

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Reportable: No
Of Interest to other Judges: No
12 March 2024

CASE NO: 1319/2019

In the matter between:

Hard Hats Equipment Hire (Pty) Ltd

Plaintiff

and

K2014137790 (Pty) Ltd t/a Rhino Civils

First Defendant

Hector Harold Spark

Second Defendant

JUDGMENT

Vally J

Introduction

[1] This is a stated case. Two issues are placed before court for determination. They are:

The first issue: Did the Honourable Harrison AJ, with his order of 13 October 2020 and judgment of 21 June 2022, determine the issue of whether the suretyship complies with the provisions of section 6 of the General Law Amendment Act 50 of 1956 (as amended) (Act)

The second issue: if the Court concludes on the first question that the validity of the suretyship has not been determined by Harrison AJ, then the second question to be decided is whether the suretyship complies with the provisions of section 6"

[2] On the first issue the plaintiff contends that the learned Judge did not decide the issue of compliance with s 6 of the Act, and on the second issue it contends that the suretyship is valid. The second defendant contends the very opposite on both issues. The parties have also agreed that if both issues were determined in favour of the plaintiff, then judgment, together with costs, should be granted against the second defendant.

Did Harrison AJ decide whether the suretyship complied with s 6 of the Act?

[3] An interlocutory application was brought in what was always an action proceeding by the second defendant. It was called before Harrison AJ on 13 October 2020. Having entertained oral argument on that day, Harrison AJ reserved his judgment. On 10 November 2020 he issued an order without furnishing any reasons therefor. It is not usually a practice in this court to reserve its judgment and then almost a month later simply issue an order. If no order is issued *ex tempore* (out of the moment) then normally a judgment with full reasons is expected and issued. This would apply even in an interlocutory application. Nevertheless, almost a month later Harrison AJ issued only an order in the following terms:

- '1 THAT the Applicant be granted leave to withdraw the formal admissions from his plea dated 17 May 2019 complained of by the Respondent in its Notice of Objection dated 28 January 2020
- 2 THAT the Applicant be granted leave to amend its plea dated 17 May 2019 in accordance with the Applicant's Notice of Intention to Amend dated 23 January 2020
- 3 THAT the Respondent be Ordered to pay the costs of this Application.

[4] The order only allows the second defendant to withdraw the formal admission made in his plea, grants him leave to amend his plea and compels

the plaintiff to pay the costs of the interlocutory application. If the matter had been left at that the parties would have complied and the trial action would have to proceed. Instead the situation took a turn for the worse. On 25 November 2020 - fifteen calendar days after the order was issued - the plaintiff's attorneys filed a formal document in the style and manner of a normal application, filed in terms of Rule 6 of the Uniform Rules of Court (rules). The phrase 'Application for Written Reasons' is placed between the customary parallel lines that are found in such formal court documents. The body of the document reads:

'TAKE NOTICE THAT the Respondent in this matter (and the Plaintiff in the action) makes an application for written judgment and reasons thereof for the granting of the Applicant's application namely the withdrawal of formal admissions in its [sic] plea, the granting of its [sic] leave to amend and that the Respondent be ordered to pay the costs of the application in respect of the abovementioned matter having been heard on 13th of October 2020 by the Acting Judge of the division **Thompson AJ.**' (Emphasis added.)

[5] It is a strange document. All the attorneys were required to do is send a courtesy letter to then Secretary of the Judge requesting reasons for order. More significantly, the reference to 'Thompson AJ' as being the judge who issued the order and from whom 'a written judgment and reasons is sought' is inexcusable. The attorneys should have known, if they read the order, that the presiding judge was Harrison AJ.

[6] More importantly, it is inexplicable as to why a simple interlocutory order, which is not appealable (except for the costs aspect and an appeal in that regard would have minimal, if any, prospect of success) would cause a party to seek reasons therefor. Judges of this Division are far too busy and cannot be expected to give reasons for every interlocutory order they issue or for every

interim order they grant or refuse. Reasons should only be given or sought in exceptional circumstances, and this case is certainly not one of those.

[7] Nineteen-months later, on 21 June 2022, Harrison AJ issued his reasons. His reasons traverse the merits of the dispute. He says that this is what the parties sought from him. He records it as follows:

- '4. When the matter was argued before this Court, the issue between the Plaintiff and the Second Defendant was whether the Suretyship was valid and enforceable.
- ...
- 6. Both parties submitted in argument presented to the Court that the matter was a question of law, and that nothing was triable.
- 7. In its written Heads of Argument, the Plaintiff further stated that it was common cause that the only remaining issue between the Plaintiff and the Second Defendant was whether the suretyship was valid and enforceable.
- ...
- 10. The matter was argued on the basis that the issues between the parties were narrow and turned on a dispute of law, rather than a dispute of fact and Counsel for the Respondent submitted that the only remaining issues to be considered were whether:
 - a. The Suretyship was valid or invalid, and
 - b. If valid, whether the suretyship fell to be rectified'

[8] Clearly, Harrison AJ was asked to deal with the merits of the matter. But the order he issued on 10 November 2020 did not deal with the merits. When confronted with the 'Application for Reasons' he took the view that it would be appropriate for him to deal with the merits (the validity of the suretyship) of the disagreement between the plaintiff and the second defendant. His judgment contains fifteen short paragraphs dealing with the issue of the validity of the suretyship. He considered that the merits should be decided by examining the suretyship for compliance with s 6 of the General Law Amendment Act 50 of 1956 (a matter to which I return to later), which would require, amongst others,

the identification of a creditor, a principal debtor and a surety. If either one of the three parties was absent the document would be invalid for non-compliance with the statutory provision. He came to the conclusion that:

'The First Defendant and the Second Defendant in the matter were separate legal entities, and in my view, a deed on suretyship did not come into force, and for reasons set out above, and the matter should therefore not proceed to a second leg where rectification might be considered.'

[9] The conclusion was based on the wording of the suretyship, which literally meant that the second defendant bound himself to the first defendant for the first defendant's obligations to the plaintiff. It drew inspiration from the finding in *Inventive*.¹

[10] Having arrived at this conclusion Harrison AJ was confronted with a dilemma. The written reasons were to explain why he made the order he did on 10 November 2020. This conclusion is not catered for in the order. The order is restricted to (i) allowing the second defendant to withdraw the formal admissions in his plea, and (ii) granting him leave to amend his plea. The order said nothing about the validity of the suretyship. Unable to amend his order, Harrison AJ concludes in paragraph 35 of his judgment with a confirmation of the order, but then adds a paragraph 36, which is not part of the order, which records his finding on the merits. It reads:

'36. As I have stated that the suretyship failed to pass the first stage of the enquiry highlighted above, it is in my view invalid and incapable of rectification.'

¹*Inventive Labour Structuring (Pty) Ltd v Carfe* 2006 (3) SA 107 (SCA)

[11] The paragraph explains why the application for rectification was refused. It is directed at what he recorded in paragraph 10 of the judgment², which is that this issue of rectification was placed before it. However, there can be little doubt that the judgment is crafted in a manner as to suggest that Harrison AJ considered the merits of the dispute and finally decided them. But to hold that that is the case would require ignoring the order as it stands as a whole. Or, viewed from another angle, it would require holding that on 21 June 2022 Harrison AJ amended the order he issued on 10 November 2020. Both holdings are untenable. The order issued on 10 November 2020 is repeated in paragraph 35 of the judgment and is justified on grounds that it restores 'the real issue between the parties'.³ There is no purpose in restoring the real issues between parties if a determination on the validity of the suretyship (the merits) is made. Thus, the inescapable conclusion to be drawn from all this is that Harrison AJ knew that he could not, and certainly did not, amend his order of 10 November 2020.

Does the suretyship comply with s 6 of the Act?

[12] Section 6 merely prescribes the formalities that have to be complied with for a suretyship to be valid. The relevant portion thereof merely requires that for it to be valid it has to be embodied in a written document and has to be signed by or on behalf of a surety.

[13] The suretyship reads

'I the undersigned [the second defendant] signatory of these terms and conditions do hereby bind myself to the Client [the first defendant] as surety and co-principal debtor for the due performance by the [the first

² Quoted above in [7] above.

³ Para 30 of the judgment

defendant's] obligations to [the plaintiff] pursuant to these terms and conditions. I hereby specifically renounce the benefits of excussion and division as well as all other legal exceptions that would otherwise be available to me in law.'

[14] A suretyship crafted in this way is not usual. Read literally it means that the second defendant bound himself as surety and co-principal debtor to the debtor (the first defendant) for the due performance of the debtor's (first defendant's) obligation to the creditor (plaintiff). A normal suretyship would involve the surety binding himself to the creditor for the due performance of the debtor's obligation. A suretyship is a guarantee given by one person (surety or co-principal debtor) to a second person who loans money or supplies goods on credit (creditor) to a third person (the debtor or principal debtor). At core, suretyship is the incentive given to a creditor to assume the risk of lending the money or parting with goods on credit, which allows the debtor to access the monies or goods it requires. Once the monies are loaned or the goods supplied, a debt for which the principal debtor is liable arises, and should the principal debtor fail to meet the liability the surety becomes liable. It involves three parties and two contracts. The two contracts are linked, with the suretyship being described as 'an accessory contract.'⁴

[15] In terms of the suretyship herein, the surety binds himself as co-principal debtor to the debtor for due performance of the debtor's obligations to the creditor. There are three parties identified, and there are two contracts. Compliance with s 6 of the Act has taken place.

⁴ Caney's *The Law of Suretyship*

[16] Those are the two issues placed before this court in the stated case. However, both parties have agreed that should this court make a finding on both issues in favour of the plaintiff, then judgment should be granted against the second defendant with costs. This court should order that the second defendant pay the sum of R1 005 612.10 plus interest and costs.

[17] The following order is made:

- a. It is declared that this court did not, either on 10 November 2020 or 21 June 2022, make a determination on the issue of whether the suretyship complies with the provisions of section 6 of the General Law Amendment Act 50 of 1956 (as amended).
- b. It is declared that the suretyship does comply with the provisions of s 6 of the General Law Amendment Act 50 of 1956 (as amended).
- c. The second defendant is to pay the plaintiff the sum of R1 005 612.10.
- d. The second defendant is to pay the plaintiff interest on the aforesaid amount which interest is to be calculated in terms of the Annexure 'E' to the notice of motion as at 31 January 2019, and further interests thereafter at the maximum rate allowable from time to time until date of payment.
- e. The second defendant is to pay the costs of the action.



Vally J

Gauteng High Court, Johannesburg

Date of hearing:	13 February 2024
Date of judgment:	12 March 2024
For the applicant:	A Bester SC
Instructed by:	Fairbridges Wertheim Becker
For the respondents:	J van Rooyen
Instructed by:	Donn E Bruwer Attorneys