



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 1930/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO	NO
(3) REVISED. ✓	
16/3/18 DATE	[Signature] SIGNATURE

16/3/18

In the matter between:

LAND AGRICULTURAL DEVELOPMENT BANK
OF SOUTH AFRICA

PLAINTIFF

And

AFRICAN SPIRIT MAIZE MEAL
PROCESSING PLANT (PTY) LTD
EDMUND RAULPH BARUCH
MARIE EVE LESCA BARUCH
MEMELA INVESTMENTS HOLDINGS
BHELEKHAZI EUSABIA MDANDALAZA
JAMES WAITSE PULE

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT

JUDGMENT

Fabricius J,

1.

At the commencement of the trial, and by agreement between the parties, I made the following order:

“1. That the following issues be separated for judgment as provided for in terms of

Rule 33 (4) of the *Uniform Rules of Court*:

1.1 The allegations in paragraph 6.1 of the Plaintiff's Particulars of Claim read together with the Defendants' response thereto as pleaded in paragraph 26 of its plea;

1.2 All issues raised by the Plaintiff in its replication read together with the Defendants' rejoinder thereto.

2. That the Court, having regard to the separation of issues as agreed upon between the parties, make a finding as to whether the Second Defendant

had bound the Second and Third Defendants as sureties in favour of the Plaintiff for debts owed to it by the First Defendant.

3. That all remaining issues as they appear from the pleadings be postponed *sine die* for later adjudication thereon."

2.

The said paragraph 6.1 reads as follows:

- "6.1 On or about 15 September 2010, the Second and Third Defendants bound themselves to and in favour of the Plaintiff jointly, severally and in *solidum* with the First Defendant as sureties and co-principal debtors for the indebtedness for the First Defendant to the Plaintiff from whatever cause arising for payment of the sums of R5 590 000,00 and R4 000 000,00.
- Copies of the written and signed deeds of suretyship are annexed and marked as "*LAND9*" and the Plaintiff prays for the contents thereof to be incorporated herein as if specifically set out."

Paragraph 26 of the Plea reads as follows:

"26.1 The Defendants aver that:

26.1.1 The Second Defendant signed the written suretyship agreements on or about

16 September 2010, which agreements are annexed to the Plaintiff's

Particulars of Claim as Annexure "LAND9" ("the suretyship agreements");

26.1.2 The Third Defendant did not sign the suretyship agreements and the

signature which is reflected on page 6 of the suretyship agreements is not

the Third Defendant's signature and in fact the Third Defendant's signature

has been forged on the suretyship agreements.

26.2 On a proper construction and interpretation of the suretyship agreements:

26.2.1 A joint contract of co-suretyship as between the Second and Third

Defendants was intended;

26.2.2 Both the Second and Third Defendants had to sign the suretyship

agreements;

26.2.3 If either the Second and/or the Third Defendant did not sign the suretyship agreements, the suretyship agreements would be incomplete and therefore would not comply with the requirements of Section 6 of the *General Law Amendment Act, No. 50 of 1956* ("the *General Law Amendment Act*") and would therefore be invalid;

26.2.4 The fact that the Third Defendant did not sign the suretyship agreements as her signature was forged thereon constituted an omission of one of the material requirements in terms of the provisions of Section 6 of the *General Law Amendment Act.*"

4.

In the replication, the Plaintiff pleaded that the Second Defendant was involved in the day-to-day management of the First Defendant, and he negotiated the terms of the loan agreement and the instalment sale agreement with the Plaintiff.

The Second Defendant signed the surety agreement in the ordinary course of business as co-manager and director of the First Defendant, and in so doing he

bound the joint estate of the Second and Third Defendants as sureties in favour of the Plaintiff. By virtue of s. 15 (6) of the *Matrimonial Property Act 88 of 1984*, the consent of the Third Defendant was not required to bind the joint estate.

5.

In the rejoinder to the replication, the Defendants averred as follows:

“1.1.1 The fact that the Third Defendant had to sign the suretyship agreement as provided for on page 6 of the same was not a consent requirement as envisaged in terms of Section 15 of the *Matrimonial Property Act, No. 88 of 1984* (“*the Matrimonial Property Act*”) as:

1.1.1.1.1 Section 15 (2) (a) of the *Matrimonial Property Act* is not a suretyship requirement but a requirement relating to immovable property;

1.1.1.1.2 Section 15 (2) (h) of the *Matrimonial Property Act* was not applicable as the suretyship agreements were signed by the Second Defendant in the ordinary course of his profession, trade or business

of the First Defendant and in the capacity as a director and shareholder of the First Defendant and in the premises, the written consent of the Third Defendant as envisaged in terms of Section 15 (2) (h) of the *Matrimonial Property Act* was not required in order to give validity to the suretyship agreements signed by the Second Defendant;

1.1.1.1.3 The suretyship agreements would not have reflected the name of the Third Defendant on page 1 thereof;

1.1.2 In the premises and by virtue of the aforesaid facts and circumstances, a joint contract of co-suretyship as between the Second and Third Defendants was intended and both the Second and Third Defendants had to sign the suretyship agreements."

6.

I may add at this stage that debts are incurred by persons, rather than by estates, and that when the marriage is in community of property, both spouses are generally

liable for payment of the debts that are incurred by one of them. It follows that a creditor may look to the estates of both debtors for the recovery of the debt.

See: *L. du Plessis v M. Pienaar N.O. and Others, 514/2001 SCA*, delivered on 26 September 2002, at par. 5.

7.

On behalf of the Defendants it was argued that their straight-forward case was that having regard to the terms of the suretyship agreement, a joint contract of co-suretyship between the Second and Third Defendants was at all times intended. In that context, reference was made to *SOCIÉTÉ COMMERCIALE DE MOTEURS v Ackermann 1981 (3) SA 422 (A)*. The facts of that case however show that the relevant document therein required the signature of six persons, where in fact only two were signatories. The form and whole tenor of that particular document indicated an intention that all six persons should sign, failing which, the omission of such *essentialia* i.e. the parties to the particular contract, made the document incomplete,

and not in compliance with the provisions of s. 6 of the *General Law Amendment Act 50 of 1956*.

8.

On behalf of Plaintiff it was submitted that this case was clearly distinguishable. The Second and Third Defendants were married in community of property. There was therefore only one joint debtor. The suretyship agreement refers to both the Second and Third Defendants as being married in community of property and in the main refers to the surety in the singular. There is no reference to "we". Reference is only made to "I" or "me". At the end of the document where the signatures appear, next to the name of the Third Defendant, is a reference to s. 15 (2) (a) of *Act 88 of 1984*. This obviously refers to the consent that was not required herein, as is common cause. There is in my opinion no indication whatsoever in this deed of suretyship that would place it within the ambit of the reasoning of the *Ackermann* decision *supra*. There is no indication that the agreement would not be valid or come into operation unless both Second and Third Defendants signed it and that one

signature was conditional upon the other. If indeed a joint contract had been intended, so as to bring it within the parameters of the *Ackermann* decision *supra*, then that would have to be decided by evidence. Having regard to the wording of the document itself, and the pleadings, I am of the view that circumstances would have to be pleaded specifically to bring the present instance within the ambit of the *Ackermann* decision. This has not been done. There is therefore no reason not to interpret the deed of suretyship at face value.

9.

The following order is therefore made:

1. It is declared that Second and Third Defendants have lawfully and validly bound themselves as sureties in favour of the Plaintiff for debts owed to it by the First Defendant.
2. The Second and Third Defendants are ordered to pay the costs of this action on an Attorney and client basis.

A handwritten signature in black ink, appearing to read 'H.J. Fabricius', is positioned above a horizontal line.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 1930/2015

Counsel for the Plaintiff:

Adv P. L. Uys

Instructed by: Gildenhuys Malatji Inc

Counsel for the 2nd and 3rd Defendants:

Adv K. Lewine

Instructed by: Joshua Apfel Attorneys

Date of Hearing: 12 March 2018

Date of Judgment: 16 March 2018 at 10:00