Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 56155/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

MOTWELL PLANT HIRE (PTY) LTD
(Registration number: 2014/050269/07) **APPLICANT**

AND

YOLANDA ZERELDA JANSE VAN RENSBURG **FIRST RESPONDENT**
(Identity number: […])

CHARLES RICHARD SCHLOESSER **SECOND RESPONDENT**
(Identity number: […])

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 21st of AUGUST 2023.

DIPPENAAR J:

[1] This is an application for a money judgment in terms of which the applicant sought payment from the respondents, as sureties for the indebtedness of Our Comp (Pty) Ltd ("the company"), of an amount of R1 395 591.07 together with interest and costs on the scale as between attorney and client.

[2] Although judgment was initially sought against both the respondents, the applicant abandoned its claim against the second respondent in its heads of argument and at the hearing. It became clear that the second respondent had not signed the suretyship clause. The only issue remaining pertaining to the second respondent is that of costs, an issue to which I later return.

[3] The respondents did not deliver any answering affidavits. Instead, they delivered a notice in terms of r 6(5)(d)(iii) ("the notice") in terms of which it was contended that the application was bad in law as the application did not evidence compliance with the provisions of the General Law Amendment Act 50 of 1956 ("the Act"). It was contended that the written suretyship agreement relied upon by the applicant did not set out the identity of the second respondent and was not signed by him and that the document did not set out the identity of the principal debtor. It was further contended that the reference to the letters of demand, G1 to G6 to the founding affidavit, only served to

prove service of the letters but did not establish a cause of action against the respondents.

[4] The applicant abandoned reliance on s 77 of the Companies Act 71 of 2008. That disposes of the point raised by the respondents that the reference to the letters of demand referred to did not establish a case of action against them and nothing more need be said on that issue.

[5] The respondents are limited to the grounds advanced in the said notice. At the hearing, the arguments advanced by the respondents went wider than the ambit of their notice and it was in argument for the first time sought to be argued that the agreement between the applicant and the company was invalid, given that the first page of that agreement was blank and unsigned.

[6] That is not permissible[1], given that the respondents did not deliver any answering affidavit or expand upon the issues raised in their notice. On the papers, the validity of that agreement is not an issue for this court to determine and the validity of the written agreement between the applicant is not relevant to the present debate.

[7] Despite the applicant's objection to the widening of the ambit of the respondents' argument, the respondents did not seek a postponement or any opportunity to deliver an answering affidavit, if its legal points were not upheld.

[8] Although a court is most reluctant to hear a case without giving a respondent an opportunity to file opposing affidavits, the position in which the respondents find themselves is of their own making[2], given that they did not avail themselves of the opportunity to deliver any answering affidavits.

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[1] Minister of Finance v Public Protector 2022 (1) SA 244 (GP) para [15]
[2] Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd and Others 1992 (1) SA 432 (T) at 442 (majority judgment)

[9] It is well established that where a respondent relies exclusively on a rule 6(5)(d)(iii) notice, a court is to accept as established facts the allegations contained in the founding affidavit [3].

[10] It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence[4]. An applicant must raise the issues upon which it seeks to rely in its founding affidavit by defining the issues and by setting out the evidence upon which it relies to discharge the onus of proof upon which it relies to discharge the onus of proof resting on it in respect thereof.[5]

[11] There is further a distinct difference between primary and secondary facts. As explained by Joffe J in *Swissborough* [6]:

"Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts. See Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A. In the absence of the primary fact, the alleged secondary fact is merely a conclusion of law. Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 875 (A) at 793D. Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it.".

[12] Applying these general principles to r 6(5)(d)(iii) notices, it is the primary facts set out in the applicant's affidavits which a court must accept as established, not any secondary conclusions, unsubstantiated by primary facts.

[13] The respondents challenged the averments in the founding affidavit on the basis that they constituted secondary conclusions rather than primary facts, specifically in relation to the contention that the first and second respondents signed the plant hire contract as sureties.

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[3] Boxer Superstores Mthatha v Mbenya 2007 (5) SA 450 (SCA) para [4]-[5]; South African Broadcasting Corporation SOC Ltd v South African Broadcasting Pension Fund and Others 2019 (4) SA 608 (GJ) fn 65; Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009 (2) SA 512 (D) para [9]
[4] Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469C-E; Minister of Finance v Public Protector supra
[5] Swissborough 323E-324B
[6] 324B-E

[14] The central issue to be determined is whether the deed of suretyship complied with s 6 of the Act. Crisply put, whether it identified the principal debtor.

[15] The suretyship is contained in clause 4 of the agreement relied on by the applicant. It was signed by the first respondent on 2 February 2021 and reflects her identity number. It provides:

> *"SURETYSHIP*
>
> *I/We the undersigned bind myself/ourselves as surety for (sic) co-principal debtor in solidum with the hirer referred to in clause 1 above (the hirer) for the due payment of all amounts which the hirer may presently owe or may in the future owe to Motwell Plant Hire (Pty) Ltd arising out of any indebtedness whatsoever."*

[16] In its form, the prominent heading proclaims that it is a suretyship, the clause is conspicuous and the form alerts the signatory to the fact that it is undertaking a personal suretyship[7]. The surety and the creditor is identified. The principal debtor is only identified as "the hirer".

[17] Section 6 of the Act in relevant part provides:

> *"Formalities in respect of contacts of suretyship.*
>
> *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;"*

[18] It is trite that the terms of a suretyship must be embodied in a written document [8]. These include the identification of the nature and amount of the principal debt, the surety, the creditor and the debtor. They are terms of the contract and essential to the creation of a surety's liability[9]. These must be capable of ascertainment by reference to

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[7] JZ Brink v Humphries & Jewell (Pty) Ltd [2005] 2 All SA 343 (SCA)
[8] Sapirstein and Others v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A) at 12B-C
[9] Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 345B-D; Airports Company South Africa Ltd v Masiphuze Trading (Pty) Ltd 2019 JDR 2310 (SCA) para [14], [18]

the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification.

[19] It is well established that "*extrinsic evidence is admissible to identify matters referred to in the written document including the identity of the creditor, the principal debtor and the surety, as well as the nature and amount of the principal debt, provided such evidence does not seek to add to or supplement the terms of the written contract".*[10]

[20] The issue is whether the extrinsic evidence relied on by the applicant identifies the Hirer as the company, or whether such evidence seeks to add to or supplement the terms of the written contract.

[21] In sum, the applicant's case was that, reading the agreement as a whole, the company was identified as the Hirer (and principal debtor), that page 1 of the document, headed "Client Mandate", could and should be incorporated by reference to identify the company as Hirer, if necessary and that on the established facts set out in the particulars of claim, a valid cause of action was made out against the first respondent [11].

[22] The respondents' case was predicated on an interpretation of the agreement relied on by the applicant which sought to differentiate between the "Client Mandate" on page 1 of the document and the "Plant Hire Contract", which appears from pages 2 to 6 thereof.

[23] Their case in sum was that the plant hire contract which contained the deed of suretyship, commenced at page 2 (B2). As B2 is a blank form and the Hirer is not defined, the Hirer, as principal debtor was unnamed when considered against the suretyship clause. On this basis it was argued that a material term of the suretyship

[10] Airports Company South Africa Ltd v Masiphuze Trading (Pty) Ltd 2019 JDR 2310 (SCA) par [14]
[11] After abandoning its claim against the second respondent.

agreement did not appear therein, rendering the suretyship invalid and void *ab initio*. It was further argued that the applicant's allegation that the respondents were liable to it "in their capacities as sureties" was devoid of truth and substance and constituted a conclusion for which no primary facts were advanced.

[24] The agreement relied on by the applicant is a six-page document headed "Client Mandate". *Ex facie* the document, it comprises of six pages which were either to be completed in full and initialled[12] or were to be initialled[13]. This is stated under the heading "Notes on completing the client mandate".

[25] Paragraph 1 on page 1 deals with the "Applicant". Thereunder, the name of the company and other relevant particulars of the company have been inserted. *Inter alia*, in section 7 reference is made to the Hirer and if the Hirer is a registered company or close corporation", certain information is required. The address of the company's registered office, the name and address of its auditors and its registration number and VAT number have been inserted. In the paragraph, *inter alia,* the first and second respondents are further identified as the directors of the company. The page was initialed by the first respondent.

[26] Paragraph 2, which appears at page 2 of the document, is headed "Contract". At the top of the page, the words "Plant Hire Contract" appears. The paragraph appears to pertain to "Order placed" and space is provided for various particulars relating to order numbers and plant numbers and descriptions to be inserted. The particulars, including the identity of the Hirer is not inserted and the entire page is blank and unsigned. At the bottom of the page there is place for the name and signature of a duly authorised representative of the Hirer.

[27] The overleaf terms and conditions of hire, consisting of three pages, comprises of 25 paragraphs, commencing at paragraph 1. Reference is made therein to "owner"

[12] Pages 1, 2 and 6
[13] Pages 3, 4 and 5

and “hirer”. Those terms were signed by the first respondent as duly authorised director on 2 February 2021.

[28] There is no clause 3 in the document attached. The last page of the agreement contains clauses 4 to 7. Clause 4 is the suretyship already referred to Clauses 4 and 6 make reference to “hirer”. The document was signed on 2 February 2021 by the first respondent in her capacity as duly authorised director.

[29] On a purposive, grammatical and contextual interpretation of the agreement[14], I conclude that the entire document is to be considered as a whole and page 1 cannot be excised from the agreement as argued by the respondents. Considering the context, content and structure of the document, the distinction sought to be drawn by the respondents is artificial and ignores the clear indications on page 1 that the document is to be read and considered as a whole. The entire document attached as B1-B6 is to be kept together as a memorandum of the agreed transaction[15], irrespective of the various headings used in the document.

[30] In argument, the respondents placed emphasis on paragraph 1 of the overleaf terms and conditions on page 3 (B3), arguing that that is the clause referred to in the deed of suretyship, which supersedes and takes preference above the Client Mandate on page 1. It provides:

> *“1 AGREEMENT*
>
> *The owner, in consideration of the payment of or an undertaking by the hirer to pay the amount of the hire charges calculated in terms of the hire rates set out overleaf, lets to the hirer and the hirer hires, the plaint describes overleaf. The conditions of hire set out in this document take precedence over any other terms which may have been included in the hirer’s offer to hire or enquiry and signature by the hirer of this contract constitutes a cancellation of any such prior terms The agreement records the whole agreement between the owner and the hirer and overrides all other agreements, terms or conditions purporting to relate to the hire of the plant and collateral verbal agreements are expressly excluded. No conditions, terms or representations not expressed herein shall be binding on the owner*

[14] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18]
[15] FJ Mitrie (Pty) Ltd v Madgwick and Another 1979 (1) SA 232 (D)

of (sic) the hirer and no variation shall be binding on either of the parties unless reduced to writing and agreed to by the owner and the hirer."

[31] That reliance is misconceived, given a grammatical, contextual and purposive interpretation of the agreement and the suretyship provisions in clause 4. Considering the agreement as a whole, the reference to clause 1 in the suretyship agreement is not a reference to clause 1 of the overleaf terms and conditions, but rather a reference to clause 1, on p 1 of the agreement, which appears under the heading "Client Mandate". In that clause, the company is clearly identified as Hirer.

[32] In any event, even if the Client Mandate were to have been viewed as a separate document, the principles applicable to incorporation by reference, are applicable to contracts of suretyship[16]. It occurs when one document supplements its terms by embodying the terms of another[17] and is admissible to identify the Hirer (and principal debtor). The reference to clause 1 in the deed of suretyship, incorporates by reference the Hirer as identified in clause 1 of the document, which appears under the heading Client Mandate. As stated, that clause expressly identifies the company as Hirer (and principal debtor) in terms of the suretyship. Given that the agreement (B1-B6) is to be considered as a whole, it is further clear *ex facie* the suretyship that the document sought to be incorporated did indeed give rise to the indebtedness secured by the suretyship [18].

[33] Ultimately, the question to be answered[19] is:

"Whether, on a reading of the document as a whole, the principal debtor is established with sufficient certainty, or can be established with sufficient certainty through the introduction of admissible extrinsic evidence that is clearly linked to the debtor sought to be identified in the suretyship and not to a potentially unlimited group of debtors".

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[16] Industrial Development Corporation SA (Pty) Ltd v Silver 2003 (1) SA 365 (SCA) ("Silver") paras [6], [9]-[13]
[17] Silver para [6]
[18] Silver paras [9]-[13]
[19] Wallace v 1662 G&D Property Investments CC 2008 (1) SA 300 (W) para [24] and [20]

[34] Considering the facts and for the reasons provided, the answer must be “yes” and I am persuaded that the debtor sought to be identified in the suretyship is the company and not a potentially unlimited group of debtors.

[35] It must be borne in mind that the respondents in the notice did not challenge the existence of the plant hire contract between the applicant and the company. They also did not challenge the existence of the company’s indebtedness to the applicant or the fact that the indebtedness was acknowledged by the company. The sole challenge raised pertained to the identification of the principal debtor in the suretyship. Seen in that context, I agree with the applicant that it does not matter that page 2 of the document is blank. Moreover, on a contextual, grammatical and purposive interpretation, page 2 pertains to specific orders particularising items of plant to be hired from time to time and is in the nature of a pro forma document to be completed with each order.

[36] I am further not persuaded that the applicant is merely relying on secondary conclusions rather than primary facts in averring that the first respondent signed the plant hire agreement as surety, as argued by the respondents. Given the undisputed primary facts as they emerge from the founding papers, I am persuaded that a valid cause of action has been made out against the first respondent.

[37] For these reasons, the respondents’ defence that the suretyship fails to comply with s 6 of the Act or is void *ab initio* must fail. I conclude that the suretyship is valid and that the applicant is entitled to the relief sought.

[38] There is no reason to deviate from the normal principle that costs follow the result.

[39] The applicant argued that a costs order on the scale as between attorney and client was justified as it was put to unnecessary trouble and expense which it ought not

to bear and it should not be left out of pocket in respect of its legal expenses. Considering all the facts and the issues which the applicant abandoned, I am not persuaded that such a punitive costs order is warranted.

[40] Given that the applicant belatedly abandoned its claim against the second respondent, the applicant should bear the second respondent's costs.

[41] I grant the following order:

[1] The first respondent is directed to make payment to the applicant of the amount of R1 395 591.07 (one million three hundred and ninety five thousand five hundred and ninety one rand and seven cents);

[2] The first respondent is directed to pay interest on the amount in [1] above at the rate of 2.5% per month from 13 December 2021 to date of final payment;

[3] The first respondent is directed to pay the costs of the application;

[4] The applicant is directed to pay the costs of the application as against the second respondent.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING : 25 July 2023

DATE OF JUDGMENT : 21 August 2023

APPLICANT'S COUNSEL	: Adv. Sias Nel
APPLICANT'S ATTORNEYS	: Wynand du Plessis Attorneys
RESPONDENTS' COUNSEL	: Adv. Jaco van Rooyen
RESPONDENTS' ATTORNEYS	: Greyling Orchard Attorneys