IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2473/2020

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

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DATE

In the matter between:

GOOSEBAY FARM (PTY) LTD Plaintiff

and

ICON CIVIL ENGINEERING (PTY) LTD First Defendant

WAYNE FRANCES NEARY Second Defendant

JUDGEMENT

MKHABELA AJ

[1] This is an application for an order declaring the plaintiff's particulars of action excipiable on account of failing to disclose a cause of action in relation to the second defendant. The dispute is centred around the manner that the agreement that forms the basis for the aplicant's claim has been pleaded. On the one hand the second defendant alleges that the agreement is an agreement of suretyship that is excipiable for failure to comply with the Section 6 of the General Law Amendment Act 50 of 1956 which provides that suretyship agreements must be in writing and signed by both parties and on the other hand, the plaintiff contends that its claim is based on a contract of guarantee.

[2] The plaintiff is Goosebay Farm (Pty) Ltd, a company with limited liability, incorporated in terms of the laws of the Republic of South Africa, having its principal place of business in Boksburg, Johannesburg.

[3] The first defendant is Icon Civil Engineering (Pty) Ltd, a company with limited liability, incorporated in terms of the laws of the Republic of South Africa, having its principal place of business in Krugersdorp, Gauteng.

[4] The second defendant is Wayne Frances Neary, a major male residing in Lonehill, Johannesburg and employed as a Director of the first defendant.

[5] The plaintiff instituted action proceedings against the first and second defendants in respect of the sale agreement between the plaintiff and the first defendant which was allegedely concluded partly orally and partly in writing on or about 1 November 2017 (the agreement). The written portions are contained in e-mail exchanges between the plaintiff and the second defendant, whom at all material times when the agreement was concluded, was acting on behalf of the first defendant.

[6] The second defendant is sued pursuant to its role as guarantor for the liability of the first defendant's indebtedness to the plaintiff in terms of the agreement. In the plaintiff's particulars of claim[1] the grounds for the second defendant's liability is pleaded at paragraph 7.10 of the particulars of claim and reads thus:

> *"The second defendant guaranteed due payment by the first defendant and would personally be liable, jointly and severally with the first defendant, for payment of the amount due by the first defendant, in the event of the first defendant defaulting on making due payment."*

[7] Further, the plaintiff has attached an email that was sent to the second defendant in terms of which the liability of the second espondent as a guarantor of the first respondent's indebtedness to the plaintiff was mentioned. This email is dated 1 November 2017 and is attached as annexure A2 in the particulars of claim, the contents of which read as follows:

> *"as stated above, should the Icon Group not make payment to Goosebay Farm (Pty) Ltd, then Mr Wayne Neary undertakes to make payment to Goosebay Farm (Pty) Ltd for the materials, on the basis set out hereinabove"*

[8] The summons was met with an exception by both defendants. The plaintiff subsequently amended its particulars of claim but the second defendant contends that the plaintiff has not rectified the complaint relating to the second defendant.

[9] The question that arises crisply for determination is whether the plantiff's claim against the second defendant is based on a contract of suretyship or on a contract of guarantee. The second defendant's exception to the particulars of claim is that the particulars do not in relation to the second defendant disclose a cause of action for the following reason:

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[1] Paragraph 4.9 of annexure A2 attached to the particulars of claim should be read together with paragraph 7.10 of the particulars of claim.

> *"the plaintiff in essence seeks[2] to rely on an agreement which constitutes a suretyship. The alleged agreement upon which the plaintiff relies does not comply with the provisions of Section 6 of the General Law Amendment Act, 50 of 1956 and is accordingly void and unenforceable."*

[10] During oral arguments as well as in the written heads, Mr Redman, counsel for the second defendant, submitted that the literal reading of the relevant paragraph in the particulars of claim as pleaded indicates that the plaintiff is relying on a suretyship agreement. He urged me to uphold the exception for want of compliance with Section 6 of the General[3] Law Amendment Act, 50 of 1956 (*"the Act"*).

[11] Mr Nel, counsel for the plaintiff, submitted that the plaintiff was relying on a contract of guarantee and not a suretyship agreement. Further that our Courts are reluctant to decide exceptions questions concerning the interpretations of a contract.

[12] In response, Mr Redman, for the second defendant, submitted that it is not necessary for the Court to interpret the agreement. All that is needed is for the Court to identify the agreement as a suretyship in the same way one would be able to identify the elements of a sale agreement.[4]

[13] I hasten to mention that it is worth observing that the Court is dealing with proceedings on exception. In *Picbel Group Voorsorgfonds v Somerville and other related matters*[5], the SCA citing the case of *Lewis v Oneanate & another*[6] stated the onus of proof in exception proceedings as such:

> *"At the outset it may be as well to remind ourselves that we are concerned with proceedings on exception. That being so, the respondents have the duty as excipients*

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2 Paragraphs 9 – 10 of the exception briefly summonses the grounds of the second defendant's exception and the second defendant avers that the plaintiff fails to plead the necessary cause of action against the second defendant.

3 Section 6 requires that a suretyship agreement should be in writing.

4 *Lewis v Oneamate (Pty) Ltd & Another* 1992 (4) SA 811 (A) at 817F-G.

5 2013 (5) SA 496 (SCA) at para ___.

6 1992 (4) SA 811 (A) at 817F-G).

> *to persuade the court that upon* ***every interpretation*** *which the particulars of claim (including the annexures) can reasonably bear, no cause of action is disclosed".*

[14] And, in *Sun Packaging (Pty) Ltd v Vreulink*,[7] Nestadt JA confirmed that there is no hard and fast rule that the interpretation of agreements is to be avoided on exception. He said:

> *"As a rule, Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain ... In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous ... Contracts are not rendered uncertain because parties disagree as to their meaning."*

[15] In this case there is disagreement between the plaintiff and the second defendant as to the true nature of the agreement between the plaintiff and the second defendant as it is pleaded in the particulars of claim. Is it a contract of guarantor or a suretyship agreement?

[16] What is a clear is that in law it cannot be a contract of suretyship since it was not reduced to writing and signed by the parties in line with the provisions of sections 6 of the General Law Amendment Act.[8] In oral argument as well as in the heads, counsel for the second defendant persisted with the contention that the substance of the agreement between the plaintiff and the second respondent is that of an agreement of suretyship that fails to comply with the statutory requirements of a suretyship agreement as required by the Act.

[17] This argument is akin to the case of *Vasco Dry Cleaners v Twycross*[9] where the court gave effect to the true nature of the agreement between the parties and not its form and concluded that though the form of the agreement was a contract of sale, its true nature as intended by the parties was a contract of pledge. In that case the court held that a pledge without possession is ineffective in our law and therefore the

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7 1996 (4) SA 176 (SCA).
8 Ibid fn 3.
9 1979 (1) SA 603 (A).

agreement was not construed as a contract of pledge. Similarly here, the second defendant contends that the plaintiff in substance concluded a suretship agreement but failed to reduce it into writing and have it signed by the parties as required by law.

[18] It was submitted on behalf of the second defendant that the question before the court for the resolution of the disputes rests on the identification of the contract. The plaintiff on the other hand submitted that the question concerns the interpretation of of the contract.

[19] In my view the characterisation of the agreement whether as a contract of guarantee or suretyship will require the factual matrix that were at play when the parties concluded the agreement.This is more so since the agreement is partly oral and partly written and its terms are common cause between the parties.

[20] On this ground, the second defendant has failed to discharge its duty as an excipient '*to persuade the court that upon* ***every interpretation*** *which the particulars of claim (including the annexures) can reasonably bear, no cause of action is disclosed.'*[10]

[21] Since the agreement is both written and oral, the context in which it was concluded would assist a trial court to determine its true form and substance. Thus, in my view, a dispute on the interpretation or identification of the agreement, is best suited for determination by a trial court and cannot be decided on the papers without being apprised about the relevant context.

[22] In *Dettmann v Goldfain & another*[11], the SCA stated that Courts are, in some instances, reluctant to

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10 Ibid fn 4

11 1975 (3) SA 385 400A-B.

> *'decide upon exception questions concerning the interpretation of a contract'. Those circumstances are, first, where the entire contract is not before the court; and secondly,* ***where it appears from the contract or the pleadings that 'there may be admissible evidence which, if placed before the Court, could influence the Court's decision as to the meaning of the contract'"***

[23] In *University of Johannesburg v Auckland Park Theological Seminary and Another*[12] the Constitutional Court emphasised that the interpretation of a contract is a question of law and not witnesses. The court also cited with approval the SCA position in *Novartis*[13] that –

> *"this court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. ... A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."*

[24] In the circumstances, a trial court is best placed to deal with the interpretation or identification of the agreement between the plaintiff and the second defendant. Mr Redman's contention that the issue is one of identification of the agreement and not interpretation ignores the advantage of the factual matrix in terms of which the agreement was concluded and therefore cannot be sustained for purposes of upholding the exception. Even if I were to attempt to identify the agreement and not interpret it, I would still have to take into account the factual matrix that led to its conclusion.

[25] In my view, the agreement as pleaded by the plaintiff at paragraph 7.10 of the particulars of claim read with paragraph 4.9 of annexure A2 is sufficient to sustain a cause of action for purposes of declining the exception and in that regard the particulars of claim are not excipiable. It is a matter for the trial court to determine whether or not the applicant will succeed in its claim.

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12 2021 (6) SA 1 (CC) at para 67.
13 *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA).

[26] I accordingly make the following order:

1. The exception to paragraph 7.10 of the plaintiff's claim by the second defendant is dismissed with costs.

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R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 22 January 2022.

COUNSEL FOR THE PLAINTIFF:	C J Nel
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ATTORNEY FOR THE SECOND DEFENDANT:	N Redman SC
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DATE OF HEARING:	25 October 2021

DATE OF JUDGMENT: 04 February 2022