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Case No 404/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DIRK HENDRIKUS JURGENS (Snr)	1st Appellant
DIRK HENDRIKUS JURGENS (Jnr)	2nd Appellant
GEERT DIRK JURGENS	3rd Appellant
JURGENS BODIES CARAVANS & TRAILERS COMPANY (PTY) LIMITED	4th Appellant
TEREXKO LIMITED	5th Appellant
CORNELIS PETRUS SWART	6th Appellant
and	
VOLKSKAS BANK LIMITED	Respondent

CORAM: HOEXTER, HEFER, GOLDSTONE, JJA et HOWIE, KRIEGLER, AJJA

HEARD: 18 August 1992

DELIVERED: 17 September 1992

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

In an application for summary judgment ("the application") made in the Witwatersrand Local Division **Lazarus J** (whose recent untimely death is a loss keenly felt by the profession) granted judgment in favour of the respondent against the six appellants, jointly and severally, for payment of R2,9 million, interest thereon, and costs. With leave of **Eloff JP** the appellants appeal to this court against the said orders.

The fourth and fifth appellants are two of a number of companies within the Jurgens Group ("the group") which has its offices at Jurgens House in Kempton Park. The first, second, third and sixth appellants are directors of the companies within the group. One of the companies in the group is Jurgens Landgoed (Edms) Beperk ("the principal debtor") which is in liquidation.

The principal debtor was a client of the

respondent at its Kempton Park branch. The respondent advanced money to the principal debtor by way of overdraft facilities. As security for the overdraft the respondent from time to time required the first, second, third and sixth appellants, both personally and in their representative capacities as directors of the fourth and fifth appellants, to sign various bank guarantee documents.

During March 1991 the respondent instituted an action against the six appellants and the wife of the sixth appellant ("Mrs Swart"), jointly and severally, for payment of an amount in excess of R8 1/2 million, together with interest thereon, and costs. The respondent's summons alleged that the sum claimed had been advanced by it to the principal debtor by way of the aforementioned overdraft, and that the appellants and Mrs Swart had bound themselves to the respondent as sureties and co-principal debtors in respect of the principal debtor's aforesaid indebtedness.

Annexed to the summons were copies, respectively marked "A", "B" and "C", of three contracts of suretyship. The appellants and Mrs Swart gave notice of intention to defend the action, whereupon the respondent made the application. The application was resisted by all the defendants to the action, the main opposing affidavit ("Swart's affidavit") being deposed to by the sixth appellant. At the hearing the application against Mrs Swart was withdrawn.

Swart's affidavit raised a number of grounds of objection to the application. However, in argument before **Lazarus J** only two defences were put forward. The second defence related to the amount of the principal debtor's indebtedness to the respondent. It succeeded to the extent that it induced the learned judge (1) to grant summary judgment in the lesser amount of R2,9 million and (2) to give leave to the appellants to defend in respect of the balance claimed. The first defence was that each of

the three suretyships reflected in Annexures "A", "B" and "C" to the summons, and on which the respondent's action was founded, failed to comply with the provisions of sec 6 of the General Law Amendment Act No 50 of 1956 ("the Act") as amended by sec 34 of Act No 80 of 1964. **Lazarus J** held that the first defence was legally unsound. The correctness or otherwise of that finding is the sole issue in this appeal.

The factual basis of the first defence is the following. Each of Annexures "A", "B" and "C" is a printed bank form headed by the name of the respondent and designed for completion as a contract of suretyship by the filling in of appropriate blank spaces and by signature by or on behalf of a surety or sureties. Annexure "A", which bears the sub-heading **"WAARBORG DEUR TWEE OF MEER BORGE - ONBEPERK"** is intended for suretyships undertaken by natural persons. Annexures "B" and "C" each bear the sub-heading

"WAARBORG DEUR BEPERKTE MAATSKAPPY." All the blank spaces in Annexures "A", "B" and "C" have been filled in. Thus, for example, on the first page of Annexure "A" there have been inscribed, in typescript, the name of the principal debtor and the names of the sixth, the first, the third and the second appellants respectively as the sureties; and on the last page of the document there have been inscribed in typescript **"KEMPTON PARK"** as the place, and **"13de .... DESEMBER** 1988" as the date of signature by the sureties. Thereunder appear four signatures. It is common cause that these are the signatures of the sixth, first, third and second appellants respectively. It is not common cause that such signatures were affixed on 13 December 1988. The typescript filled in on the remaining two guarantees respectively name the fourth appellant (in Annexure "B") and the fifth appellant (in Annexure "C") as the surety for the indebtedness of the principal debtor;

and the names of the first, third and sixth appellants (duly authorised by a board resolution) acting for and on behalf of the surety in each case. On the last page of each of Annexures "B" and "C" the same place (Kempton Park) and the same date of signature (13 December 1988) have been typed in. Thereunder appear three signatures. It is common cause that these are the signatures of the first, third and sixth appellants respectively. It is not common cause that such signatures were affixed to Annexures "B" and "C" on 13 December 1988.

Whenever the respondent required suretyships from the appellants the printed bank forms such as those already described were delivered by the respondent at the group office. According to Swart's affidavit such documents -

> ".... although **prima facie** signed on a particular date by particular persons ...."

were in fact signed -

> "....from time to time by whichever of the

> signatories were then present .... in blank and in an incomplete state pending final signature by the last of the persons concerned, whereupon one of the secretaries [at the group office] would complete the documents by inserting the appropriate names."

Swart's affidavit proceeds to say that each of the suretyships reflected in Annexures "A", "B" and "C" was so signed, and -

> ".... at the time each of the signatures was appended thereto, the document was inchoate in that, in particular, none of the typescript appearing throughout the body of the document had been inserted...."

It is not expressly stated in Swart's affidavit that it was only after the secretaries of the group had typed in all the relevant particulars now appearing therein that Annexures "A", "B" and "C" were delivered to the respondent, but in the course of his judgment **Lazarus J** correctly concluded that this was the obvious inference to draw. In argument before this court it was common cause that all three suretyships were returned to the respondent

after they had been so completed on behalf of the appellants.

The court below gave the first defence short shrift. **Lazarus J** said the following:-

> "I refer to the case of **Standard Bank of South Africa v Jaap de Villiers Beleggings** 1978(3) SA 955(W), where **Coetzee J** held that the relevant time for considering whether a suretyship is complete is the time of delivery and not the time of signature. He found that **Miller JA** in the case of **Fourlamel (Pty) Ltd v Maddison** 1977(1) SA 333(A), had not intended to deal with the case where the suretyship was complete at the time of delivery though incomplete at the time of signature. In my respectful view this is correct, and I in any event regard myself as bound by the case."

Sec 6 of the Act is in the following terms:-

> "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 the **Fourlamel** case (**supra**) the defendant

surety raised the defence that the printed document which bore his signature had been a blank form at the time when he signed it. In delivering the unanimous judgment of this court **Miller JA** (at 341 C-D) defined the essential issue between the parties as being -

> "....whether, if the printed document was in blank in the respects alleged by respondent at the time of his signing thereof, the unilateral insertion thereafter, by another, of the missing details, resulted in a contract of suretyship 'the terms (whereof) are embodied in a written document signed by or on behalf of the surety', within the meaning and effect of those words in sec 6 of Act 50 of 1956."

Counsel for the appellant in the **Fourlamel** case had submitted that sec 6 of the Act required only that the terms of the contract of suretyship be embodied in a written document bearing the surety's signature, irrespective whether the orally agreed terms were so inscribed before or after the surety appended his signature. In rejecting this submission **Miller JA**

remarked (at 341 G-H):-

> "The plain, grammatical meaning of the words used in sec 6 appears to me to be clear. The section presupposes that an agreement of suretyship has been reached - 'contract of suretyship entered into' - and it provides thereafter that such agreement shall not be valid
>
> > 'unless the terms thereof are embodied in a written document signed by or on behalf of the surety.'
>
> What is it that requires to be signed by the surety? It is surely the written document containing the terms of the agreement (Cf. the Afrikaans version
>
> > '....tensy die bepalings daarvan in 'n deur of namens die borg ondertekende skriftelike dokument beliggaam is'.)."

In the course of his judgment **Miller JA** considered what objects sec 6 had been intended to achieve. In this connection the learned judge of appeal pointed out the following (at 342 **in fin** - 343 C) -

> "However many objects the Legislature may have had in mind in enacting sec 6 of Act 50 of 1956, one of them was surely to achieve certainty as to the true terms agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary litigation. This is a purpose which, despite differences in wording, is common

> to the enactments relating, respectively, to contracts for the sale of land (see, e g, **Wilken v Kohler,** 1913 A.D. 135 at pp 142, 149; **Clements v Simpson,** 1971 (3) SA 1 (A.D.) at p 7) and to agreements of hire-purchase (**Van Rooyen v Hume Melville Motors (Edms) Bpk., supra** at p 71). The Legislature may also have been influenced by other considerations, for example, that suretyship being an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after their undertaking had been recorded in a written document and signed by them or on their behalf. These objects would clearly be defeated if it were left to another, after a party had appended his signature to a blank document, to insert the terms of a prior verbal agreement."

Suretyship is a bilateral jural act. See **LAWSA** vol **26** par 156 at p 138. It is a contract which arises from agreement between creditor and surety, and it involves the acceptance of an offer. An offer is a manifestation of the offeror's willingness to contract, made with the intention that it shall become binding as soon as it is accepted by the offeree. It is trite that an offer cannot

be accepted unless and until it has been brought to the attention of the offeree. It need hardly be said that there is a fundamental difference between, on the one hand, the situation in which after a surety has signed and delivered a blank form to the creditor, the latter unilaterally completes the blank form by filling in some of the contractual terms, and, on the other hand, the situation in which the surety has signed a blank form which is then filled in, by, or for and on behalf of the surety, before the document so completed is delivered to the creditor. In the **Fourlamel** case this court was concerned only with the former situation.

A prerequisite for a contract of suretyship is that the offer communicated by the would-be surety to the creditor must be complete. In the instant case, so it seems to me, the appellants communicated their offers to the respondent when the documents in question, duly filled

in, were delivered by or on behalf of the appellants to the respondent. It cannot be suggested that, on the face of them, these offers were in any respect incomplete. At that juncture they contained the terms essential for the material validity of a contract of suretyship (the identity of the creditor; the identity of the surety or sureties; and the amount of the principal debt.) These terms had been incorporated at the group office by the secretaries of the group for and on behalf of the appellants. Each such document bore the signatures of those of the appellants named therein. It is not in dispute that the suretyships thus delivered to the respondent were accepted by it.

It will be recalled that in rejecting the appellants' first defence the court **a quo** relied upon the judgment of **Coetzee J in Standard Bank of South Africa v Jaap de Villiers Beleggings (supra)**, to which I shall refer

hereafter as "the **De Villiers** case". There the plaintiff bank had partially filled in one of its standard printed suretyship forms. The incomplete form was then handed to the defendant surety which further filled in the form. The form was signed on behalf of the surety and handed back to the bank. At that stage there was still blank a clause which provided that the guarantee would remain in force as a continuing guarantee -

"..... until the .... branch of the Bank"

should receive written notice of termination and until the sums due at the date thereof should have been paid. Having received the signed document the bank in the blank space just indicated caused to be typed in on the document the words:-

"Standard Bank Centre"

Relying on the suretyship, the bank sued the surety. The latter noted an exception to the claim on the ground that

the document did not comply with sec 6 of the Act in that at the time of its signature not all the "terms thereof" had been embodied therein. The notice of exception stated that the term not so embodied was contained in the words "Standard Bank Centre" abovementioned.

Coetzee J dismissed the exception. The learned judge held that a contract had come into existence when the signed document, which contained all the terms material to suretyship, had been returned to the bank. The clause in which the words "Standard Bank Centre" had subsequently been inscribed by the bank was irrelevant to the action and the signed document made sense without those words. The following observations in the judgment of **Coetzee J** (at 958 A-D) seem to me to be pertinent to the issue in this appeal:-

> "The question which must be answered in the first instance is when did the parties, as the declaration is framed, actually enter into an agreement of suretyship, one that had to be

> embodied in writing. It seems to me that, on the facts alleged in the declaration, such a contract could not, on any basis, have come into being until the defendant **delivered** the document signed by him to the plaintiff. When he took the document away, there may already have been an agreement reached between itself and the plaintiff in relation to the suretyship. It may be that the purpose of taking the document away was for the defendant to complete it in whatever way was necessary. Now if the defendant had signed it at some or other stage and kept it locked up in the privacy of its own premises, then clearly until it informs the plaintiff that such a document exists with the intention of creating a valid **vinculum juris** thereby, no such **vinculum juris** can possibly come into existence. It can only begin to exist at a moment when the defendant manifests its intention of being bound according to the tenor of the document and, on these facts, that is when it delivers that piece of paper to the plaintiff and not before. Consequently, the important point in time at which I should look, for the purposes of the exception, is the moment of delivery of this document to determine whether a valid contract came into existence at that moment."

Sec 6 of the Act requires (i) that the terms of the contract of suretyship shall be embodied in a written document which (ii) shall be signed by the surety. The

function of a signature is to signify that the writing to which it pertains accords with the intention of the signatory. It conveys an attestation by the person signing of his approval and authority for what is contained in the document; and that it emanates from him. Sec 6 is silent as to when the surety's signature must be affixed to the document. Nothing is prescribed as to the sequence in which completion of the document and the affixing of his signature by the surety must occur.

The Act is similar in purpose to the English Statute of Frauds - see **Wilken v Kohler (supra)** at 142. Kindred legislation exists in the United States of America. In regard to the antecedent signature of a document subsequently completed, the following remarks of **Corbin, on Contracts**, vol 2 (Statute of Frauds) para 522, are instructive. At p 769 the learned author states:-

> "It is not usual to sign a formal document until it is complete in form with its terms fully written out. Nevertheless, sometimes words are scratched out and new words inserted by

> interlineation or other addition, after the act of signing. The document as thus amended is quite effective to perform its ordinary functions if what is known as 'delivery' takes place after the amendment. There need be no new act of signing."

On p 770 the following is said:-

> "In requiring a memorandum signed by the party to be charged, the statute of frauds makes no requirement as to the time of inscribing the signature. The court must be satisfied that the signature was intended as an authentication of the instrument in the form in which it is now afforded as evidence; but it may be satisfied of this even though the signature was inscribed before the terms of the agreement were written. This is shown by the cases holding that a name written at the beginning of a letter as the address, or a name printed on a letterhead long before the subject matter appears on the paper, may operate as a signature. **In all these cases, it must be shown that the name antecedently inscribed was adopted by the party to be charged as his authenticating signature."**
> (Emphasis supplied.)

In my view it is quite immaterial whether the surety signs the document only after all the material terms have been written therein or whether the surety signs the

document first and thereafter, by his own hand or that of his agent, completes the document by filling in the material terms. In either case the surety's signature serves to authenticate the document.

Mr **Hoffman**, who argued the matter on behalf of the appellants, urged upon us that the **De Villiers** case had been wrongly decided; and that, upon a proper construction of the judgment in the **Fourlamel** case, **Lazarus J** had erred in failing to uphold the first defence in the court below. Counsel founded his argument on the passage which occurs at 341 G-H in the judgment of **Miller JA**, and in particular the following statement:-

> "What is it that requires to be signed by the surety? It is surely the written document containing the terms of the agreement."

It was said that, in so interpreting the provisions of sec 6 of the Act, this court in the **Fourlamel** case had laid down without qualification the following principle of

general application: that whenever a would-be surety affixes his signature before completion (by whomsoever, including the surety himself) of the document embodying the terms of the suretyship, there can never be compliance with the requirements of sec 6. On the other hand Mr **Du Plessis**, who appeared for the respondent, submitted that no such broad proposition of law was implicit in the actual decision of the **Fourlamel** case; and that, in dealing with the particular facts of the present case this court was unhampered in determining the legal point here involved. For the reasons which follow I agree with the latter submission.

At the outset it is useful to bear in mind the salutary reminder of the **Earl of Halsbury LC** in **Quinn v Leathem** 1901 AC 495 (HL(I)) at 506:-

> "....that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not

> intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found .... that a case is only authority for what it actually decides."

I have already indicated what the sole issue was in the **Fourlamel** case. That what was decided in the **Fourlamel** case was intended by the court to be confined to its particular facts, and the only issue raised by them, appears sufficiently, I think, from the following observations of **Miller JA** when he found it necessary to contrast the facts of the case before him with the facts in **Levin v Drieprok Properties (Pty) Ltd** 1975(2) SA 397 (A). Of the last-mentioned decision **Miller JA** said (at 344 A-B):-

> "In that case, after a written offer for the purchase of land had been made, the offeror's agent made an alteration to it. The Court left open the question whether, if the agent was verbally authorized to make the alteration, a valid contract of sale would have resulted from the written acceptance by the seller of the amended offer (p.409G)."

Immediately thereafter **Miller JA** proceeded to say:-

> "What is important to note in that connection, however, is that the question left open by the Court related to an alteration made by **the offeror's agent**, not by any other person. Here, the additions to the deed of suretyship **were not made by the respondent or his agent.**"
> (Emphasis supplied.)

In the instant case the additions to the suretyships were made on behalf of the appellants before they were returned to the respondent. That was the very situation which **Miller JA** was at pains to distinguish from the facts of and the issue in the **Fourlamel** case. It follows, despite the general statement made by **Miller JA** in the **Fourlamel** case at 341 G-H (and likewise at 344 D), that on the facts proved in the present appeal we are at liberty to state our view of the law on the point which here arises untrammelled by what was said in the **Fourlamel** case. In passing, however, and with much deference, I am constrained to say

that in the future this court may yet be required to reconsider the correctness of the broad proposition stated at 341 G-H of the **Fourlamel** case. In support of that proposition **Miller JA** (at 342 D-H) relied upon **Van Rooyen v Hume Melville Motors (Edms) Bpk** 1964(2) SA 68(C). For purposes of the present appeal it is unnecessary to decide whether that case was correctly decided. It is likewise unnecessary to venture any opinion as to whether there would still be compliance with sec 6 where the surety fills in a material term **after** the signed document has been delivered to the creditor. Suffice it to say that on the particular facts there assumed for the purposes of an exception, the result in the **De Villiers** case was correct; and that on the particular facts proven in the present case the judgment of **Lazarus J** is right and should not be disturbed.

For the above reasons I consider that the appeal should be dismissed with costs, including the costs of two counsel.

G G HOEXTER, JA

Hefer, JA)
Goldstone, JA) Concur
Howie, AJA)
Kriegler, AJA)