended by SMI that what saves the suretyship, despite its deficiency, from extinction, was the reference to the loan agreement ultimately concluded, which, it was said, was incorporated by reference into the deed of suretyship. Incorporation by reference, as the name implies, occurs when one document supplements its terms by embodying the terms of another. It is now settled that a deed of suretyship that omits essential terms may nonetheless be saved from invalidity by virtue of the doctrine of incorporation by reference. (See *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A); *Industrial Development Corporation of SA v Silver* 2003(1) SA 365 (SCA).) Scott JA observed in *Industrial Development Corporation*, para13 that: 'Extrinsic evidence identifying the loan agreements as the one referred to is all that would be required and is therefore admissible.'

[12] The deed of suretyship in this case identifies the principal obligation by direct reference to the loan agreement. Much evidence was placed before the high court as forming part of the background facts relevant to and proper for consideration in relation to the question now being considered, namely, whether the requirements of s 6 were met. All of that evidence served, moreover, to identify the acknowledgement of debt referred to in the suretyship. Thus in his supplementary affidavit filed on behalf of SMI, Du Plessis stated (as summarised by Gamble J):

'27.1 On 16 April 2008 Basson attended on the offices of SMI's attorneys in Cape Town.

27.2 At a meeting with SMI's attorney that day, Basson "signed all the documents, including the loan agreements and the deed of suretyship" in the presence of the attorney.

27.3 Basson explained to SMI's attorney that he would meet with Odendal and Jordaan (who could not make the meeting) for purposes of procuring their signatures on the various documents, including the loan agreement and the suretyship.

27.4 Sometime between 16 and 24 April 2008 Basson contacted a director of SMI and proposed three minor amendments to the draft loan agreement. It is contended that these were not contentious and that SMI agreed thereto. SMI also instructed its attorneys to make the necessary amendment to the draft loan agreement.

27.5 A copy of the loan agreement in its form prior to these three amendments, and as signed by Basson on 16 April 2008, was annexed by Du Plessis to the supplementary affidavit.

27.6 On 25 April 2008 SMI's attorney met Basson at the latter's office and was handed a number of documents by Basson. These included the signed deed of suretyship, the loan agreement as already signed by Basson on 16 April 2008 (in its unamended form), and the unsigned amended loan agreement.

27.7 During the aforesaid meeting with SMI's attorney Basson informed the latter that Jordaan had informed him, when signing the deed of suretyship the previous day, that he wanted a further amendment to be made to the draft agreement viz.to clause 9.1.1 thereof which governs the procedure to apply on default by the debtor.

27.9 Du Plessis says that according to Basson SMI's attorney was amenable to that amendment and a manuscript alteration was made to clause 9.1.1 of the amended draft of the loan agreement. This alteration is visible on the signed loan agreement filed with the founding affidavit.

27.10 On the same day (25 April 2008) Basson handed to SMI's attorney the trustees' resolution referred to above, which also bore the signatures of Odendal and Jordaan. Du Plessis draws attention, once again, to the fact that the resolution identified both the nature and the amount of the principal debt.'

[13] Earlier in that affidavit, Du Plessis asserted (para 23):

'From the above it is evident that, although the loan agreement in its final signed form as attached to the founding affidavit was not in possession of Odendal and Jordaan at the time they signed the deed of suretyship, they were in fact in possession of a copy of the loan agreement in the exact same terms save for the four amendments referred to above, which amendments were effected subsequently. It is further evident that the four amendments did in no way whatsoever affect the principal debt. Accordingly, the document which was attached to the deed of suretyship at the time it was signed by Odendal and Jordaan properly and sufficiently identified the principal

debt for which they signed surety. Furthermore, the four amendments which were effected were in fact proposed by Basson and Jordaan, ostensibly after consultation with Odendal. I reiterate that those amendments did not in any way whatsoever affect the extent or nature of the principal debt.'

The supplementary answering affidavit filed by the appellants in response, like its predecessor, was scant. Odendal, who deposed to that affidavit stated:

'The Suretyships and resolution were signed by Jordaan and myself at Jordaan's offices on 24 April 2008 after Basson handed it to Jordaan for signature. The loan agreement was definitely not handed to us nor attached to any document we signed. We were asked to sign the suretyships at that stage and were told that the loan agreement would be concluded later. I did not even read the terms of the suretyship due to the factors set out above. 6th Respondent and I are not aware what happened at the meetings between the meetings between Applicant and First Respondent nor what was said between them.'

[14] Gamble J observed:

'I am satisfied that Du Plessis's summary of events in the supplementary affidavit, and the conclusions to be drawn therefrom as set out in the said paragraph 23, are a correct and accurate reflection of the state of play at the time the suretyship was signed. To the extent that there are disputes of fact put up by Odendal in the supplementary answer, I do not believe that such disputes survive the test in *Plascon-Evans:* they are fanciful and designed to be apparent rather than real. The question that then arises is whether this additional evidence is admissible in light of the parole evidence and integration rules.'

The learned judge accordingly concluded:

'I have already found that the denial by Odendal and Jordaan that the partially signed, unamended agreement was annexed to the suretyship is not worthy of serious credence. But even if I am wrong in this regard, it matters little to my mind that the document was not attached: it was readily capable of identification by the parties, was in existence at the time the suretyship was signed, had been signed by Basson on behalf of the trust and the material terms thereof had been agreed upon.'

[15] In our view this evidence is decisive with regard to the identification of the loan agreement referred to in the suretyship. Moreover, the appellants were not strangers to either transaction - qua trustees, they had: resolved to borrow the money from SMI on behalf of the Trust; authorised various actions

to secure the loan, including, but not limited to, the signing of the suretyship agreement, the registration of a mortgage bond over the property and the furnishing of an irrevocable guarantee. In addition, the terms of the loan facility approval of February 2008, which Basson signed on behalf of the Trust, mirrored in material respects those of the loan agreement. Tellingly, in Jordaan's application for the sequestration of the Trust, he recorded that he and Odendal regarded themselves as indebted to SMI by virtue of the deed of suretyship that they had concluded in respect of the Trust's indebtedness to SMI. That was consistent with their initial approach in these proceedings, when the validity of the suretyship was not placed in issue. It is thus difficult to resist the conclusion that the defence, which came to be raised midstream in these proceedings, was contrived.

[16] It must follow that the defence raised that the deed of suretyship is invalid for lack of compliance with s 6 of the Act must fail, for reading the written loan agreement as incorporated into the suretyship, which expressly refers to it, the requirements of that section are satisfied. In the result the appeal must fail.

[17] The appeal is dismissed with costs.

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VN PONNAN

JUDGE OF APPEAL

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HK SALDULKER

JUDGE OF APPEAL

APPEARANCES

For appellant:	L M Olivier SC
	Jordaan & Associates, Somerset West
	Rossouw & Conradie, Bloemfontein
For respondent:	J F Pretorius
	Sim & Botsi Attorneys, Johannesburg
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