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

CASE NO: 61964/15

31/3/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

31/03/2017

DATE

SIGNATURE

In the matter between:

SDV SOUTH AFRICA (PTY) LIMITED	PLAINTIFF/RESPONDENT
and	
LUCAS MACINTYRE JELE CONSTRUCTION (PTY) LIMITED T/A LMJ CONSTRUCTION	FIRST DEFENDANT / EXCIPIENT
GYSBERT HENDRIK GEORGE LUCAS	SECOND DEFENDANT / EXCIPIENT

JUDGMENT

COLLIS AJ:

INTRODUCTION

[1] On 29 June 2016 the first and second defendants raised an exception on three grounds, namely, that the Plaintiff's amended summons lack the necessary averments to sustain a cause of action, does not disclose a cause of action and that it does not comply with the requirements of Rule 18(4). The Plaintiff disagrees and opposes the exception.

[2] Before dealing with the issues it is important to look at Rule 18(4) which provides as follows:

> "[4] Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be with sufficient particularity to enable the opposite party to reply thereto".

There are accordingly two separate requirements. The first is that the pleader must set out the material facts upon which it relies for its claim and the second is that these material facts must be set out with sufficient particularity to enable the opposite party to reply thereto.

In **Jowel v Bramwell-Jones & Others 1998 (1) SA 836(W) at 903A-B** the following was stated:

*"A distinction must be drawn between the **facta probanda**, or primary factual allegations which every Plaintiff must make and the **facta***

***probantia,** which are the secondary allegations upon which the Plaintiff will rely in support of his primary factual allegations".*

[3] The basic principle according to McCreath J in **Trope v South African Reserve Bank and Another and Two Other cases**[1], is that particulars of claim should be raised in such a way that the Defendant "*may reasonably and fully be required to plead thereto*". Parties must be able to come to trial prepared to meet each other's case and not be taken by surprise. The ultimate test must be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing law.

[4] Pleadings are expected to be lucid, logical and intelligible. The factual allegations made must clearly disclose the cause of action or defence. (Harms Civil Proceedings in the Supreme Court at 26 3 – 4).

[5] The Defendants' exception is directed to one aspect of the Plaintiff's claim, namely the allegation that the suretyship relied upon by the Plaintiff as contained in the credit application of the First Defendant, fails to comply with the requirements of Section 6 of the General Law Amendment Act 50 of 1956 *('the Act')*.

[6] Section 6 of the Act provides as follows:

[1] *1992 (3) SA 208 (T) at 210 G-J*

"No contract of suretyship entered into after the commencement[2] 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 shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

[7] I now turn to consider the particulars of claim in the current matter and the complaint on which the exception is based.

GROUND OF COMPLAINT

[8 In paragraph 6.2.of the amended summons it is alleged that:

*'The Second Defendant for and on behalf of the First Defendant accepted the Plaintiff's standard trading terms and conditions of sale as attached and bound himself as co-principal debtor jointly and severally for all the debts and obligations of the First Defendant to the Plaintiff from whatsoever cause arising.(**the permission clause of Annexure "A"**)'*

[9] In paragraph 10.2 it is alleged that:

*'By virtue of the first defendant's failure to pay the aforesaid amount to the plaintiff, and pursuant to the second defendant's said suretyship undertaking the second defendant is jointly and severally liable with the first defendant to the plaintiff in the aforesaid sum of **R 4 279 072,97**.'*

[2] *Commencement date: 22 June 1956*

[10] With regards to this ground of complaint, it is alleged that for its claim against the Second Defendant, the Plaintiff purports to rely solely and exclusively on the following sentence in the alleged **"permission clause":**

"The undersigned further binds himself/herself as co-principal debtor jointly and severally."

[11] On behalf of the Defendants, it was contended that the alleged suretyship undertaking does not sustain the allegations in paragraphs 6.2 and 10.2 and is in fact contradictory to those allegations in that the alleged suretyship undertaking does not refer to the alleged creditor, the alleged debtor or the alleged debts or obligations.

[12] Furthermore, it was contended that nowhere in the Plaintiff's standard terms and conditions is there any reference whatsoever to the alleged suretyship undertaking. In addition thereto, the alleged suretyship undertaking is not incorporated in the standard trading terms and also, that nowhere in the alleged suretyship undertaking is there any reference whatsoever to the trading terms and conditions. Furthermore, clause 2.1 of the Plaintiff's standard trading terms and conditions provide that:

"All and any business undertaken or advice, information or services provided by the Company whether gratuitous or not, is undertaken or provided subject to these Standard Trading Terms".

[13] The Plaintiff carries the *onus* that the alleged suretyship agreement complies with the requirements of the General Law Amendment Act. A Plaintiff who wishes to claim on a deed of suretyship must allege and prove the following:[3]

(a) A valid contract of suretyship

Here the terms of the contract must have been embodied in a written document signed by or on behalf of the surety. The document must set out at least the identity of the creditor, the surety, the principal debtor and the nature and the amount of the principal debt must be capable of ascertainment by reference to the provisions of the written document.

(b) That the causa debiti is one in respect of which the defendant undertook liability; and

(c) The indebtedness of the principal debtor.

[14] Failure to complete the essential terms of a suretyship agreement means that the contract is invalid for failure to comply with the statutory requirements. [4] It should also be borne in mind that a suretyship is always an accessory obligation,[5] to the main agreement.

[15] Where an exception is based upon the interpretation of a contract (as *in the present matter being a deed of suretyship*) the excipient must demonstrate that the contract is unambiguous and that the meaning which he or she contends for is the correct one.

[3] *Amlers Precedents of Pleadings Seventh Edition pg 367*
[4] *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others 2010 (5) SA 523*
[5] *Fourlamel (Pty) Ltd v Maddison 1977(1) SA 333 (A) at 345*

[16] To the matter at hand the Defendants contend i.e. that the identity of the surety is unknown, that it is unclear whether the surety is a limited or unlimited one, that the identity of the principal debtor is unknown and that the debts and obligations for which the surety was signed, is also not disclosed.

[17] The excipient bears the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.[6] It is important to bear in mind that the pleading must be looked at as a whole.[7] The permission clause to my mind cannot be looked at in isolation to the pleaded case of the Plaintiff.

[18] As to the pleaded case, counsel for the Plaintiff contended that it is the Plaintiff's pleaded case that annexure "A" be incorporated into the particulars of claim as if specifically pleaded[8] and it is in this annexure where the permission clause is contained in.

[19] *Ex facie* the permission clause the undersigned is listed as Gys Lucas (the *surety*) who signed in his capacity as director of Lucas Macintyre Jele Construction (Pty) Ltd (the *principal debtor*), who applied for credit from SDV South Africa (Pty) Ltd (the creditor).

[20] The permission clause further contains the phrase *"........................ that the undersigned further binds himself/herself as co-principal debtor jointly and severally."*

6 Picbel Groep Voorsorgfonds (in Liquidation) v Somerville and Related Matters 2013 (5) SA 496 (SCA) at 501A-B

7 Nel and Others NMO v McArthur 2003 (4) SA 142 (T) at 149F

8 *Particulars of Claim paragraph 5 pg 4*

[21] Counsel for the Plaintiff further contended, that annexure "A" being the Plaintiff's credit application has included in it, standard trading terms of which clause 19 thereof specifically provides as follows:

"Unless otherwise specifically agreed by the Company in writing, the Customer shall pay to the Company in cash immediately upon presentation of invoice, all sums due to the Company without deduction or set-off and payment shall not be withheld or deferred on account of any claim or counterclaim which the Customer may allege."

[22] The said payment clause (Clause 19) was also pleaded by the Plaintiff in paragraph 7 of the particulars of claim.

[23] The pleading having to be looked at as a whole and with specific reference to the payment clause in my opinion does indeed reflect a reference to the debt and obligations in respect of which the surety had bound himself.

[24] In Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA) Lewis JA held:

"A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in Hillas & Co Ltd v Arcos Ltd 147 LTR 503 at 514:

Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects."

[25] Having regard to the pleaded case of the Plaintiff, read together with annexure A and the standard trading terms and bearing in mind the *onus* as carried by the Defendants, I cannot conclude that the permission clause failed to comply with the provisions of section 6 of the General Law Amendment Act and thereby also failed to comply with the provisions of Uniform 18(4) as quoted above.

ORDER

[26] In the result I make the following order:

[26.1] The exception taken by the Defendants is dismissed with costs.

C. J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR PLAINTIFF/RESPONDENT:	ADV. B.D. HITCHINGS
INSTRUCTED BY:	BREYTONBACH MOSTERT SKOSANA INC. ATTORNEYS
FOR DEFENDANTS/EXCIPIENTS:	ADV.Y. COERTZEN
INSTRUCTED BY:	VAN DER MERWE & BESTER INC.
DATE OF HEARING:	17 MARCH 2017
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