



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

CASE NO: 114305/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
12/02/2025	
DATE	SIGNATURE

In the application between

**AIRCRAFT ASSET FINANCE CORPORATION
(PTY) LIMITED**

(Registration No: 2003/029134/07)

Applicant

And

DEYMINE (PTY) LIMITED

(Registration No: 2017/304226/07)

First Respondent

CORNELIUS JOHANNES DEYSEL

(Identity No: 800422 5087 083)

Second Respondent

EVERT PHILIP SERFONTEIN

(Identity No: 890306 5042 084)

Third Respondent

EPS COURIER SERVICES CC

(Registration No: 1996/052772/23)

Fourth Respondent

EPS LOGISTICS CC

(Registration No: 2010/005466/23)

Fifth Respondent

Neutral Citation:

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J

Introduction

- [1] This is an application for money judgment. The application arises due to the deeds of surety executed by the second to fifth respondents who bound themselves as sureties and co-principal debtors for the indebtedness of the first respondent, who is in liquidation.

Background

- [2] The first respondent concluded three master lease agreements for the rental of three Volvo equipment and the first respondent defaulted and was eventually liquidated. There is not relief sought against the first respondent.
- [3] The parties agreed that the first Respondent as principal debtor concluded the Master Rental Agreements and defaulted. The First Respondent has been wound up. The parties also agree that the remaining respondents executed the deeds of surety in favour of the applicant for the liability of the first respondent arising out of the Master Rental Agreement. The parties

also agreed that the outstanding balance has been confirmed by means of a detailed statement; a letter of demand; a termination agreement in terms of which the outstanding balance was confirmed by the respondents themselves and an Electronic Communication Transactions Act, no 25 of 2002 (“ECTA”) Certificate.

- [4] The respondents have raised several contentions that they aver are defences. Firstly, they deny that the amount claimed is due and payable. The basis of their contention is that when the first respondent made monthly repayments, the applicant refused to accept the payment and did not credit the first respondents with the alleged payments. They aver that the first respondent suffered serious financial setback and logistical challenges and was eventually wound up. They contend that the applicant did not submit its claim with the liquidators of the estate of the first respondent. They argue that the applicant should pursue its claim against the first respondent before it holds the respondents liable.
- [5] Secondly, so contend the respondents, they never intended to bind themselves to the applicant as sureties for the fulfilment of the first respondent's obligations with the applicant. In amplification of their alleged defence, they contend that they were never informed of the consequences of the deeds of surety. They furthermore aver that the members of the third and the fourth respondents never adopted the resolution to authorise the third and fourth respondents to conclude the deeds of surety. Consequently, so the argument goes, the third and fourth respondents never intended to be bound by the deeds of surety as co-principal debtors with the applicant and that the deeds of surety are void

and unenforceable. The respondents aver furthermore that they were ambushed with documents to sign and that they have no legal experience.

[6] The issue for determining is whether the defences raised by the respondents are sustainable.

[7] I now deal with the alleged disputed amount claimed and the principles on dispute of facts. In the seminal case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹, the Court held that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[8] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*² Heher JA said the following regarding a bona fide defence:

“A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When

¹ [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

² [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) at para 13

the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

- [9] In its founding affidavit, the applicant states fully the basis of its claim. It states how it launched an urgent application in Mpumalanga High Court against the first respondent and cited all the other respondents. It further states what the amount owing was in terms of each of the three rental agreement regarding the three equipment used in the colliery operated by the first respondent and the fact that both Part A order which was obtained *ex parte* and later confirmed in Part B order without opposition was dealt with. It states that the equipment had already been attached in terms of Part A order and that the equipment was sold by an online auction where the under recovery of the amount owed was R25 million plus interest sets out how the amount is made up which is supported by the statement of account which has been generated electronically.

[10] The answer provided by the respondents to the application's affidavit on the disputed amount is a bare denial of the amount and an averment that the applicant refused to accept payments from the first respondent. They do not provide an answer with the sufficient detail to enable me to assess the alleged disputed amount. It follows, therefore, that the alleged dispute of facts and the bona fide defence based on the alleged ground has not been supported by any cogent facts. Accordingly, the dispute raised by the respondents on the amount of the claim has not been established and the defence must fail.

[11] The view that I hold is supported by Clause 16.1 of the Master Rental Agreements which provides:

“A certificate signed by a manager or director of AAFC, whose position it shall not be necessary to prove, as to any amounts owing by the Hirer in terms of the Agreement, or any other fact, shall in the absence of manifest and/or clerical error, be prima facie evidence of the Hirer's indebtedness to AAFC herein.” The respondents have not provided facts in their papers suggesting that there was any manifest or clerical error pertaining to amount claimed.

[12] I now deal with the contention by the third and the fourth respondents that they did not intend to be bound by the deeds of surety because they are laymen with no knowledge or understanding of the law.

[13] In *George v Fairmead*³ the Appellate Division had an opportunity to deal with the contention where the party raised a contention that he was not

³ [1958] ALL SA 1 (A)

bound by what is contained in the agreement as a guest of the hotel because he had concluded a separate agreement with one official of the hotel he was staying which did not limit the hotel's liability to him. Fagan CJ, accepted what Innes CJ said in *Burger v. Central South African Railways*,⁴ that:

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he had put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither fraud nor misrepresentation has been alleged; nothing was said by any railway official which misled the signatory; the language of the document was one which the consignor understood; no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he had signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a principle unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such *justus error* as would entitle him to claim a *restitutio in integrum*, or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when the railway seeks to rely upon it.” This has been the law of our Republic and various courts judgments have not suggested the departure from this principle. Accordingly, there is no merit to suggest that a person can sign an agreement without an intention to be bound by the terms thereof.

⁴ 1903 T.S. 571, at 578

[14] It is trite that a contract of suretyship is accessory to the contractual relationship between the principal debtor and the creditor.⁵ In this regard, Wallis JA in *Van Zyl v Auto Commodities (Pty)Ltd*⁶ said the following:

“[11] A contract of suretyship is distinct from the contract or contracts between the principal debtor and the creditor that give rise to the principal indebtedness, but it is accessory to that contractual relationship and the principal debtor's obligations under it. Subject to any specific limitation, such as a suretyship in a limited amount, the surety's obligations are coterminous with those of the principal debtor. Where the surety signs as co-principal debtor, as Mr van Zyl did, the addition of those words shows that the surety is assuming the same obligations as the principal debtor. In other words, the obligation of the surety is the same as that of the principal debtor.⁷ It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal debtor.⁸

[12] A consequence of this is that if the principal debtor's debt is discharged, whether by payment or release, the surety's obligation is likewise discharged.⁹ If the principal debtor's obligation is reduced by compromise the surety's obligation is likewise reduced. If the principal debtor is afforded time to pay that enures for the benefit of the surety.¹⁰ If the claim against the principal debtor prescribes so does the claim against the surety.¹¹ This will be subject to any terms of the deed of suretyship that preserve the surety's liability notwithstanding the release or discharge of, or any other benefit or remission afforded to, the principal debtor.”

⁵ See Forsyth and JT Pretorius Caney's *The Law of Suretyship* 6th Edition at p38.

⁶ [2021] ZASCA 67; [2021] 3 All SA 395 (SCA); 2021 (5) SA 171 (SCA) at paras 11 and 12

⁷ *Kilroe-Daley v Barclays National Bank Ltd* [1984] ZASCA 90; 1984 (4) SA 609(A) at 622H-623H.

⁸ *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA (A) at 470C-D.

⁹ *Moti and Co v Cassim's Trustee* 1924 AD 720.

¹⁰ *Tuning Fork* paras 46 to 49 and the authorities there cited.

¹¹ *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA).

[13] Although a principal debtor's discharge from liability ordinarily releases the debtor's surety, the accessory nature of a surety's liability is not so rigidly applied in our law as to preclude some derogation by way of agreement between the creditor and the surety.¹² As will be shown below, the terms of the Deed of Surety are an important consideration.

[14] The respondents have also argued that the applicant must first file its claim against the estate of the first respondent and if it does not achieve the full recovery, only then can it claim against the respondents. This is a common law exception of excussion. Absent any agreement to the contrary, the respondents would, in principle, be correct. To test if this is correct, regard should be had to the terms of the Deeds of Surety.

[15] Page two of the Deeds of Surety and paragraph two thereof provide as follows:

“The **Surety** hereby renounces the benefit of legal exceptions of excussion and division, with the force and meaning whereof I acknowledge the **Surety** to be fully acquainted. The **Surety** waives and abandons any right it might otherwise have had to rely on prescription of any obligation of the **Principal Debtor** or of itself to the **Creditor**, and the **Surety** undertakes not to raise prescription as a defence to any claim brought against it by the **Creditor** pursuant to this deed. The **Surety** shall be bound by this deed whether or not any other intended surety becomes such.”

¹² See Van Zyl case footnote 6 above para 4.

[16] The effect of the paragraph referred above is that the right to raise the defence as the respondents sought to do has been waived as agreed between the parties. The Court has no basis to interfere with what the parties to the Deeds of Surety agreed upon.

[17] In *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*¹³ the issue for determination was whether the appellant's right of action against respondent, a surety and co-principal debtor, became prescribed under the Prescription Act, 18 of 1943. Before the Court considered the issue it restated the law on suretyship to be as follows:

“From the above and other authorities it appears that generally the only consequence (albeit an important one) that flows from a surety also under-taking liability as a co-principal debtor is that *vis-à-vis* the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor (see, for example, Caney, *Law of Suretyship*, 2nd ed., p. 51; Wessels on *Contract*, 2nd ed., paras. 4087, 4088, and 4124; Voet, 46.1.16 and 24 (*Gane's* trans., vol. 7, pp. 38-9, 48-9); Pothier on *Obligations*, paras. 408, 416 (*Evans' trans.*, pp. 330, 335-6). However, he retains the right, on paying the creditor, to obtain a cession of the latter's rights and securities in order to recover the full amount from the principal debtor (*Caney, supra* at p. 52; *Kotze v. Meyer*, 1 Menz. 466; *In re Deneys*, 3 Menz. 309; *Business Buying and Investment Co. Ltd. v. Linaae*, 1959 (3) S.A. 93 (T) at p. 96). It follows, I think, that in the present case respondent, by also signing as a co-principal debtor, did not transform his accessory obligation as a surety into a joint principal obligation as co-lessee with Benam. As Burge on *Law of Suretyship* says of co-obligators liable *in solidum* (*correi debendi*) at p. 394” Although the appeal was dismissed based on prescription,

¹³ [1978] 2 All SA 1 (A) page 7

but the principles underlying the law on suretyship were fully and correctly restated.

[18] I now consider another defence by the respondents that the deponent to the founding affidavit of the applicant has not provided evidence that he has authority to launch the application. They contend that because Mr. Lizemore, who deposed to the application is not a director and that because his authority has been challenged, that the application should be dismissed on this basis alone.

[19] Mr. Botes SC referred me to the case of *Ganes v Telecoms Namibia Ltd*¹⁴ as the authority for this proposition. In that case, the SCA said the following regarding the defence of lack of authority to institute the application/action:

“In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.

¹⁴ [2003] ZASCA 123; [2004] 2 All SA 609 (SCA); 2004 (3) SA 615 (SCA)

The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703(W) at 705C-J.)”

[20] Mr Botes SC submitted that because the respondents challenged the authority of Mr Lezimore to institute the application and depose to an affidavit on behalf of the applicant and failed to provide the evidentiary proof of the authority when challenged, the application must be dismissed. This submission loses the principle established in the case relied on by the respondents. Mr. Lizemore says he is employed by the applicant as the credit analyst, and he is authorised to institute the application and depose to an affidavit on behalf of the applicant.

[21] The submission is not sustainable. Firstly, Rule 7 the Uniform Rules envisages the challenge to the legal representative to act on behalf of a party. It does not envisage the situation where an employee deposes to an affidavit on behalf of the company. There is no impediment for Mr Lezimore, as an employee of the applicant, to depose to an affidavit providing the details of the claim and its basis. Secondly, there is no need for a deponent to prove that he/she is authorised to give evidence by way of an affidavit to prove the basis of the applicant’s claim. It follows that the defence must fail.

[22] Mr Botes SC furthermore submitted that because the First Respondent has been wound up, it ought not have been cited in the proceedings. He relies for his proposition on the provisions of section 359(1) of the Companies Act, 61 of 1973 for his proposition. The section provides that where the court has made an order winding -up the company, all civil proceedings by

or against the company concerned are suspended until the appointment of a liquidator.

[23] The proposition is the correct one. I have indeed looked at the notice of motion as well as the draft order and noted that the citation of a first respondent gives no indication on its face that the first respondent is in winding-up. However, the argument does not take the matter any further because it was accepted in the joint practice note by all the parties in this litigation that the first respondent has been wound-up. The consequence thereof must be and is that no relief is sought against the first respondent. The point has therefore become moot.

[24] The prohibition against civil litigation of a company in winding-up is no bar to the enforcement of the Deed of Suretyship if the legal exceptions have been waived. It is not necessary to wait for the appointment of the liquidator before the enforcement of deeds of surety can be embarked upon. Accordingly, as already stated, the defence must fail.

[25] Mr Botes sought to rely on what the Court said in *Dole South Africa Pty Ltd v Pieter Beukes (Pty) Ltd*¹⁵ for the proposition that the respondents were not aware of what they were signing.

¹⁵ 2007(4) SA 577(C) at 587 where the Court said: “A party to a contract who has concluded same whilst labouring under a *bona fide* and reasonable mistake as to its contents will not be bound by the provisions thereof. In particular, where the contracting party has been led to believe by the other party that the contract contains certain provisions, which in fact it does not, the party relying upon the misrepresentations, will not be bound by the agreement. In this regard it was stated in *Tesoriero v BHYJO Investments Shareblock (Pty) Ltd*. 2000(1) SA 167(W) at 175: “**The misrepresentation need not have been fraudulent or negligent. The duty to inform would or could arise where the document departs from what was represented, said or agreed beforehand or whether other contracting party realizes or should realize that the signatory is under a misapprehension or whether the existence of the provision or the contract is hidden or not apparent by**

[26] It should be remembered that the general principle set out by Innes CJ in *Burger v Central South African Railways*¹⁶, namely that:

“It is a sound principle of law that a man, when he signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature,” has not been changed as part of our law. It must therefore follow that the defence raised in this regard is not supported by the facts and the law and must fail because on the evaluation of the papers, not case has been made in this regard by the respondents.

Order

[27] Having read the documents filed of record and having considered Counsel’s submissions, it is hereby ordered that:

27.1. The Second to Fifth Respondents, jointly and severally, the one paying the other to be absolved to make payment to the Applicant in the amount R29 018 132.57.

27.2. Interest on the amount aforesaid at the rate of 2% per month, from the 13th of September 2023 calculated daily and compounded monthly in arrears, until the date on which the Applicant receives payment; and

27.3. That the Second to Fifth Respondents, jointly and severally, the one

reason of the way in which it is incorporated in a document or whether provision, not clearly presented, is unusual or would not normally be found in the contract presented for signature.”

¹⁶ 1903 TS 571

paying the other to be absolved, pay the Applicant's costs in respect of this application on the scale as between attorney and client.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD:

14 October 2024

DATE JUDGMENT HANDED DOWN:

11 February 2025

APPEARANCES

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Lanham-Love Galbraith-van Reenen In

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