

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

Case Number: 045157/2023

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

_____ DATE	_____ SIGNATURE
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In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

NIZAMUDEEN NOOR MOHAMED AYOB

First Respondent

SHANNA GANI

Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 15 April 2025.

Summary - Applicable principles- Admissibility of video footage regarding completion of suretyships in terms of the Regulation of Interception of Communications and Provision of Communication - Related Information Act 70 of 2002.

JUDGMENT

BAQWA, J

Introduction

[1] The applicant (FirstRand) seeks a monetary judgment against the first and second respondents (Ayob and Gani) in their capacity as sureties for Hanmar Beleggings (Pty) Ltd (Hanmar). Hanmar was previously known as Rashida Manufacturing (Pty) Ltd.

[2] The respondents oppose the application.

The Facts

[3] Hanmar and FirstRand entered into a written loan agreement (the first loan agreement) in terms of which:

3.1 FirstRand agreed to advance R 25.2 million to Hanmar, which, together with interest, was repayable over a term of 60 months.

3.2 The first and second respondents would each execute a suretyship limited to R 13 million as security for Hanmar's obligations under the first loan agreement.

3.3 An event of default would occur if Hanmar defaulted in respect of any other agreement Hanmar might have with FirstRand upon occurrence of which FirstRand would have the right, upon notice, to accelerate or place on demand payment of all amounts owing and all such amounts would immediately become due and payable.

3.4 A certificate signed by a manager of FirstRand would be prima facie proof of the amount owing by Hanmar.

[4] On 30 November 2020, and at Pretoria, Hanmar and FirstRand entered into a second written loan agreement (the second loan agreement) in terms of which FirstRand agreed to advance R 10 million to Hanmar. The first and second respondents would each execute a suretyship for Hanmar's obligations under the second loan agreement, and the remaining terms and conditions of the second loan agreement are the same as the first loan agreement.

[5] On 21 October 2021, at Pretoria, FirstRand and Hanmar concluded a facility agreement (the facility agreement) in terms of which:

5.1 FirstRand offered Hanmar a short-term direct facility for the sum of R 8 million (repayable on demand) and an asset finance facility in the amount of R 15 million.

5.2 A breach of the agreement would occur if the limit was exceeded or in the event of non-payment of any amount due under the facility agreement, in which event, FirstRand would be entitled to accelerate payment and claim payment of all outstanding amounts.

[6] From February 2020 to August 2022, FirstRand and Hanmar concluded 10 instalment sale agreements, but due to a breach, FirstRand terminated the instalment sale agreements.

Suretyships

[7] On 21 October 2021, the first and second respondents each executed an unlimited suretyship in favour of FirstRand. In terms of the suretyships:

7.1 The first and second respondents bound themselves to and in favour of FirstRand as sureties in solidum for and as co-principal debtors, jointly and severally, as an ongoing obligation and with Hanmar, for the due payment by Hanmar to FirstRand of all monies which Hanmar may, at the time or from time to time, owe to FirstRand from whatever cause and however arising.

7.2 A certificate signed by any FirstRand manager would be prima facie evidence of the indebtedness of the respondents or Hanmar, and would be sufficient for purposes of any application, action, judgment or order.

[8] The suretyships contained all the terms and conditions of the suretyships given by the first and second respondents to FirstRand, and no cancellation, amendment, addition or alteration of, or to the provisions thereof, would be of force and binding unless made in writing and signed by the parties.

Breach

[9] Hanmar breached the terms of the facility and asset finance agreements in that it exceeded the overdraft limit and failed to make payment of amount due in terms of the asset finance facility.

[10] FirstRand addressed a letter to Hanmar on 19 December 2022 demanding that the breaches be remedied, which Hanmar failed to do.

[11] As a result of Hanmar's failure, FirstRand demanded payment from the respondents on 14 February 2023.

[12] As a result of a meeting between FirstRand's attorney, the first respondent and Hanmar's legal representative on 22 February 2023, FirstRand, Hanmar and the first and second respondents concluded a written agreement (the memorandum of agreement) on 15 March 2023.

[13] The memorandum of agreement acknowledged all the agreements entered into between FirstRand and the respondents, including the unlimited suretyships and that the indebtedness was due and payable. In the agreement, Hanmar and the respondents undertook to pay the amounts owing between 8 March 2023 and 30 June 2023.

[14] The initial payment of R 335 089.02 was made on 8 March 2023, but thereafter, there were no further payments.

[15] On 6 April 2023, the directors of Hanmar resolved to commence business rescue proceedings in respect of Hanmar.

[16] FirstRand applied for the setting aside of the business rescue resolution and for the provisional winding up of Hanmar, which was granted on 7 June 2023 with a return date of 31 July 2023.

[17] After a few extensions of the rule nisi, the provisional order for the winding up of Hanmar was confirmed on 3 October 2023.

[18] The present application was launched on 15 May 2023.

Respondents answering affidavit

[19] In the answering affidavit to the liquidation application, it is admitted that Hanmar exceeded the overdraft facility by R 512 886 and the contents of the memorandum of agreement are also admitted. Hanmar's indebtedness is not disputed.

[20] In opposition to this application, the respondents contend that the suretyships do not comply with the provisions of the General Law Amendment Act 50 of 1956, which requires that suretyships must be executed in writing. This defence is premised on the allegation that the suretyships were executed electronically and that electronic signatures do not comply with section 37 and 38 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA).

The General Law Amendment Act

[21] Section 6 of the General Law Amendment Act provides that *"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."*

[22] There can be no doubt that the sureties in question were signed in manuscript, as this is demonstrated in the evidence before this court. The signatures

do not constitute electronic representation of information in any form within the definition of “data”.

[23] Section 1 of the ECTA defines an “*electronic signature*” as data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature;

23.2 “data” as electronic representations of information in any form;

23.3 an “advanced electronic signature” as an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37.

[24] In this case, the respondents merely allege that the documents were executed electronically, but the evidence suggests otherwise. More importantly, however, they do not deny the execution of the suretyships. Even with regard to the Memorandum of Agreement, the first respondent refers to it as a settlement agreement.

[25] FirstRand submits, and I am inclined to accept, that legally, the respondents have precluded themselves from raising any defences by consenting to and attaching their signatures to the settlement agreement.

[26] The respondents have also purported to rely on defences in the liquidation application, but I do not think it necessary to consider those defences as they were unsuccessful.

Supplementary Answering Affidavit

[27] In the main answering affidavit, Gani purported to raise a defence to the effect that she had signed the suretyship in a foreign country (Dubai). In the supplementary affidavit, however, she denies that she signed the suretyship at all. She states that her signature was forged by an employee of the principal debtor (Hanmar), one Kendridge Moswane, who confirms this allegation under oath.

[28] Secondly, she states, on behalf of the first respondent, that the suretyship executed by her contains misrepresentations by FirstRand. She further alleges, in

furtherance of this contention, that *“the alleged originals of the “suretyship” must be scrutinized.”*

[29] Thirdly, Gani alleges that the debt owing to FirstRand has been reduced by payments to FirstRand after the institution of this application.

Supplementary Replying Affidavit

[30] FirstRand delivered a replying affidavit to the supplementary answering affidavit on 16 October 2024, in which the deponent therein explains that when the suretyships annexed to the founding affidavit were signed, restrictions under the Disaster Management Act 57 of 2002 were in place due to the Covid 19 pandemic.

[31] On 21 October 2021, a virtual meeting was held on the Microsoft Teams platform between Sharon Crowie of FirstRand, Ayob, Gani and Jawed Gani (the husband of Gani). The meeting was recorded and the recordal thereof was made available to this Court and the respondents.

[32] Ayob and Gani were known to Crowie because of previous interactions between them. During the meeting, Ayob identified the suretyship that Crowie had sent to him to sign. Upon Crowie’s request, Ayob turned the camera of his computer to make the suretyship visible.

[33] Ayob signed the suretyship and completed the date and place of signature, as well as Ayob’s address, manually. Crowie witnessed him do so.

[34] Gani was also a participant in the virtual meeting and the suretyship which had been sent to her was also identified. She signed it in manuscript in full view of the camera, and she initialled each page of the document comprising six pages.

[35] The suretyships were then sent back to Crowie by email, and FirstRand is not in possession of the originals which remained with the respondents.

[36] Crowie deposed to a comprehensive confirmatory affidavit, in which she confirms not only what is stated in the supplementary reply in so far as it relates to her, but also the following:

36.1 She was present at the virtual meeting with Ayob and Gani on 21 October 2021. She caused the meeting to be recorded using the recording tool on the Microsoft Teams platform.

36.2 Prior to the meeting, she had sent the unsigned suretyships to Ayob, who confirmed during the meeting that he had forwarded the documents to Gani.

36.3 She had witnessed the recordal of the meeting and confirms the accuracy thereof and the accuracy of the transcript of the meeting.

36.4 She was a witness to Ayob and Gani signing the suretyships and completing the date and place of signature as well as their addresses.

36.5 Crowie also annexed to her affidavit the email under cover of which the unsigned suretyships were sent to Ayob, together with copies of the unsigned suretyships.

36.6 She confirms that the signed suretyships emailed to her are identical to the unsigned ones except for the manuscript signatures and insertions made by Ayob and Gani respectively during the virtual meeting.

The Law

[37] In terms of section 4(1) of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (the Act), it is permissible for a party, other than a law enforcement officer, to intercept communication if he or she is a party to the communication, unless it is intercepted for purposes of committing an offence.

[38] Section 1 of the Act provides that “Communication” includes direct communication. Direct communication means oral communication between two or more persons, which occurs in the immediate presence of all the persons participating in that communication.

[39] Section 1 further defines “intercept” as the aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient of that communication.

[40] “Party to communication” is defined in section 1, for purposes of section 4 of the Act, in the case of direct communication, to include any person participating in such direct communication or to whom such direct communication is directed.

[41] Video material is admissible in motion proceedings. It does not, in principle, stand on a different footing from photographs or other documentary evidence. This was confirmed in *Intercape Ferreira Mainliner (Pty) Ltd and Others vs Minister of Home*

[42] *Affairs and Others*.¹

[43] Prior the enactment of the Act, the common law prevailed. In *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Waste Products)*,² it was said that the general rule is that evidence is admissible if it is relevant. It was further confirmed that the court does, however, retain a discretion to allow evidence, even if it was unlawfully obtained or a person’s right to privacy was violated, if fairness and public policy so dictate.

[44] In *Waste Products*,³ the court allowed a tape recording unlawfully obtained, taking into account the attempts of the parties against whom the evidence was presented, to deceive the court.

Analysis

[45] In this application, the video footage is, without doubt, relevant. The record of the meeting was not only in the ordinary course of business and legitimate, but also

¹ 2010 (5) SA 367 (WCC) at para 86.

² 2003 (2) SA 515 (W) at 549J-550B and 550B-C.

³ Id at 552F-G.

appropriate in light of the Covid 19 regulations and restrictions and Crowie, who caused the meeting to be recorded, confirms its accuracy.

[46] The video clearly shows, for any person with an interest, Ayob and Gani appending their signatures in manuscript to the suretyships after the suretyships had been identified.

[47] With Crowie's confirmation, the attempt by the respondents to mislead the court has been well and truly exposed.

Electronic Communication and Transaction Act (ECTA)

[48] The respondents have sought to rely on ECTA, but their reliance is misplaced as FirstRand relies on written, physically signed suretyships. As alluded to earlier, they only received copies thereof as the respondents retained the originals.

[49] The electronic signatures, as alleged by the respondents, remain a mere allegation which is unsupported by real evidence as demonstrated in the video footage.

[50] The submission that the suretyships were transmitted by email as a data message as defined in the ECTA does not assist the respondents' case in any manner.

[51] Section 15 of the ECTA provides:

"15 Admissibility and evidential weight of data messages

(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence:

- (a) on the mere grounds that it is constituted by a data message; or
- (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of data message, regard must be had to-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) . . .”

[52] Despite the allegations by the respondents, the copies of the suretyships transmitted by email remain admissible evidence in terms of section 15 of the ECTA. They are the best evidence FirstRand could produce, and the respondents are not prejudiced in any manner as they are in possession of the originals.

[53] It is trite that if a party is unable to produce a written contract or copy thereof, it is legally permissible for the party to prove the contract by means of other evidence.⁴ In this application, FirstRand produced the emailed copies of the suretyships, supported by the overwhelming evidence of Crowie. The video footage is also a data message which is equally admissible in terms of section 15 of the ECTA.

The balance owing

[54] Apart from the defences referred to above, the respondents contend that further payments were made after the institution of this application.

[55] FirstRand accepted that six payments were made in respect of the Wesbank account, but no payments have been made on the loan and overdraft accounts.

[56] The contention of payment is however not sustainable in that the respondents have failed to produce any evidence regarding how much has been paid and when.

⁴ *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC) at para 20.

Respondents' Authorities

[57] The respondents have relied on some authorities which are distinguishable from the facts of this application. This is demonstrable by reference to a few of these.

56.1 In *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another*,⁵ the issue was whether typewritten names at the foot of an email constituted an electronic signature of the author, for the purposes of section 13(3) of the ECTA. The court held that it did. *Spring Forest* finds no application in the present matter, which does not concern electronic signatures and therefore does not assist the respondents.

56.2 In *Massbuild (Pty) Ltd v Tikon Construction CC and Another*,⁶ it was common cause that the signature of the purported surety was electronically appended to the document by someone else. The signature was a scanned version of the physical signature. In this application, the issue of an electronic signature or of someone else having appended signatures electronically for the respondents did not arise. FirstRand relies on the manual signatures of the respondents. The *Massbuild* decision is clearly distinguishable from the present application.

56.3 In *Jurgens and Others v Volkskas Bank Ltd*,⁷ the surety signed the deed of suretyship. An employee of the surety then completed other details on the suretyship on behalf of the surety. The court came to the conclusion that the validity of the suretyship is determined when the creditor received it, not when surety signed it. It was held in *Jurgens* that a suretyship is a contract between a creditor and a surety, and which comes into existence upon the acceptance of an offer, made with the intention that it shall become binding as soon as it is accepted by the offeree.

In this application, it is evident from Crowie's evidence that she presented the respondents with the suretyships. They signed the documents and communicated that they would email them back to her. It was at that point that the suretyships constituted valid suretyships. True to their word, the

⁵ 2015 (2) SA 118 SCA.

⁶ 2022 JDR 0901 (GJ).

⁷ 1993 (1) SA 214 (A).

respondents did send the signed suretyships back to Crowie. *Jurgens* does not, therefore, assist the respondents' case.

Conclusion

[58] Having clearly forgotten about the recording of 21 October 2021, the respondents embarked on a course of deceitful conduct of approbating and reprobating, which consisted of initially admitting and acknowledging their indebtedness and even signing an acknowledgment of debt. Thereafter, they attempted to seek refuge in the provisions of the ECTA and suggested that the suretyships did not comply with the Act. Subsequently, they engaged in a downright fraudulent act of denying their signatures and submitting an affidavit by an employee confirming that he was the person who signed the suretyships and not the respondents. I find the behaviour to be despicable, to say the least.

[59] These denials are made despite a memorandum of agreement in which the respondents not only admitted the execution of the suretyships but later confirmed it under oath.

[60] In light of the above, and after considering the evidence and submissions by counsel, I am satisfied that the applicant has made out a proper case and the following order ensues.

Order

1 Condonation is granted for the filing of the supplementary answering affidavit and the supplementary replying affidavit.

2 Judgment is granted in favour of the applicant against the first and second respondents, jointly and severally, the one paying the other to be absolved for payment in the amounts of:

2.1 R 36 483 224.33 plus interest thereon at the rate of Prime (currently 11.50% per annum), minus 0.50% per annum, calculated daily, compounded monthly in arrears from 08 October 2024 until date of payment, both days inclusive in respect of account number 3-...]

2.2 R 10 436 452.53 plus interest thereon at the rate of Prime (currently

11.50% per annum), plus 0.25% per annum, calculated daily, compounded monthly in arrears from 08 October 2024 until date of payment in respect of account number 3-...].

2.3 R 10 884 918.61 plus interest thereon at the rate of Prime (currently 11.50%), plus 3.00% per annum, calculated daily, compounded monthly in arrears from 08 October 2024 until date of payment in respect of account number 6[...].

2.4 R 6 180 017.15 together with interest thereon at 11.50% per annum, calculated daily and compounded monthly in arrears from 7 October 2024 to date of payment, both days inclusive of asset finance facility agreement.

3. The respondents are ordered to pay the costs of this application, jointly and severally, on an attorney and client scale.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 17 October 2024

Date of judgment: 15 April 2025

APPEARANCES:

For the Applicant:	Adv N Horn
Instructed by:	Werksman Attorneys Inc

For the Respondents:	Adv P F Louw
Instructed by:	Lacante Henn Inc Attorneys