



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

Case No: 44447/2021

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

23 /12/2022
DATE


SIGNATURE

ANDRA INVESTMENTS (PROPRIETARY) LIMITED
(REGISTRATION NUMBER: 2008/026246/07)
and

Applicant/Plaintiff

ADZAM SOLAR (PTY) LTD
Respondent/Defendant
(REGISTRATION NUMBER: 2012/212798/07)

First

JAN VISSER
Respondent/Defendant

Second

JUDGMENT

PHOOKO AJ

INTRODUCTION

- [1] This is an application wherein the Applicant seeks an order granting summary judgment for the amount of R666,461.04 against the First and Second Respondents, the one paying the other to be absolved. The Applicant further seeks an order declaring the lease entered into between the parties cancelled.

THE PARTIES

- [2] The Applicant is Andra Investments (Proprietary) Limited with registration number 2008/026246/07, a private company with limited liability, duly registered and incorporated in terms of the laws of the Republic of South Africa with its principal place of business and registered address at 7 Cruse Street, Stellenbosch.
- [3] The First Respondent is Adzam Solar with registration number 20121212798107, a private company trading as such with its principal place of business at ERF 232 Silvertondale No 113 Hoogoond Street, Silvertondale, whose full and further particulars are unknown to the Applicant.
- [4] The Second Respondent is Jan Visser, an adult male whose *domicilium citandi et executandi* is at 113 Hoogoond Street, Silvertondale Extension 2, and whose full and further particulars are unknown to the Applicant.

THE ISSUES

- [5] The issue before the Court is whether the Second Respondent has a *bona fide* defence, and whether there are triable and mitigating issues raised by the Second Respondent.

THE FACTS

- [6] On or about 12 December 2019, the Applicant and the First Respondent (the

Second Respondent acting on behalf of the First Respondent in his capacity as a director of the First Respondent) entered into a 2 year lease agreement for a commercial property, the terms of which can be found in the agreement.

- [7] The First Respondent failed to make payment of the agreed monthly rental payment and fell into arrears for the amount of R R666,461.04.
- [8] The Applicant avers that the Respondents are jointly liable for the debts incurred by the First Respondent and that the Second Respondent's liability arises from clause 9 of the lease agreement, which binds all directors and shareholders in their personal capacity as surety and co-principal debtor *in solidum* with the First Respondent for the fulfilment of all obligations.
- [9] The Second Respondent disputes this position and submits that he signed a deed of surety that binds himself as surety in favour of Willem Daniel Joubert should the First Respondent fail to meet its obligations towards the Applicant. Therefore, the Second Respondent is not indebted to the Applicant.

APPLICABLE LAW

- [10] In this section, I briefly consider the law relating to summary judgment, signatures, and thereafter deal with the law relating to suretyship agreements.

Summary judgment

- [11] Resort to summary judgment in terms of Rule 32 of the Uniform Rules of the Court by the plaintiff is intended to offer a speedy remedy against a defendant who does not have a *bona fide* defence without the matter having to go to trial.¹ If the court agrees with the Applicant based on the information presented before it such as the point in law and facts relied upon which his claim is based, it will grant summary judgment. However, this does not mean that the defendant has been deprived of the opportunity to defend the claim against

¹ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para 31.

him. In *Maharaj v Barclays National Bank*², it was held that:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be...”.

[12] Therefore, where the court has found that the Defendant has disclosed his defence, it will not hesitate to rule in favour of the Defendant and refuse to grant summary judgement.

Signature

[13] It is trite that when you sign an agreement it is your responsibility to make sure that you understand all the terms of that agreement. A person signing a document is normally accepted as having assented to the contents of the said document. As correctly observed in *George v Fairmead (Pty) Ltd*³, the court held that:

“When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent

² 1976 (1) SA 418 (A) at 426 A-E.

³ 1958 (2) SA 465 (A) at 472.

to whatever words appear above his signature...”

[14] In other words, the signature also serves as sufficient proof that the person signing the document has familiarised himself with the terms and provisions contained in the document, irrespective of whether or not he can show that he was not, in fact, aware of them or was unable to understand them.⁴ This is in line with the *caveat subscriptor* rule, which has been firmly established in South African law.⁵ A party to a contract may however escape liability should it be found that the error was *Justus*.⁶

Suretyship

[15] The court in *Orkin Lingerie Co. (Pty) Ltd v Melamed & Hurwitz*⁷ provided a definition of suretyship as:

“...a contract of suretyship in relation to a money debt can be said to be one whereby a person (the surety) agrees with the creditor that, as accessory to the debtor’s primary liability, he too will be liable for that debt. The essence of suretyship is the existence of the principal obligation of the debtor to which that of the surety becomes accessory.”

[16] Section 6 of the General Law Amendment Act 50 of 1956 states that for a valid contract of suretyship to exist the following is required:

“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

⁴ Hutchison & Pretorius (eds), *The Law of Contract in South Africa*, Oxford University Press (2009) at 237.

⁵ *Diners Club SA PTY LTD v Thorburn* 1990 (2) SA 870 (C).

⁶ *George v Fairmead (Pty) Ltd* supra fn 2 at para 471.

⁷ 1963 (1) SA 324 (W) at 326 G-H.

of an aval under the laws relating to negotiable instruments”.

[17] The court in *Industrial Development Corporation of SA (Pty) Ltd v Silver*⁸ held that:

“What the section requires is that the ‘terms’ of the contract of suretyship are to be embodied in a written document. Those terms are not limited to the essential terms but would include at least the material terms of the contract.”

[18] It is trite law that provisions may be incorporated into a contract by means of reference.⁹ Before a document is incorporated, two requirements must be fulfilled.¹⁰ Firstly, the reference must indicate the relationship between the absent term and the document to be incorporated, and secondly the reference must be so specific that the document can be identified *ex facie* the agreement which refers to it.

[19] In *Odendal v Structured Mezzanine Investments*¹¹, the court confirmed that:

“It is indeed so that a contract of suretyship is accessory in the sense that it is of the essence of suretyship that there be a valid principal obligation (that of the debtor to the creditor)”

[20] The ruling in *Odendal*¹² entails that a deed of suretyship is not a detached document from the main contract. In other words, the deed of suretyship in the context of this case ought to be read together with the lease agreement which contains a principal obligation.

[21] I now turn to consider the submissions of the parties considering the applicable

⁸ [2002] 4 All SA 316 (SCA)

⁹ Kerr, *The Principles of the Law of Contract* (6th Edition), Butterworths (2002) at 343.

¹⁰ *Trust Bank van Afrika Bpk v Sullivan* 1979 2 SA 765 (T).

¹¹ 2014 ZA SCA 89

¹² *Ibid.*

law, the lease agreement, and the annexure (deed of suretyship) to the lease agreement to ascertain whether summary judgment should be granted or not.

APPLICANT'S SUBMISSIONS

[22] The Applicant first relied on the heading of the lease agreement which provides that:

“(“The agreement”) made and entered into BY AND BETWEEN: ANDRA INVESTEMENTS (PROPRIETY) LIMITED REG NO; 2008/026246/07 A company registered with limited liability according to the company laws of the Republic of South Africa. Duly authorized and represented by: WILLEM DANIEL JOUBERT IN HIS CAPACITY AS: DIRECTOR: ANDRA INVESTMENTS RESIDING: 7 CROUSE STREET , STELLENBOSH (“the LANDLORD”).”

[23] Based on the above extract from the lease agreement, counsel for the Applicant argued that it is clear that the Second Respondent “*is fully aware that Mr Joubert is the Director of the Plaintiff and therefore bound himself as surety and co-principal debtor towards the Director of the Plaintiff*”.¹³ Further, counsel for the applicant contended that this meant that the Second Respondent bound himself in *solidum* as the surety and as co-principal debtor towards the Plaintiff.

[24] Furthermore, the Applicant relied on the the declaration of the deed of surety which states that:

“ I Jan Visser hereby declare that all shareholders; duly authorised representatives and directors of the TENANT are aware and support the terms and conditions of this lease agreement, including CLAUSE 9: suretyship as well as Part 3 - Annexure “B”

¹³ Applicants heads of argument at para 9.1.

[25] In light of the above, counsel for the Applicant argued that the Second Respondent's defence is bad in law and cannot succeed.

[26] The Applicant further contended that the Second Respondent also signed the lease agreement which states in clause 9 that:

“Suretyship

9.1 It is a specific term of this lease agreement that all shareholders and directors of ADZAM SOLAR PTY LTD reg no: 2012/212798/07 at the time of the signing of this agreement binds him/her/themselves, in their personal capacity, as surety and co-principal debtor in solidum with the TENANT for the fulfillment of all the obligations, terms and conditions of the TENANTS in terms of the agreement”.

[27] Based on the above, the Applicant argues that the Second Respondent bound himself as surety and co-principal debtor in *solidum* with the Plaintiff in terms of the fulfilment of the lease agreement together with the deed of suretyship.

[28] In addition to the above, the Applicant relies on the deed of surety which further provides that:

“For all and every obligation of ADZAM Solar PTY LTD , REG NO: 2012/2012798/07 a Company registered with limited liability according to the company laws of the Republic of South Africa, SITUATED ON ERF 232 SILVERTONDALE, IN HOOGOOND STREET SILVERTONDALE, arising out of a of certain lease agreements signed at Pretoria on the 12th Day of December 2019. We hereby renounce the benefits of exclusion and division, *non numeritia pecunia and non coza debiti* with the meaning and effect whereof we acknowledge ourselves to be acquainted”.

[29] Again, the Applicant submitted that the Second Respondent bound himself as surety and co-principal debtor towards the Applicant in terms of the lease agreement and the deed of surety (which makes reference to the lease agreement). Consequently, the Applicant contends that the Second Respondent cannot rely on the defence that *“the deed of surety is not in favour of the Applicant/Plaintiff but one of the Directors as the deed of surety explicitly states that the Second Respondent renounces the benefit of exclusion and division and that he acknowledge himself to be acquainted with the meaning of non numeratae pecunia and non-cosa debiti”*.¹⁴

[30] In addition, the Applicant argued that the intention of the parties was clear when the parties entered into the agreements and therefore the parties were aware of the obligations flowing from the contract of surety. To this end, the Applicant contended that the *“reasonable man test if applied correctly demonstrates that the Second Defendant/Respondent bound himself as surety and co-principal debtor towards the Applicant/Plaintiff”*.

[31] Therefore, the Applicant argued, the Second Respondent has failed to raise a defence in his pleadings and/or affidavits and therefore summary judgment is to be awarded in his favour.

SECOND RESPONDENT’S SUBMISSIONS

[32] The Second Respondent contended that the Applicant did not make proper reference to the deed of surety in the particulars of claim.

[33] Further, the Second Respondent contended that the deed of surety is flawed in that the Second Respondent bound himself as a surety in favour of Willem Daniel Joubert for the obligations of the First Respondent towards the Applicant. The Second Respondent further argued that Willem Daniel Joubert is not cited as the Applicant. Based on this, the Second Respondent contended that he did not bind himself as a surety in favour of the Applicant.

¹⁴ Applicant’s heads of argument at para 13.2.

[34] The Second Respondent also relied on rectification as a defence, in that it was argued that where the plaintiff or the defendant seeks the rectification of documents, this cannot be resolved through a summary judgment application. To this end, the Second Respondent relied on the case of *Malcomes Scania (Pty) Ltd v Vermaak*¹⁵ where the court ruled that a claim for rectification cannot be dealt with by way of summary judgment.

[35] In light of the above, the Second Respondent argued that the application for summary judgment should be refused.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[36] With regards to the application of a *bona fide* defence, this Court needs to satisfy itself that the Applicant has shown that the Respondent has no defence on the merits of the case and is therefore liable, as a surety, for the full outstanding amount that is due and payable to the Applicant for the outstanding rental payments.

[37] With regards to the Second Respondent's contention that the deed of suretyship does not state that he bound himself as surety for the obligations of the First Respondent to the Applicant, the Applicant has demonstrated on several occasions such as the simple reading of the heading and clause 9 of the lease agreement read together with the deed of suretyship, which also refers to the lease agreement, reveals that the Second Respondent bound himself as a director and shareholder in his personal capacity as surety and co-principal debtor *in solidum* with the First Respondent for the fulfilment of all obligations. Therefore, the Second Respondent's contention cannot be sustained.

[38] Concerning the Second Respondent's argument that the Applicant's amended particulars of claim do not contain any allegation that the Second Respondent bound himself as surety for the obligations of the First Respondent towards the

¹⁵ 1984 1 SA 297 (W).

Applicant, this Court is of the view that the Second Respondent is selective in reading the amended particulars of claim. In particular, paragraph 3 of the amended particulars of claim states what the Second Respondent seeks to dispute, it also refers to the lease agreement whose clause 9 unambiguously states that *“all shareholders and directors of Adzam Solar (PTY) ... at the time of the signing of this agreement binds him/herself/themselves, in their personal capacity as surety as co-principal debtor in solidum with the tenant...”*. In interpreting the agreement, the inevitable point of departure is the language of the document itself. In my view, all the provisions that this Court has been referred to by the Applicant are not in any way ambiguous. The terms are crystal clear. The objective assessment of the facts of this case demonstrates that the Second Respondent bound himself as surety towards the Applicant. I am of the view that they are not capable of bearing any meaning other than that the Second Respondent assumed suretyship on behalf of the First Respondent.

[39] In light of the above, this Court concludes that the deed of suretyship is an accessory to the lease agreement, especially in light of the heading titled “Part 3 Annexure B – Suretyship” in the lease agreement which introduces the deed of suretyship to the agreement.¹⁶ In addition, clause 9 of the lease agreement explicitly holds the directors liable for the debts incurred by the First Respondent. Furthermore, the deed of suretyship clearly states that should Daniel not be able to pay the debts owed by the First Respondent, the Second Respondent will be liable, this being the material term. Finally, the deed of suretyship on more than one occasion does refer to the lease agreement. All in all, the original agreement and the accessory to the agreement have bound the Second Respondent.

[40] Regarding the issue of rectification, this aspect does not appear at all as a defence in the Second Respondent’s answering affidavit. At no stage did counsel for the Second Respondent sufficiently deal with it. Even if this Court were to give it significant consideration, it does not in any way assist the Second Respondent’s case for the reasons that have already been stated

¹⁶ See page 003-11 of the lease agreement on CaseLines: 003-4.

above.

[41] Accordingly, the Second Respondent has no *bona fide* and/ or triable defence against the claim of the Applicant. If the Second Respondent had a defence this should have been set out clearly in the affidavit as required in terms of Rule 32(3)(b) of the Uniform Rules of Court. However, there is nothing contained in the founding affidavit to dispute the liability for payment of R666 461.00 except bare denials of surety and/or not being aware of what the terms of the contract entailed when the circumstances of this case dictate otherwise.

[42] This Court is persuaded by the Applicant's reliance on the case of *George v Fairmead* where it was held that "a man, when he signs a contract, is taken to be bound by the ordinary meaning of the words which appear over his signature".¹⁷ In any event, the Second Respondent has not raised any *Justus* defence and therefore has bound himself wholly and knowingly to the lease agreement and deed of suretyship.¹⁸ This further diminishes the Second Respondent's claim that he has a *bona fide* and triable defence.

[43] In my view, these denials do not constitute a *bona fide* and/or a trial defence but are solely raised for the purposes of delaying an inevitable outcome. Therefore, there is no basis as to why the Applicant should not be granted summary judgment.

COSTS

[44] The costs in this matter are provided for in the agreement on a scale between attorney and client.¹⁹ Consequently, this court will be slow to interfere with lawful contractual agreements concluded between the parties unless the conduct of the successful party justifies depriving him of his costs or a portion thereof.²⁰

ORDER

¹⁷ See 1958 (2) SA 465 (A) at 472.

¹⁸ *Ibid* at 471.

¹⁹ Clause 38.3 of the lease agreement.

²⁰ *Neuhoff v York Timbers Ltd* 1981 (1) SA 666 (T).

[45] I, therefore, make the following order:

- (a) Application for summary judgment is granted.
- (b) Confirmation of the cancellation of the agreement.
- (c) Payment of the sum of R666 461.00 by the First and Second Respondents, the one paying the other to be absolved.
- (d) Interest on the amount of R666 461.04 at the rate of the prime daily rate charged by the First National Bank Limited applicable at the time, from due date to the date of final payment, both days inclusive.
- (e) Costs of the suit against the First and Second Respondent's on a scale as between attorney and own client, the one paying the other to be absolved.



M R PHOOKO

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 December 2022.

APPEARANCES:

Counsel for the Plaintiff: Adv H W Botes

Instructed by: Van Heerden's Incorporated

Counsel for the Second Respondent: n/a

Instructed by: Johan Van Heerden

Date of Hearing: 14 September 2022

Date of Judgment: 23 December 2022