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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2018/3067

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED NO
31 March 2022

In the matter between:

RADIANT GROUP (PTY) LTD

Plaintiff

(Registration Number: 2002/022677/07)

And

XELMAR (PTY) LTD

1st Defendant

(Registration number: 2017/22754/07)

ZALMON MARON

2nd Defendant

(Identity Number: [...])

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 31st of March 2022.

DIPPENAAR J:

[1] The plaintiff instituted action against the first and second defendants, as principal debtor and surety respectively for payment of an amount of R594 623,77, being the balance due, owing and payable by the first defendant in respect of goods sold and delivered by the plaintiff at the first defendant's special instance and request during the period 22 June 2016 to 29 June 2018, together with interest and costs. Reliance was placed on a written trade facility agreement ("the trade agreement") which included the suretyship provisions.

[2] At the commencement of the trial, the first defendant withdrew its opposition to the plaintiff's claim and withdrew its counterclaim in terms of which it claimed payment of R960 000 for expenses and damages. At the end of the trial, judgment was granted against the first defendant.

[3] The crisp issues to be determined are whether the second defendant bound himself as surety for the due performance of the first defendant's obligations or whether the second defendant is estopped from relying on the name change of the first defendant to avoid the obligations of the suretyship. The central dispute crystallised into whether the plaintiff discharged its onus to prove that the second defendant signed a written deed of suretyship for the indebtedness of the first defendant in favour of the plaintiff.

[4] Three witnesses testified at the trial: Mr Farhad Ally, the erstwhile managing director of the plaintiff at the time, Mr Mark Wilken, the plaintiff's head of national sales at the time and Mr Zalmon Maron, the second defendant. Although I agree with the plaintiff that Mr Maron's evidence was unsatisfactory in numerous respects, it is not

necessary to make any credibility findings as the matter can be determined on the undisputed facts. During the hearing, the relevant facts by and large became common cause.

[5] The plaintiff's evidence established that in order for a credit facility to be provided by it, a trade facility agreement had to be concluded between the plaintiff and a prospective customer which would be evaluated by Credit Guarantee Insurance Corporation ("CGIC"), which would provide the plaintiff with cover for the credit facility. Credit was not usually granted to customers without a signed deed of surety as it was a requirement of CGIC.

[6] It was common cause that the trade agreement was concluded on 22 June 2016 between the plaintiff and *Zalmon Maron t/a Xelmar FXN* ("*Xelmar FXN*"), reflected as trade name. A box "sole trader" is ticked. The deed of suretyship incorporated into the trade agreement was signed by the second defendant for and on behalf of Xelmar FXN. A trade limit of R400 000 was requested, reflecting registration number 4008145025085. In a block, designated "Director(s)/Member(s) details", the names of both the second defendant and a Mr Jeffrey Robert Allan ("Mr Allan") together with their contact numbers are reflected. An addendum, styled, "limit increase application form" dated 15 November 2016 requested an increase of the credit limit of Z Maron T/A Xelmar FXN to R1.8 million. The document was signed by Mr Allan and witnessed by the second defendant.

[7] The second defendant did not dispute the account statement relied on by the plaintiff, which pertained to the period 1 February 2017 to 31 August 2018, was addressed to the first defendant, Xelmar (Pty) Ltd, and commenced with an opening balance of R770 430.40. The statement reflects invoices, payments and credit notes for the period 8 February 2017 to 25 June 2018. It was undisputed that the invoices relied on by the plaintiff were all addressed to the first defendant. All the invoices produced at the trial, made out to either the first defendant or Xelmar FXN, bore the same account number.

[8] It was common cause that on 1 October 2017 and 2 February 2018, respectively, the second defendant confirmed “change of details for Xelmar FXN” with the plaintiff. The plaintiff was provided with certain documents evidencing that Xelmar (Pty) Ltd was registered during May 2017, including a bank account confirmation letter, a notice of registration for VAT, a CIPC registration certificate for Xelmar (Pty) Ltd and copies of the identity documents of the second defendant and his partner, Mr Allan.

[9] Although the documents evidenced different export numbers, bank account numbers and tax and VAT numbers, the email address, contact details and physical business addresses for the two entities were the same. Their letterhead reflected logos for both entities and the link to the website of one took one to the website of the other.

[10] No written notification was received by the plaintiff of any change in ownership of Xelmar’s business. If there was a change in ownership, in all amounts owing by FXN would immediately become due and payable in terms of the trade agreement. From the objective documentary evidence it was established that the first defendant continued trading with the plaintiff under the FXN trade agreement, using the same account reference and on the same trading terms.

[11] Mr Ally testified that he understood Xelmar FXN and Xelmar (Pty) Ltd to be the same entity. Mr Wilken confirmed that he did not differentiate between the entities and dealt with the second defendant and his partner Mr Allan personally. He understood the entities to be the same. The letterhead is confusing in that both Xelmar (Pty) Ltd and the logo of Xelmar FXN appears on the letterhead. Mr Ally understood this to mean that the entities were the same.

[12] According to Mr Ally, the name change and change of banking details had no consequences on the written credit agreement and it continued to apply to the first defendant. The first defendant acted on the terms of the credit agreement signed in the name of Xelmar FXN and the credit limit increase application signed by Mr Allan. Financial statements of FXN were used in motivation for certain proposals of the first

defendant as background. The first defendant met with CGIC and requested amendments and extensions of the credit agreement signed by Xelmar FXN.

[13] Against this background, the apposite starting point is whether the plaintiff established a valid suretyship. Our courts have held that the plaintiff must at the outset prove the existence of a valid contract of suretyship and must then prove that the source of the indebtedness of the agreement is one in respect of which the surety undertook to be liable. Finally it must prove that the indebtedness is due and payable.¹ If a surety raises a defence such as illegality, he would be required to present evidence in support thereof.

[14] To prove a valid deed of suretyship, the plaintiff must prove compliance with the requirements of s 6 of the General Law Amendment Act² ("the Act"), by reference to the document, supplemented if necessary by admissible extrinsic evidence.³ S 6 of the Act provides:

"Formalities in respect of contracts of suretyship

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: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments".

[15] It is trite that identification of the principal debt and the parties is not only a term of the contract but is essential to the creation of the surety's liability as suretyship is an accessory obligation⁴. If a deed of suretyship does not contain three distinct parties⁵

¹ Di Giulio v First National Bank of South Africa Ltd 2002 (6) SA 281 (C) at para [26]-[28]

² 50 of 1956

³ Sapirstein v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A); Du Toit v Barclays Nasionale Bank Bpk 1985(1) SA 563 (A); Stewarts & Lloyds of Sa Ltd v Croydon Engineering & Mining Supplies (Pty) Ltd 1981 (1) SA 305 (W) at 309E-H; General Accident Insurance Co SA Ltd v Dancor Holdings (Pty) Ltd 1981 (4) SA 968 (A)

⁴ Fourlamel (Pty) Ltd v Maddison ("Fourlamel") 1977 (1) SA 333 (A) 334B-C, 345A-B 34B-C

⁵ Nuform Formwork & Scaffolding (Pty) Ltd v Natscaff CC and Others 2003 (2) SA 56 (D)

and the names of the creditor, principal debtor and all sureties it is not a valid deed of suretyship.⁶

[16] Our courts⁷ have further held, in the context of s 6 of the Act, that the plain grammatical meaning of the words used in s 6 of the Act are clear. As explained in *Fourlamel*:

“The section presupposes that an agreement of suretyship has been reached-“contract of suretyship entered into”- and it provides thereafter that such agreement shall not be valid “unless the terms thereof are embodied in a written document signed by or behalf of the surety”. What is that requires to be signed by the surety? It is surely the written document containing the terms of the agreement.

[17] However of the many objects the Legislature may have in mind in enacting s6 of the Act, one of them was surely to achieve certainty as to the true terms agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary litigation.

[18] It was common cause that no written trade facility agreement was concluded between the plaintiff and the first defendant and that no written deed of suretyship was signed by the second defendant for the indebtedness of the first defendant in favour of the plaintiff. The only credit agreement and suretyship was the one signed by Mr Maron on behalf of Z Maron t/a Xelmar FXN. It was further common cause that no subsequent trade facility agreement was entered into between the plaintiff and the first defendant and that no written suretyship was signed by the second defendant for the indebtedness of the first defendant in favour of the plaintiff.

[19] Moreover, Z Maron t/a Xelmar FXN is a sole trader and is not a separate legal entity from the second defendant. It is well established that it is essential to the existence of a suretyship that there be a principal obligation in terms whereof someone

⁶ *Fourlamel (Pty) Ltd v Maddison* (“Fourlamel”)1977 (1) SA 333 (A) 334B-C, 345A-B

⁷ *Oceanair (Natal) (Pty) Ltd v Sher* [1980] 1 All SA 206D at 210-211 and 213, referring to *Fourlamel* at 341H-342A

other than the surety is the debtor, and that a person cannot stand as surety for his own debt⁸. It is further trite that a surety and principal debtor cannot be the same person⁹ and that a suretyship does not comply with the statute if there are not three distinct parties, being the surety, the principal debtor and the creditor.

[20] From the undisputed facts and applying the principles referred to above, I conclude that the plaintiff did not establish a valid deed of suretyship as envisaged by s6 of the Act, binding the second defendant for the obligations of the first defendant.

[21] It must be considered whether plaintiff's reliance on estoppel can salvage its position. It is trite that the plaintiff bore the onus to prove the estoppel¹⁰ pleaded.¹¹

[22] I accept that the plaintiff has established the representations relied on and that the plaintiff acted to its detriment¹². It is apposite to refer to the relevant principles. In *Scottish Rhodesian Finance Ltd v Olivier*¹³ the proper test to be applied was enunciated thus:

⁸ Nedbank Ltd v Van Zyl 1990 (2) SA 469 (A) at 474E-I

⁹ Nuform Formwork & Scaffolding (Pty) Ltd v Natscaff CC and Others 2003 (2) SA 56 (D) at 61A-B; 62D-E;

¹⁰ Blackie Swart Argitekto v van Heerden 1986 (1) SA 249 (A)

¹¹ In response to the plea, the plaintiff delivered a replication in terms of which it raised an estoppel in the following terms:

"2.1 The first defendant underwent a change from a sole proprietor to a (Pty) Ltd :-

2.1.1 On 02 February 2018 the second defendant notified the plaintiff of the change from a sole proprietor to a (Pty) Ltd;

2.1.2 The second defendant represented to the plaintiff by words alternatively conduct that the entity remained the same and that the incorporation was as a going concern with no change to debtors and creditors;

2.1.3 The plaintiff relied on this representation to its detriment;

2.1.4 In the circumstances, the defendants are estopped from relying on the name change to avoid the obligations of the suretyship".

¹² Aris Enterprises (Finance)(Pty) Ltd v Protea Assurance Co Ltd 1981 (3) SA 274 (A); SA Broadcasting Corp v Coop 2006 92) 217 (SCA)

¹³ 1965 (2) SA 716 (SRA) 720I-721A, applying the test as expressed in *Maritime Electric Co v General Diaries Ltd* 1937 A.C. 610 at 620.

“The Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision¹⁴

[23] In *Trust Bank van Afrika Bpk v Eksteen*¹⁵(“Eksteen”), in the context of an exception it was held:

“Dit is ‘n erkende beginsel van ons reg dat wat by direkte optrede in stryd met ‘n wetlike voorskrif van nul en gener waarde sou wees, nie deur indirekte optrede geldig gemaak kan word nit. So ‘n voorskrif wat teen ‘n bepaalde transaksie gerig is, tref ook enige optrede wat die voorskrif sou verydel. Geldigheidsvereistes kan daarom bv. nie deur gesimuleerde voldoening, nabootsing van ‘n andersoortige kontrak, enige waarborg van nakoming, by wyse van aparte onderneming of andersins, of enige ander optrede wat hulle sou verydel, omseil word om aan ‘n nietige transaksie geldigheid of wesentlike afdwingbaarheid te verleen nie. By die toepassing van hierdie beginsel is dit egter nodig om nie die doel en strekking van die voorskrif waarom dit gaan, uit die oog te verloor nie...Indien die een party hom teenoor die ander, waar bedoelde vereistes nie nagekom is nie, op estoppel sou beroep, ...sou bogenoemde beginsel pertinent die vraag laat ontstaan of erkenning van estoppel toelaatbaar is, want daardeur (so sou aangevoer kan word) sou die kontrak dan tussen die partye afgedwing word asof hy geldig is”¹⁶

[24] In *Eksteen*, it was further explained:

“The doctrine of estoppel is an equitable one, developed in the public interest, and whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The court will have regard to the mischief of the statute concerned on the one hand and the conduct of the parties and their relationship on the other hand.”¹⁷.

¹⁴ 720I-721A

¹⁵ 1964 (3) SA 402 (A) at 415-416

¹⁶ At 411G-412A

¹⁷ 415I-416A

[25] In the context of estoppel, the Supreme Court of Appeal in *City of Tswane Metropolitan Municipality v RPM Bricks (Pty) Ltd*¹⁸ held:

*“There are formidable obstacles to the plaintiff’s reliance upon the doctrinal device of estoppel. Assuming in the plaintiff’s favour that all the requirements for its successful invocation have been established, this is not a case in which it can be allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel (Trust Bank van Afrika Bph v Eksteen 1964 (3) SA 402 (A) at 411H-412A), for to do so would be to compel the defendant to do something that the statute does not allow it to do. In effect therefore it would be compelled to commit an illegality (Hoisain v Town Clerk, Wynberg 1916 AD 236)”*¹⁹

[26] Application of these principles are in my view fatal to the plaintiff’s case. I have already dealt with the nature of the obligations imposed under s6 of the Act and the mischief the legislature sought to address. Even taking onto consideration the conduct of the second defendant it cannot be said to be in the public interests to jettison the requirements of s6 of the Act and allow the suretyship to be enforced. In my view, the public interest demands the converse. I conclude that the plaintiff cannot rely on the estoppel raised to overcome the deficiencies in the suretyship.

[27] As succinctly put by the Supreme Court of Appeal in *Philmat (Pty) Ltd v Mosselbank Developments CC* ²⁰:

“Where a statute requires certain formalities to render a transaction valid, failure to comply with such formalities cannot be remedied by estoppel”.

¹⁸ [2007] JOL 19532 (SCA) para [16]

¹⁹ HNR Properties Cc & Another v Standard Bank of South Africa Ltd [2003] JOL 12162 (SCA) PARA [21]; Croxon’s Garage (Pty) Ltd v Olivier 1971 (4) SA 85 (T); Strydom v Die Land & Landbou Bank van Suid Afrika 1971 (1) PH K10 (NKA)

²⁰ Philmat (Pty) Ltd v Mosselbank Developments CC [1996] 1 All SA 296 (A).

[28] Moreover, the estoppel relied on by the plaintiff is pleaded in specific terms, namely that defendants “are estopped from relying on the name change²¹ to avoid the obligations of the suretyship”. The change from Z MAron t/a Xelmar to Xelmar (Pty) Ltd is more than a name change. It is an entirely different legal entity. I am not persuaded that the estoppel as pleaded in any event assists the plaintiff’s case. I am further not persuaded that the plaintiff established that it was induced by the conduct of the second respondent to act to its detriment, given the documentation provided to the plaintiff pertaining to the first defendant. In light of the conclusion reached, it is not necessary to deal with the evidence in detail.

[29] I conclude that the plaintiff has failed to discharge its onus that the second defendant signed a written deed of suretyship for the indebtedness of the first defendant in favour of the plaintiff or that he can be held liable for the debts of the first defendant. It follows that the plaintiff’s claim must fail. This is in my view dispositive of the action and the plaintiff’s claim is doomed to failure.

[30] The plaintiff however raised various other arguments, albeit that they were not expressly raised on the pleadings and take the matter no further. For the sake of completeness, I shall deal with these arguments, raised by the plaintiff in its heads and supplementary heads of argument.

[31] The plaintiff argued that the first defendant’s withdrawal amounted to a concession of its claim as pleaded and thus that it was conceded that the plaintiff supplied goods to the first defendant in terms of a credit agreement concluded between it and the first defendant and it was not possible for the second defendant to evade liability under the suretyship on the basis that the agreement applied only to Xelmar FXN. It was argued that the only defence against the suretyship was that the first defendant did not exist as a juristic entity when the agreement was concluded in June 2016 and that he signed surety only on behalf of Xelmar FXN. As Mr Maron admitted that the first defendant did exist as an entity when the agreement was concluded the

²¹ To Xelmar (Pty) Ltd

suretyship could only have been signed in respect of that entity that was party to the agreement.

[32] The plaintiff's arguments do not pass muster for various reasons. First, from the notice delivered it is clear that the first defendant withdrew its opposition to the plaintiff's claim and withdrew its counterclaim. It also consented to the plaintiff's costs to be taxed. Under r41 the first defendant was entitled to do so. It is not ordinarily the function of a court to force a party to persist with its claim or to investigate the reasons for abandoning it²².

[33] Second, the first and second defendants are different parties and any concessions made by the first defendant cannot be attributed to the second defendant. The second defendant did not concede the plaintiff's claim, even if both defendants may have been represented by the same counsel.

[34] Third, on a proper interpretation of the pleadings²³, the second defendant did dispute the existence of a valid deed of suretyship, signed by him in favour of the

²² Levy v Levy 1991 (3) SA614 (A) at 619 D-E and 620B-C

²³ In relation to the trade agreement and the suretyship, plaintiff pleaded:

"5 On or about 22 June 2016 and at Sandton, the first defendant duly represented by Zalmon Maron in his capacity as Director, entered into a written agreement with the plaintiff, duly represented, in terms of which the plaintiff sold and delivered goods to the first defendant at the latter's special instance and request. 6 A copy of the written agreement...is attached hereto marked A1-A7 (the terms and conditions of which should be read as if specifically incorporated herein".

....

16 On or about 22 June 2016, and at Sandton, the second defendant bound himself, in his private and individual capacity as surety, guarantor and co-principal debtor in solidum with the first defendant in favour of the plaintiff for the due performance of the obligations of the first defendant and for the payment to the plaintiff of any amounts are due in terms of the agreement.

17 The suretyship is incorporated into the agreement attached hereto marked as Annexure A7 (clause 1-clause 3) (the terms and conditions of which should be read as if specifically incorporated herein).

17.1 The second defendant thereby bound himself in his private and individual capacity and surety for and co-principal debtor in solidum with the first defendant in favour of the plaintiff for the due performance of any obligation, of whatsoever nature of the first defendant to the plaintiff and for the payment to the plaintiff by the first defendant of any amounts which may have at any time have become owing to the plaintiff by the first defendant from whatsoever cause arising and including, but without the generality of the foregoing, any claims for damages and action against the first defendant acquired by way of cession...

18 In the premises, and owing to the first defendant's breach, the second defendant in his capacity as surety, is jointly and severally indebted to the plaintiff"

plaintiff for the indebtedness of the first defendant.²⁴ Although in general terms, the suretyship was denied together with the averments pertaining thereto, thus placing them in dispute. Read in context the defence raised was that the second defendant did not conclude a deed of suretyship for obligations of the first defendant and that the first defendant was not a party to the credit agreement.

[35] In supplementary heads of argument submitted after the hearing was concluded, the plaintiff argued that the defendants' plea did not place the validity of the suretyship in issue and the defendant ambushed it in argument. A simple reading of the credit application in its terms would alert the reasonable reader that the document was signed by Mr Maron personally with Zelmon Marron trading as Xelmar FXN reflected as principal debtor. I cannot agree that the plaintiff would be deprived of a fair trial if the validity of the deed of suretyship is considered.

[36] The argument that Mr Maron admitted the validity of the suretyship in failing to directly plead it and/or is precluded from placing in issue the validity of the suretyship, lacks merit. The plaintiff argued that the second defendant was precluded from raising the validity of the deed of suretyship (in the context of it being invalid on the principle that one cannot stand surety for yourself) as it was not pleaded, not was an issue plaintiff anticipated it needed to lead evidence on and the plaintiff was prejudiced. I cannot agree.

²⁴ In their plea, the defendants pleaded in relation to the trade agreement and the suretyship:

"3.1 The defendants deny the allegations²⁴;

3.2 Without derogating from the generality of the aforesaid denial, defendants plead as set out below.

3.2.1 The first defendant did not exist as a juristic entity on 22 June 2016.

3.2.2 The first defendant was only registered at the Companies and Intellectual Property Commission on 29 May 2017, being the coinciding recorded date of commencement of business.

3.2.3. The first defendant is not recorded as the principal debtor or a contracting party in the alleged agreement.

3.2.4 The alleged agreement was not concluded for a company or juristic person to be formed".

...

5.1 Defendants deny the allegations herein contained for the reasons as set out above.

5.2 Alternatively to 5.1 above, insofar as the second defendant was indebted to the plaintiff, for whatever reason (which indebtedness is denied) the defendants plead as set out below²⁴".

[37] Based on general principles, the plaintiff at all material times bore the onus to prove the credit agreement and the validity of the suretyship on which it relies.²⁵ The denial of the suretyship, albeit it in broad terms, should have alerted the plaintiff to the need to prove a valid suretyship with all that that entails, including the terms of the partnership, which includes the parties thereto. A court cannot ignore the trite principle that a party cannot stand surety for itself and it was open to the second defendant to argue compliance with the requirements of s 6 of the Act for its validity.

[38] Moreover, at the close of the plaintiff's case, the second defendant applied for absolution. That application was refused, reasons having been provided in an ex tempore judgment at the time. The second defendant argued in that application that there was no compliance with the provisions of s6 of the Act. That should have alerted the plaintiff that the second defendant disputed compliance with those provisions. The plaintiff could have applied to reopen its case, but did not do so. This court did not raise the issue of validity of the suretyship *mero motu* as suggested by the plaintiff in its supplementary heads of argument.

[39] The plaintiff further argued that the representations made by Mr Maron represented to plaintiff that Xelmar FXN was being converted to a company but that the entity remained the same as a going concern. It argued that once this conclusion was accepted, the law applicable to the conversion of juristic entities applies. In support of the argument, reliance was placed on *Masibuyisane Services (Pty) Ltd v Eqstra Corporation (Pty) Ltd*²⁶ ("*Masibuyisane*") in which it was held that the juristic persona remains the same regardless of the corporate form upon conversion from a close corporation to company or vice versa and an incorrect description of the juristic persona is not a ground to compromise a contract concluded between it and another person. It was held that the suretyship was valid and the incorrect description of the juristic persona was not a ground to compromise that contract.

²⁵ Pillay v Krishna 1946 AD 946

²⁶ 2020JDR 2585 (SCA) paras 37 and 38

[40] In my view, the plaintiff's argument and its reliance on *Masibuyisane* is misplaced as it is distinguishable. *Masibuyisane* dealt with the conversion of a close corporation into a company and the applicable statutory framework²⁷ concerning conversions of the same juristic person. The present facts and context are different. It is trite that a sole proprietorship has no separate legal existence whereas a company has a separate juristic personality.

[41] The plaintiff further relied on the substance over form doctrine allowing courts to ignore the form of a disguised transaction to examine its true nature and attach adequate legal implications to it.²⁸ For the same reasons as the plaintiff cannot rely on estoppel, this argument is equally doomed to failure. In any event, the plaintiff made out no proper case for application of this doctrine.

[42] In the alternative it was argued that the evidence established that FXN is not a sole trader but a partnership with Mr Maron and Mr Allan as partners. It was argued that a suretyship signed by one of the partners for the debts of the partnership is indeed valid.²⁹ The authorities relied on by the plaintiff do not however establish that the agreement is valid as a deed of suretyship, but rather that it is an enforceable agreement having the effect that a partner waives a procedural advantage.³⁰ Reliance was also placed on *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz*³¹, which is similarly distinguishable. Although the facts may be similar, the fundamental distinction is that the validity of the deed of suretyship was not placed in issue. The partnership issue was further never raised in the pleadings nor expressly canvassed at the trial.

²⁷ Being the Close Corporations Act 69 of 1984 and the 1973 and 2008 Companies Acts

²⁸ *Dadoo Ltd & Others v Krugersdorp Municipal Council* 1920 AD 530; *SA Pulp and Paper Industries Ltd v Commissioner for Inland Revenue* 1955 (1) SA 8 (T); *Du Plessis v Joubert* 1968 (1) SA 585 (A)

²⁹ Relying on *Standard Bank of SA Ltd v Lombard & Another* 1977 (2) SA 808 (T); *City of Cape Town v Lombard Insurance Co Ltd* (unreported CPD 24 October 2005 case no 5178/2002 Davis J. the judgment was overturned by the Supreme Court of Appeal in *Lombard Insurance Co Ltd v City of Cape Town* [2007] ZASCA 423

³⁰ *Caney's Law of Suretyship* (6th Edition) Chapter III, para 2(e) pp43-46

³¹ (SA25/2005) [2008] NASC9; 2008 (2) NR 775 (SC) (14 July 2008) para [16]

[43] Even if the obligations of Xelmar FXN were delegated to the first defendant, it would not assist the plaintiff in proving the validity of the suretyship. As a general principle, if the principal debtor was substituted or its obligations delegated to a new debtor, a surety is discharged³². The surety's obligation is not transferred to operate in respect of the new debtor unless he agrees to this. If he does not agree, he is discharged. If he does agree to secure the new debtor's debt, the agreement will have to comply with the formalities in s 6 of the Act³³.

[44] There is no reason to deviate from the normal principle that costs follow the result. I am not persuaded that costs should be granted on the scale as between attorney and client as sought by the second defendant.

[45] Two additional costs orders require consideration. First, the costs of the absolution application, which were reserved. That application was orally launched from the bar after closing of the plaintiff's case and neither party delivered heads of argument. The issue took up the whole day for the hearing on 1 March 2022. As the application was dismissed, it would be appropriate for the second defendant to be held liable for those costs.

[46] Second, the matter was enrolled for trial on 23 November 2020. From the available facts it cannot be concluded that any fault can be ascribed to the plaintiff, as argued by the second defendant. It would be appropriate that each party pay its/his own wasted costs.

[47] I grant the following order:

[1] The plaintiff's claim against the second defendant is dismissed with costs, save for the cost orders referred to in [2] and [3] below;

³² Eaton Robins & Co v Nel (2) (1909) 26 SC 624 at 630

³³ Caney's Law of Suretyship (6th edition) Forsyth & Pretorius Chapter XIII para 2(i) and the authorities cited therein, p197

[2] The costs of the absolution application and the hearing on 1 March 2022 are to be paid by the second defendant.

[3] Each party is liable for its/ his own wasted costs for the hearing on 23 November 2020.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING : 28 February, 1, 2, 4 March 2022

DATE OF JUDGMENT : 31 March 2022

PLAINTIFF'S COUNSEL : Adv. R. Blumenthal

PLAINTIFF'S ATTORNEYS : NVDB Attorneys

DEFENDANTS' COUNSEL : Adv. P. Marx

DEFENDANTS' ATTORNEYS : Schickerling Inc.