IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 121/2005

In the case between:

EVERITE BUILDING PRODUCTS (PTY) LTD Plaintiff

and

CASSIM, CHOTHIA Defendant

JUDGMENT: EBRAHIM, J

HEARD ON: 7, 8 & 10 FEBRUARY 2006

DELIVERED ON: 16 FEBRUARY 2006

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[1] The plaintiff sues the defendant on the basis of a written Deed of Suretyship signed by the defendant on the 7th of May 2002 for the unpaid purchase price in the sum of R127 675,17 of goods sold and delivered by it to Kroon Build Centre (Pty) Ltd (hereinafter referred to as “Kroon”) during September - October 2003. The plaintiff alleges

that the defendant bound himself as surety in solidium and co-principal debtor with Kroon for the due payment of the latter's indebtedness to plaintiff.

[2] The Deed of Suretyship was attached to the summons as annexure "B" and provides as follows:

"1. I/We the undersigned

CASSIM CHOTHIA
I.D.No.: 551105 5025 08 5

do hereby bind myself/ourselves, as surety/ies and co-principal debtor/s jointy and severally and in solidium with:

for and behalf of:- KROON BUILD CENTRE (PTY) LTD
(hereinafter referred to as "The Principal Debtor/s")

unto and in favour of the Creditor or any of its associated, subsdiary, divisions and agent companies or its successors in title or assigns for the due and punctual payment of all amounts due payable or owing by the Principal Debtor/s to the Credit or for any reason whatsoever."

The defendant affixed his signature to the Deed of Suretyship after making the following endorsement in manuscript on the right-hand-side of the 2nd page-:

> ¡°This suretyship shall be valid for one year from dated and not exceed R150 000,00 (one hundred & fifty thousand rands).”

He explained in evidence that the word “dated” refers to the date of signature of the document viz. 7 May 2002.

[3] The defendant has admitted that the goods in question were delivered to and received by Kroon but has denied liability on two grounds. The first ground is a denial that Kroon purchased the goods from the plaintiff. Whilst admitting his signature on annexure “B”, the defendant denies that annexure “B” is a suretyship undertaking given by him in favour of the plaintiff. The second ground of dispute is directly concerned with the endorsement made on annexure “B” and is pleaded as an alternative defence. Defendant contends that in the event of it being found that plaintiff is indeed the creditor then *ex facie* the endorsement, the Deed of Suretyship was given for limited duration; it was valid for a period of only one year from date of signature, until 7^{th} May 2003. The period of

purchase relevant to this case, September - October 2003, falls outside the period covered by the suretyship and defendant accordingly argues that he cannot be held liable for the payment of goods purchased in that period.

[4] In support of its case the plaintiff called as its first witness Mrs. Paola, it's National Credit Control Manager. She testified quite simply that she received the duly completed credit application form (annexure "C" to the summons) together with annexure "B" (the Deed of Suretyship) from the defendant who she understood was the Managing Director of Kroon, the principal debtor. Indeed it was common cause that the defendant had been in telephone communication with her assistant, one Elaine Green on the 7th of May 2002 and a credit application form had been faxed to the defendant for completion. According to this witness, she approved a credit facility of R65 000,00 initially and Elaine Green communicated this to the defendant by way of a letter dated the 20th of May 2002.

On the 21st of May 2002 she increased the facility to R150 000,00 at the defendant's request. She said that she had no difficulty approving the initial facility as well as the increased facility as she had done a thorough investigation on both defendant and the principal debtor and was satisfied as to the creditworthiness of both. When referred to the endorsement on annexure "B", she confirmed knowledge of it but said she had disregarded it as the terms were not acceptable to the plaintiff. In other words she said, she had rejected on behalf of the plaintiff the limited undertaking given by the defendant in annexure "B". She said she did not communicate the plaintiff's non-acceptance to the defendant and assumed that her silence would denote this to the defendant. She said she believed that it was for the defendant to have been pro-active in making enquiries to ascertain whether his limited undertaking had been accepted by the plaintiff. She was questioned on the various documentation issued by the plaintiff in connection with the purchases made by

Kroon during September, October 2003 and she identified all the invoices and delivery notes shown to her as being the plaintiff's documentation. She was emphatic that the words "Everite Building Products (Pty) Ltd as agents for Everite Limited" on the documentation did not purport to convey that the plaintiff was acting in a representative capacity on behalf of a principal being Everite Limited. According to her Everite Limited is a holding company which does not trade, the plaintiff being the trading company in the Everite group of companies. Both she and Green, her assistant who dealt with the Kroon account, were employed by the plaintiff. All order notes from the defendant were faxed to the fax number of the plaintiff and all statements, invoices and delivery notes sent to Kroon bore the fax and telephone numbers as well as the address details of the plaintiff. According to her Kroon had no dealings with any other entity but the plaintiff and it was the plaintiff who sold and delivered the goods in question to Kroon during September, October

2003. She also verified the correctness of the amount owing as contained in the Certificate of Indebtedness annexed to the summons as annexure “D” as being R127 675,00 plus interest at a rate 15,5% per annum. The plaintiff thereafter closed its case.

[5] The defendant testified in his own defence. His evidence was that he did not know who he had dealt with, whether he had dealt with Everite Building Products (Pty) Ltd, that is the plaintiff, or Everite Limited. He said as far as he was concerned he knew he was dealing with Everite and he conceded under cross-examination that it did not matter to him whether it was Everite Building Products (Pty) Ltd or Everite Limited who was supplying the goods. After testifying that he had endorsed the Deed of Surityship limiting the value thereof to R150 000,00 and the duration thereof to 1 year from date of signature because that was the sum total of the risk which he was in a position to undertake, he too closed his case.

[6] It is trite that in cases such as the present where the plaintiff seeks to enforce a contract, the onus is upon it to prove its terms on a balance probabilities.

See: **<u>PILLAY v KRISHNA & ANOTHER</u>** 1946 AD 946.

6.1 In addressing the first issue, in this case, namely the dispute surrounding the identity of the creditor, I have been unable to find a single shred of evidence in the documentation which points to any other entity but the plaintiff being that which granted the credit facilities and supplied the goods to Kroon, the principal debtor. I also have no reason to reject the testimony of Mrs. Paola to this effect. I have attempted to understand why it was that the identity of the plaintiff as creditor in these proceedings was placed in dispute in the first place as no evidence to that effect emerged from the defendant's testimony. In fact the defendant stated that it was immaterial to him who it was that supplied the goods. Mr. Roux's brave attempt to come to the aid of his client by latching onto the fact that the documentation purported to create an agency relationship between the plaintiff and Everite Limited, the holding company, must therefore fail as it is unsupported in the evidence.

6.2 Turning to the second and alternative ground of defence, namely that the suretyship does not hold good for the relevant period (September to October 2003), Mr. De Koning who presented the plaintiff's case relied essentially on clause 7 of the Deed of Suretyship to prove his case. Clause 7 provides:

> "7. No addition to variation or consensual cancellation of this Deed of Suretyship shall be of any force or effect unless in writing and signed by or on behalf of the

parties."

He argues that the endorsement by the defendant in manuscript to be bound as surety for a limited duration amounts to a variation of the Deed of Suretyship which, because it was not consented to and signed by both plaintiff and defendant, cannot and does not bind the plaintiff. He argues that, accordingly the defendant must be taken to have consented to the terms of annexure "B" to be bound as surety unconditionally.

6.2.1 A Deed of Suretyship, albeit that it is to be signed by the surety alone, is nevertheless a bilateral juristic act. It is a contract between creditor and surety and accordingly in the making thereof there must be a conscious and deliberate intention by both parties to enter into a binding contract of suretyship. The creditor and surety, must each of them, be competent to make the contract and must be *ad idem* on all the terms and conditions of the contract. Thus the ordinary rules as to offer and acceptance apply. It follows that an offer of suretyship can be withdrawn before acceptance by a creditor.

See:

1. **CANEY'S: THE LAW OF SURETYSHIP, 5TH EDITION,** page 60.

2. **<u>VOLKSKAS SPAAR BANK BPK v VAN ASWEGEN</u>** per M.T. Steyn JA, 1990 (3) SA 978A at 986 F – G:

"Enige nuwe aanspreeklikheid van verweerder teenoor eiser spruitende uit die transaksies van 24 April 1975 sou derhalwe slegs ingevolge 'n nuwe ooreenkoms tussen hulle tot stand kon kom. So 'n ooreenkoms sou uiteraard konsensueel moes wees. 'n Onderneming deur verweerder, 'n aanvaarding deur eiser en mededeling daarvan aan verweerder, is gevolglik noodsaaklik vir die totstandkoming van so 'n nuwe aanspreeklikheid. Aanvaarding van verweerder se onderneming van 26 Mei 1982 en mededeling daarvan aan verweerder moes derhalwe deur eiser bewys word."

3. **FEDERATED TIMBERS (PRETORIA) (PTY) LTD v FOURIE** 1978 (1) SA 292 at 297 A-B per Melamet, R:

"Mededeling van die aanvaarding van die voordele verleen onder 'n borgakte deur 'n krediteur is nie nodig nie as die borgakte 'n duidelike onderneming waarby die verpligtinge van 'n ander gewaarborg word, vervat - mededeling is net nodig as die onderneming deurd die borg in die vorm van 'n voorstel gegiet is."

4. **BOUWER v LICHTENBERG CO-OPERATIVE SOCIETY** 1925 TPD 144 at 148 per Stratford, J:

"… but, on the other hand, if the undertaking is put in the form of a proposition, it is required to be accepted."

5. **BROWN & CO v JACOBSON** 1915 OPD 42 at 44 (per Maasdorp, CJ).

6. **AFRICAN LIFE PROPERTY HOLDINGS v SCORE FOOD HOLDINGS** 1995 (2) SA 230 at 239

(per Nienaber, JA).

6.2.2 The defendant's evidence is clear. It was his intention to be bound for a limited duration of one year. He accordingly endorsed the Deed of Suretyship in this respect and signed it. On receiving no enquiry or objection from the plaintiff he assumed that all was in order and that his offer to be bound for one year was acceptable to the plaintiff. In my view this assumption on his part was a natural one and quite understandable in the circumstances especially considering that immediately thereafter on receipt of the credit application and signed Deed of Suretyship, credit facilities were given to him by the plaintiff. Moreover it is clear from the evidence that the plaintiff had ample opportunity to communicate its rejection of the defendant's offer of limited suretyship, but failed to do so. It does not avail the plaintiff to argue that its silence and failure to communicate its rejection in a written letter amounted to a show of its refusal to accept the limited undertaking offered by the defendant. It was the defendant who was undertaking the risk and he had clearly indicated an intention unequivocally to be bound only for one year and only up to an amount of R150 000,00 because this was the only risk he was capable of carrying. It was not up to the plaintiff in those circumstances to have ignored the defendant's stated intention and to have accepted his signature as surety for an unlimited amount and for an unlimited duration.

6.2.3 The argument that the defendant had unilaterally varied the agreement is wholly without substance. There can only be talk of a variation once the agreement is in place. In the present case no contract came into existence in my view because there was no acceptance by the plaintiff of the defendant's offer. Annexure "B" is thus of no force and effect as between the plaintiff and the defendant. Alternatively, if I am wrong in this conclusion and annexure "B" is properly in place, it follows that annexure "B" can only be valid to the extent of the limited liability undertaken by the defendant, for a period of one year from date of signature. This would mean that annexure "B" ceased to be of force and effect on the 7th of May 2003. The plaintiff's claim being for payment in respect of purchases sold and delivered in September - October 2003, outside the decisive period of the suretyship, it follows therefore that the plaintiff's claim cannot succeed even on this account.

[7] On all accounts therefore I am of the view that the plaintiff has failed to discharge the onus it carries in this matter and accordingly its claim is dismissed with costs.

S. EBRAHIM, J

On behalf of the plaintiff: Adv. De Koning
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of the defendant: Adv. Roux
Instructed by:

Smith Tabata Buchana Boyes
JOHANNESBURG

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