

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NUMBER:** 13152/2005

5 **DATE:** 30 NOVEMBER 2011

In the matter between:

**ZIMCO GROUP (PTY) LIMITED t/a ZINCHEM** Plaintiff

and

10 **GIDEON JOHANNES THERON** 1<sup>st</sup> Defendant

**ANNA LAUBSER** 2<sup>nd</sup> Defendant

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**J U D G M E N T**

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**BINNS-WARD, J:**

In this matter the plaintiff, a company which supplies zinc and aluminium, instituted action against the two defendants based  
20 on the obligations undertaken by the defendants in terms of a suretyship incorporated in an application for credit by the company of which the defendants were at the relevant time directors.

25 At an earlier stage of the proceedings, summary judgment was

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taken against the second defendant and the action has proceeded only against the first defendant. The relief sought in the action is:

5 (a) An order rectifying the written agreement in the following manner:

(i) By the deletion of the words "Zinchem (Pty)  
Limited" in the written agreement and the  
10 substitution thereby (sic) with the words "Zimco  
Group (Pty) Limited t/a as Zinchem".

(ii) By the insertion of the phrase "the applicant", after  
the words "Dip & Spin Galvanisers" in Part A of the  
15 written agreement.

(b) Payment of the amount of R764 422,22.

(c) Interest on the aforesaid amount at the rate of 15,5% a  
20 *tempore morae* until date of payment.

(d) Costs on the scale as between attorney and client.

(e) Further/or alternative relief.

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The prayer for rectification was advanced because the party in whose favour the suretyship was granted in the written agreement was named as Zinchem (Pty) Limited, whereas the claim for payment of the monetary amount in the action is  
5 being advanced by Zimco Group (Pty) Limited t/a as Zinchem. In the agreement of suretyship, which was incorporated as Part B of a composite document containing an application for credit facilities by Dip & Spin Galvanisers, the debtor is referred to simply as "the applicant" and the creditor as "the supplier".

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The defences alleged in the first defendant's plea were threefold. He alleged that the agreement of suretyship, to which he subscribed, was intended by him to be in favour of an entity named Zinchem (Pty) Limited, and not in favour of the  
15 plaintiff. Implicit in this defence was an allegation on his part that the document reflecting Zinchem (Pty) Limited as the party in whose favour, qua supplier, the suretyship had been executed was not mistaken, but reflected his intention, even if it did not reflect the intention of any other party to the  
20 contract. If the defence were good, of course, it would defeat the claim to rectification. And to be good, it has to be factually well premised.

The second defence was an allegation to the effect that the  
25 deed of suretyship incorporated in the composite document to

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which I have referred was non-compliant with the formality requirements of section 6 of the General Law Amendment Act 50 of 1956 due to the fact that it did not contain the details of the principal debtor, but referred only to “the applicant”.

5 Thirdly, the first defendant put the plaintiff to the proof of the amount of the debt secured by the suretyship.

Turning to deal with the first defence. It is a trite principle that a jural document falls to be construed as a whole, and that in  
10 determining its import it is appropriate to have regard to all of its provisions. Having regard to the document, it is clear from its content that the parties, by their execution of it, intended to achieve two objects. The first was the putting in place of a credit facility in favour of Dip & Spin Galvanisers, the credit to  
15 be granted by what is described in the document as “the supplier”. It is plain when one has regard to the document as a whole, therefore, that the applicant, in terms of the document, is the applicant for credit, Dip & Spin Galvanisers, and that the credit facility sought was to secure the supply of  
20 goods by the creditor to Dip & Spin Galvanisers. And that explains the terminology occurring in various places in the document of “supplier” and “applicant”.

Thus turning to the suretyship part of the document which  
25 reads as follows:

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“Part B.

SURETYSHIP.

Name and address of directors/members who will  
bind themselves as surety and co-principal debtor in  
5 respect of the indebtedness of the applicant with  
(sic) the supplier.

Gideon J J Theron.

Anna Laubser.

I/We, the above-named, do hereby, by our  
10 signature, bind myself/ourselves as surety and co-  
principal debtor *in solidum* for the indebtedness of  
the applicant to the supplier. I/We choose the  
address set out in Part B as my/our *domicilium*  
*citandi et executandi* for all purposes and consent  
15 to the jurisdiction of the Magistrate’s Court.”

that Theron and Laubser, the first and second defendants in  
this matter, intended thereby, as sureties, to bind themselves  
in favour of the supplier for any debt owed by the applicant to  
20 the supplier for goods supplied.

The monetary claim in this matter arises out of the supply of  
goods to Dip & Spin Galvanisers, which were invoiced in terms  
of invoices issued by a creditor, describing itself as Zinchem,  
25 registration number 1947/02524507:

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“A division of the Zimco Group (Pty) Limited in the year 2005.”

5 The second defendant, who gave evidence on behalf of the plaintiff in these proceedings, was referred to the invoices in question, which, with some adjustment which was explained in the evidence, make up the amount claimed of R764 422,22, and confirmed receipt of the invoices by Dip & Spin  
10 Galvanisers and the provision of the goods referred to in those invoices to Dip & Spin Galvanisers.

The question then is who was the supplier of those goods. The evidence showed very clearly that the supplier at all  
15 relevant times from the execution of the composite document in issue in this case, was not Zinchem (Pty) Limited. It is clear on the evidence that Zinchem (Pty) Limited ceased to trade as a company in 1991. The evidence was that at some time during the 1990's, the businesses of the group of companies  
20 was, to use the word employed in the evidence, “divisionalised”, and the businesses concerned transferred under the umbrella of a company known as Zimco Group (Pty) Limited. The business of Zinchem (Pty) Limited was one of the businesses thus transferred and “divisionalised” within the  
25 operations of the plaintiff company.

Thus while it was clear that after Zinchem (Pty) Limited ceased to trade as an operating company, a business conducted under the name of Zinchem continued in operation as a so called  
5 division of Zimco Group (Pty) Limited.

It was clearly *that* business, conducted by the plaintiff company, which at all times material to this action, was the supplier of the goods in question to Dip & Spin Galvanisers. It  
10 is thereby, in my view, clearly established that the plaintiff company, through its division Zinchem, was the supplier of goods to Dip & Spin Galvanisers and was thus the creditor to which the composite document in which the deed of suretyship is incorporated, was directed.

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Certainly from the perspective of the plaintiff, it is clear that the description of the supplier in the composite document as Zinchem (Pty) Limited, was an error. It is necessary, however, to consider the first defendant's evidence which was to the  
20 effect that it was his particular intention to execute or undertake a suretyship obligation in favour of an entity known as Zinchem (Pty) Limited and no other. There was no logical or commercial basis for the first defendant's contention in this regard. He was constrained to concede under cross-  
25 examination that the object of the exercise of the execution of

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this document was the obtaining of credit for Dip & Spin Galvanisers from its supplier of zinc and aluminium. He was also constrained to concede that the object of the execution of the deed of suretyship was to facilitate the provision of the credit facilities sought by Dip & Spin Galvanisers in that regard. The first defendant was unable to give any cogent explanation as to why the name of the supplier should have been material in the context.

10 Insofar as it is apparent, therefore, that the first defendant's intention was to give a suretyship undertaking in favour of the "supplier", and insofar as it is clear that that supplier was the plaintiff, a common error on the part of the parties to the contract is demonstrated. The first of the afore-mentioned  
15 defences of the first defendant, cannot be sustained.

It remains necessary to consider, however, whether the deed of suretyship is amenable to rectification, which leads me on to the second defence, based on non-compliance with the provisions of section 6 of the General Law Amendment Act. It is well established that the formalities provide no obstacle to the remedy of rectification to cure common error in such written contracts. In order for such contracts to be amenable to rectification, however, they must, on their face, comply with  
20 the requirements of the Act. And the requirements of the Act,  
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it is well established in authority, include a requirement that all the material terms of the contract must be apparent on the face of the deed of contract. It is equally trite on established authority that the material terms of a deed of suretyship  
5 include the identity of the creditor, the debtor and the surety.

I have already indicated that within the context of the document in which the suretyship is incorporated, the identity of the applicant, the supplier and the sureties is evident. It,  
10 therefore, follows that this is an agreement which is amenable to rectification and the only rectification that, in my view, is required is the correction of the name of the supplier from that Zinchem (Pty) Limited to that of the plaintiff company. I accordingly find no merit in the second of the afore-mentioned  
15 defences advanced by the first defendant.

With regard to the third defence, which went to the establishment of the nature and amount of the principal debt, the first defendant had no basis on which to challenge the  
20 evidence which was led in that regard, which did indeed prove the existence of the principal debt in the amount claimed; and that it remained unpaid.

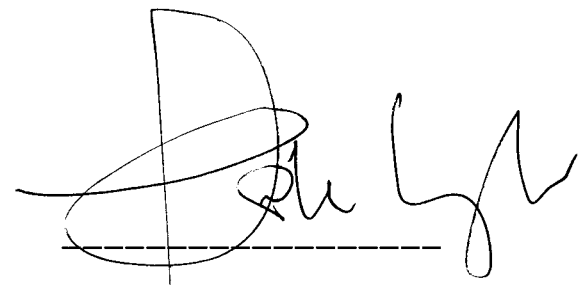
The plaintiff is, therefore, entitled, in my view, to judgment in  
25 its favour in terms of paragraph (a)(i), (b), (c) and (d) of the

particulars of claim as amended, save that in respect of prayer (d), costs will be awarded on the scale as between party and party.

- 5 The trial of the action had been postponed on two previous occasions and the question of liability for the wasted costs occasioned in those postponements was reserved for later determination. The parties were unable to place material in respect of the circumstances of those two postponements  
10 before me and, therefore, I am not qualified to judicially make any determination in respect of those costs.

Judgment is, therefore, awarded in favour of the plaintiff against the first defendant in the terms set out above.

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A handwritten signature in black ink, appearing to read 'Binns-Ward', is written over a horizontal dashed line. Below the line, the name 'BINNS-WARD, J' is printed in a bold, sans-serif font. A vertical line extends downwards from the center of the signature.

BINNS-WARD, J