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

Reportable

CASE NO: A 31/2014

In the matter between:

PIETER JACOBUS DE BEER	**Appellant**
And	
STANDARD BANK OF SOUTH AFRICA	**First Respondent**
INTERIOR URBAN DEVELOPMENTS (PTY) LTD	**Second Respondent**
RUEBEN PIETER DE BEER	**Third Respondent**

JUDGMENT: 08 August 2014

DAVIS J

Introduction

[1] This is an appeal against summary judgment which was granted by the court *a quo* in favour of first respondent on 6 May 2013. With leave of the Supreme Court of Appeal, this matter has now come on appeal to this Court.

[2] Briefly the dispute can be summarised thus: First respondent issued summons against second, third respondent and appellant on 8 March 2013. First respondent's claim against appellant was that it was liable as a surety for the debts of second respondent arising out of mortgage entered into between first and second respondent. In its particulars of claim first respondent relied upon a suretyship document.

[3] First respondent obtained judgment against all three defendants in the court *a quo*, jointly and severally for the sum claimed of R 5 034 103, notwithstanding that it had only claimed **R** 300 000 in the case of appellant. Appellant had filed an affidavit opposing summary judgment. The critical passage of this affidavit reads as follows:

> 'The plaintiff claims that I am liable to it on the basis of the suretyship document ... I deny that I am bound by the said suretyship.
>
> It will be seen from the perusal of the suretyship document that it does not contain any detail of the identity of the debtor for whom I allegedly stood surety, and further, that the place in the document where the details of the debtor are to be inserted, has been left blank.'

[4] In his judgment granting the order for summary judgment as prayed for by first respondent, Samela J said 'I am of the view that the second document of suretyship can amplify the first one'. It appears thus that Samela J had recourse to a document which was part of the record and which was described therein as a 'surety consent'.

[5] It is common cause that the suretyship agreement upon which the first respondent relied did not include a description of the identity of the debtor; that is the entity indebted to first respondent. Indeed, the only details which were included in a standard form of suretyship agreement were the identity of appellant as the surety and that the total amount of the debt which first respondent could recover under this suretyship agreement was limited to an amount of R 350 000.

[6] The surety consent to which I have made reference is a document which was signed on 11 October 2007; that is almost seven months earlier than the

suretyship agreement, to which I have made reference and which was signed on 17 April 2008. In the suretyship consent which was signed by the appellant in favour of first respondent and on behalf of second respondent the following appears:

> '1. The Surety hereby consents to an advance / a further advance of R 4 350 000,00 (**FOUR MILLION THREE HUNDRED AND FIFTY THOUSAND RAND**) being granted by the Bank to the Borrower upon the security of a mortgage bond over ERF 2491 CAMPS BAY.
>
> 2. The maximum amount for which the Surety will be liable under the suretyship in respect of the said advance/further advance is the sum of R4 350 000,00.
>
> 3. This consent is given in addition to and not in substitution for any previous consent(s) given in respect of the Borrower's indebtedness to the Bank and the Surety shall remain bound under the suretyship in respect of any previous advance made by the Bank to the Borrower and consented to by the Surety.'

[7] It therefore appears that the court *a quo* found that this agreement supplemented the suretyship agreement and accordingly the two agreements, read together, represented a complete answer to the defence which had been raised by the appellant in his opposing affidavit, namely that the identity of the debtor had been omitted from the written agreement in breach of the provisions of s 6 of the General Law Amendment Act 50 of 1956 ('the Act').

Appellant's case

[8] Mr Walther, who appeared on behalf of the appellant, submitted that the suretyship consent document was not itself a suretyship agreement. At best, it

was a consent for the first respondent to loan more money to appellant. He submitted that suretyship consents are typically procured by banks to protect themselves against surety's, which might later contend that the bank had prejudiced them by loaning more money to the debtor for whom they stood surety. The document could not be considered to be a suretyship and therefore could not be employed to cure the breach of s 6 of the Act.

[9] While the suretyship consent document related to a suretyship, in that it referred to the suretyship to which the appellant purportedly remained bound, Mr Walther submitted that the suretyship referred to in the suretyship consent document could not be the same suretyship relied upon by first respondent in the court *a quo* to substantiate its claim for summary judgment. He reasoned that the suretyship consent document was signed in October 2007, at a time when the suretyship document itself did not exist. That document was signed some seven months later. There was no basis by which the suretyship consent document could be read to fill the *lacunae* in the suretyship document which had been signed some seven months later.

The applicable law

[10] Section 6 of the General Law Amendment Act 50 of 1956 provides:

> 'No contract of suretyship entered into after the commencement of this Act [22 June 1956] shall be valid, under the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.'

[11] The purpose of this section was described by Miller J in **Fourlamel (Pty) Ltd v Maddison** 1977 (1) SA 333 (A) at 342 – 3 as follows:

> 'However many objects the Legislature may have had in mind in enacting sec 6 of Act 50 of 1956, one of them was surely to achieve certainty as to the true terms agreed on and thus avoid or minimise the possibility of perjury or fraud and unnecessary litigation... The Legislature may also have been influenced by other considerations, for example, the suretyship being an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after their undertakings had been recorded in a written document and signed by them or on their behalf.'

[12] The question which is luminously raised in this case and which has been the subject of considerable consideration by the courts in previous cases turns on whether a party relying on a suretyship agreement is strictly bound by the provisions of s 6 of Act 50 of 1956 or whether recourse may be had to extrinsic evidence to prove compliance with the provisions of the Act.

[13] In **Sapirstein v Anglo African Shipping Company (SA) Ltd** 1978 (4) SA 1 (A) at 12 B, Trengove AJA (as he then was) sought to provide an answer:

> '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 (i.e. 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."'

[14] The question then arose as to what the learned judge of appeal meant by 'supplemented if necessary by extrinsic evidence of identification other than evidence by the parties as to their negotiations and consensus'.

[15] In **Sapirstein**, extrinsic evidence was sought to be admitted to establish the identity of both the principal debtor and sureties where the plaintiff sued on a multiple guarantee in which a number of promisors had bound themselves as sureties and co-principal debtors *in solidum* with each other for all sums of money 'which each may have in the past owed or may presently or in the future owe to each of you'. In this case, the problem raised was that the liability of the promisors as sureties under the agreement could not arise until the principal obligation had come into existence.

[16] Evidence that the principal debtor had become indebted to plaintiff was held to be admissible. Furthermore, the court dismissed an argument that the contract of suretyship should be declared invalid because of the number of potential debtors, potential creditors and potential sureties, a position may arise where it would be difficult or somewhat complicated to establish the respective obligations of the various parties. Trengove AJA held that this could not serve as a ground for

questioning the validity of the contract for such difficulty or complication would only arise in the application of the terms of the contract and not in interpretation thereof.

[17] In a more recent decision, Scott JA in **Industrial Development Corporation of SA (Pty) Ltd v Silver** 2003 (1) SA 365 (SCA) dealt again with the question of what evidence could be invoked to meet noncompliance with s 6 of the Act. In this case, the question arose as to the identity of the principal debtor and hence these facts are closer to those confronting this Court. The appellant relied on a reference in the deed of suretyship to a loan agreement which, in turn, disclosed the identity of the principal debtor. It was contended that the loan agreement was incorporated by reference into the deed of suretyship and, accordingly, there had been compliance with s 6, notwithstanding the blank space where the name of the principal debtor ought to have been inserted.

[18] Scott JA referred to the *dictum* in **Fourlamel**, *supra* at 345 G – H and then said:

> 'What emerges from this passage is that it was not apparent *ex facie* the deed of suretyship that the deed of lease sought to be incorporated was the document giving rise to the indebtedness secured by the suretyship. This meant that not only would it have been necessary to adduce evidence identifying the deed of lease as the one referred to in the deed of suretyship but, in addition, evidence would have been necessary to establish that the debt created by that deed of lease was the debt being secured in terms of the deed of suretyship. The additional evidence would have been evidence of the verbal agreement of the parties and was therefore inadmissible.'

[19] In applying this *dictum* to the facts of the dispute the court found that the deed of suretyship made it clear that the debt secured was the loan as indicated in terms of the loan agreement sought to be incorporated. Accordingly, extrinsic evidence identifying the loan agreement as the one referred to was all that was required and was therefore admissible.

Application of the law to the present dispute

[20] Mr Howie, who appeared on behalf of the first respondent, contended that the suretyship consent should be admitted as evidence in order to clarify the identity of the debtor. He further submitted that the opposing affidavit had only raised the issue of the identity of the debtor and none of the other factors mentioned in **Sapirstein**, *supra* at 12, namely the nature and amount of the principal debt and the identity of the principal debtor. Thus the only issue that had been raised by appellant in his opposing affidavit was the identity of the principal debtor and that was the only *lacunae* that stood to be cured by respondent. In this regard a clear link could be ascertained between documents included in the record, being the loan agreement, the suretyship agreement and the suretyship consent.

[21] As I understand first respondent's argument, it ran thus: the principal agreement of 11 October 2007 between the first and second respondent contained the following: 'Consent from sureties, Mr Rueben Pieter De Beer, Mr Pieter Jacobus De Beer is required'. From this provision in the loan agreement Mr Howie turned to the suretyship consent signed on the same day as a principal loan agreement, 11 October 2007, in which the surety had consented to an advance /a further advance of R 4, 350 000,00 being granted by first respondent to the borrower, being second

respondent. Mr Howie submitted that it was clear that thus suretyship consent was linked to the principal agreement and that the suretyship agreement had then been concluded in order to safeguard the first respondent's interests, pursuant to the principal loan, or put differently, constituted the implementation of that to which the appellant had consented in terms of the suretyship consent.

[22] By contrast, Mr Walther submitted that the reference to sureties in the principal agreement could be interpreted to mean that appellant and Mr Rueben De Beer were already sureties or that first respondent had mistakenly taken them to be sureties, in that if there was only one suretyship agreement upon which first respondent relied, it had only been entered into some seven months later.

[23] In **Van Wyk v Rottchers Saw Mills (Pty) Ltd** 1948 (1) SA 983 (A) at 989 Watermeyer CJ said, in relation to the implications of a statutory provision which required a contract to be in writing such as s 6 of the Act:

> 'There must, of course, be set out in the written contract the essential elements of the contract. One of such essential elements is a description of the property sold and, provided it is described in such a way that it can be identified by applying the ordinary rules for the construction of contracts and admitting such evidence to interpret the contract as is admissible under the parol evidence rule (see **Rand Rietfontein Estates Ltd v Cohn** (1937, A.D. 317)) the provisions of the law are satisfied. This statement must be taken subject to one caution or qualification which I wish to emphasise.
>
> In a simple written contract which need not by law be in writing it is possible to describe a piece of land by reference, e.g. the land agreed upon between the parties, and in that case testimony as to the making of the oral agreement may be

admissible to identify the land, but when a contract of sale of land is by law invalid unless it is in writing, then it is not permissible to describe the land sold as land agreed upon between the parties. Consequently testimony to prove an oral *consensus* between the parties which is not embodied in the writing is not admissible for any purpose, not even to identify the land sold. It follows that a written contract for the sale of land which contains a provision that the boundaries of the land sold shall be those agreed upon between the parties is invalid by reason of the provisions of sec. 30 of the Proclamation.'

[24] In the present case the suretyship agreement is exquisitely vague. *Ex facie* this document, little of key importance can be ascertained which would sustain first respondent's cause of action. There is nothing in the manner in which the debt or debtor are described, to the extent that they are set out in the suretyship agreement, which can assist the first respondent nor can any evidence that has been previously admitted by courts in the cases which I have analysed assist the first respondent.

[25] Without further evidential support, which, in this case, is sourced outside of any reference in the suretyship agreement or with sufficient clarity in the principal agreement it is difficult to know precisely what was meant in the principal agreement and what suretyship agreements had already been concluded by appellant together with Mr Rueben De Beer at the time of the conclusion of the principal loan agreement.

[26] The suretyship consent does not assist first respondent in that, although it was signed on the same day as the principal loan agreement, it is not itself a suretyship agreement. On the basis of this document it cannot be concluded

without more, that appellant was a surety as alleged by respondent in its particulars of claim.

[27] The jurisprudence, as I have outlined it, would suggest that a Court commence with an analysis of the principal agreement upon which a creditor relies for its cause of action; in this case the suretyship agreement. From this, little is ascertainable which would be sufficient to permit compliance with s 6 of the Act. But, even if a court was more generous than has been the case in the previous jurisprudence as I have outlined it, it is not possible, without further evidentiary clarification, to link the principal agreement to the suretyship consent and then to the suretyship agreement, as Mr Howie sought to do in support of first respondent's case.

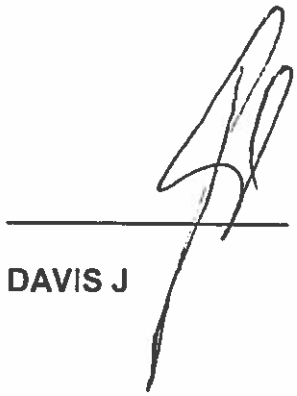
[28] To the extent that Mr Howie relied on the opposing affidavit and the defence which was set out therein which only dealt with the identity of the debtor, Rule 32 (3) does not require a defendant in a summary judgment application to set out all the details of all the evidence which he or she proposes to rely upon at the trial but rather provides that there must be a disclosure of the defendant's defence and the material facts upon which is based with sufficient particularity and completeness to enable a court to decide whether the affidavit disclosed a *bona fide* defence.

[29] In my view, the essential paragraphs of the opposing affidavit, which I have cited in this judgment, indicate that the defence raised by the appellant was predicated on s 6 of the Act and noncompliance therewith. That appellant did not raise all of the difficulties relating to noncompliance with s 6 of the Act, cannot come

to the assistance of the first respondent and thus justify a finding that summary judgment was justified in these circumstances.

[30] In the result the appeal succeeds with costs. The order of the court a quo is set aside and replaced with the following:

> "Summary judgment is refused. Second defendant is granted leave to defend the action."



DAVIS J

LE GRANGE and FORTUIN JJ agreed