



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

CASE NUMBER: 312/11

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

DATE

SIGNATURE

In the matter between:

J.J. MOLLER

Excipient/2nd Defendant

And

**BARLOWORLD EQUIPMENT, A DIVISION
OF BARLOWORLD SA (Pty) Ltd
t/a THE CAT RENTAL STORE**

1st Respondent/Plaintiff

SILVER FALCON TRADING 510 (PTY) LTD

2nd Respondent/1st Defendant

J.A. NEL

3rd Respondent/3rd Defendant

JUDGMENT

RATSHIBVUMO AJ:

1. **Background.** This is an exception taken by the second defendant to the plaintiff's particulars of claim. In the particulars of claim the first respondent (herein after referred to as the plaintiff), claims the amount of R395 099.09 being the amount owed to it following a credit application by the the second respondent (herein referred to as the first defendant). The plaintiff alleges in the particulars of claim that the first defendant represented by Mariaan Wild (Wild), applied for a credit facility for a plant equipment hire from it on 14 July 2008. The said application¹ "thereafter constituted an agreement between the plaintiff and the first defendant." Following the plant equipment hire referred to above, by the first defendant, the plaintiff issued a number of invoices to the value of R395 099.09 to the first defendant who failed to make payments to the plaintiff. The second defendant's liability to the claim derives from the suretyship agreement² signed by him and the third respondent (third defendant) whereby they bound themselves jointly and severally as sureties and co-principal debtors in favour of the plaintiff and failure by them to make payment for the amount owed by the first defendant despite demands made by the plaintiff.
2. **Exception.** The second defendant excepts the plaintiff's claim as disclosing no cause of action and bad in law. He further avers that Annexure C referred to under footnote 1 above does not comply with the provisions of section 6 of the General Law Amendment Act, Act 50 of 1956 (the Act) in that it does not contain the names or identity of the debtor, that Annexure A does not contain a hiring or rental agreement and that it does not contain any signature other than Wild's. The plaintiff opposes the exception.

¹ See Annexure A of the plaintiff's particulars of claim.

² See Annexure C of the plaintiff's particulars of claim.

3. **Suretyship Requirements.** Section 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.

In interpreting the meaning of “terms” the Appellate Division (as it was known) held that it includes the identification of the parties to a contract.³ In that judgment, Miller JA stated “[c]onfining myself to the word when used in relation to a contract of suretyship, it is manifest that, for example, identification of the principal debt and debtor is not only a term of the contract but is essential to the creation of the surety's liability, suretyship being an accessory obligation.”⁴ The mere fact that the suretyship agreement does not contain the identification of the debtor would not render the suretyship agreement invalid provided a reference has been made in the said suretyship agreement to a loan agreement where the debtor is identifiable.⁵ (*Own Emphasis*) In so doing, the terms of the contract are incorporated into the suretyship agreement by such reference.

4. The question is whether it is possible to identify all the parties to a suretyship agreement without resorting to extrinsic evidence in this case. As a general rule, extrinsic evidence is inadmissible if it is led in order to cure the defect.⁶ Extrinsic evidence remains inadmissible as long as it concerns the negotiations between the parties prior to execution of a written agreement or relating to parties consensus. Other than that,

³ *Fourlamel (PTY) LTD v Maddison* 1977 (1) SA 333 (A).

⁴ *Fourlamel (PTY) LTD v Maddison* *supra* at p. 345

⁵ *Industrial Development Corporation of SA (PTY) LTD v Silver* 2003 (1) SA 365 (SCA)

⁶ *Trust Bank van Afrika Bpk v Sullivan* 1979 (2) SA 765 (T).

extrinsic evidence is not only admissible, but also essential since a written contract was merely an abstraction until it was related, by evidence, to the concrete things in the material world.⁷ The condition however is that there must be a reference in the suretyship agreement to such loan agreement (or any such relevant contract) where the terms such as the identification of parties are clear without extrinsic evidence.⁸

5. **Issues:** I now turn to the relevant parts of the disputed document purported to be suretyship agreement – Annexure C. In a two paged pro forma, under the heading “GENERAL DEED OF SURETYSHIP AND INDEMNITY” the following was inserted: (a) I/We the undersigned, Johannes Jacobus Moller of 26 Oberholzer Str, Lephalale (b) Jacob Adriaan Nel of 50 Valedoring Str, Owerwatch do hereby bind myself/ourselves jointly and severally as surety/sureties and co-Principal Debtor/s unto and in favour of BARLOWORLD EQUIPMENT (PTY) LTD or its successors intitle or assigns (hereinafter referred to as the “Creditor”) in sodium with _____ herein referred to as the (“Debtor”) for the due and punctual payment of all amounts of whatever nature or and/or performance of any obligation, all of which may now or in future become owing by the Debtor for any reason whatsoever (underlined text reflects what was handwritten by a pen). 17 clauses appear in this document, eight of which are on the first page and the rest are on the second page. Page 1 contains one signature at the bottom next to the words hand-written: “to be completed” whereas page 2 contains 3 signatures, two under the words “[A]s surety/sureties:” and one under “[A]s witnesses:” Page 2 further shows that it was signed at Lephalale on 14 July 2008.

⁷ *Industrial Development Corporation of SA (PTY) LTD v Silver supra & Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A).

⁸ *Industrial Development Corporation of SA (PTY) LTD v Silver Supra.*

6. As reflected above, the space provided for the identity of the debtor was left blank in the purported suretyship agreement (Annexure C). There is equally no reference whatsoever to any other agreement that may have been signed between the creditor and the debtor. It was argued for the respondent that Annexure C should not be seen in isolation, but as part of the same bundle as Annexure A. Annexure A is a document comprising of 9 pages. As indicated above, it is a credit application by the first defendant represented by Wild to the respondent. Only Wild's signature appears in this document. The last page with a subheading 'FOR OFFICE USE ONLY' has a number of open slots all of which were left blank. As a result, from Annexure A, it is not apparent if the loan application was approved. It is also not clear as to how this application can be referred to by the respondent as an agreement especially when it contains no signature of the creditor. No reference is made in this document to the suretyship agreement or any other contract for that matter. I cannot therefore find any basis for the argument that Annexure A is part of Annexure C.
7. It follows therefore that the alleged suretyship agreement does not contain the terms as it's required by the Act. It follows further that it does not make reference to any other agreement whatsoever. Equally, there is nothing in Annexure A that suggests that it is an agreement. It is also apparent that there is nothing the respondent can do to amend the particulars of claim so as to cure the defects therein; hence there is not even a request for such an amendment.
8. In light of the above, I make the following order:
 - 8.1 The exception by the second defendant is upheld.

8.2 The respondent (plaintiff) is ordered to pay the costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Date Heard: 07 May 2013

Judgment Delivered: 31 May 2013

**For the Excipient:
Instructed by: Adv. JC Kloppe
MP Van Staden Attorneys
C/O DBM Attorneys
Centurion**

**For the Respondent:
Instructed by: Adv. Z Schoeman
Savage Jooste & Adams Inc
Pretoria**