



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 9324/22

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

APPLICANT

and

WARDKISS PROPERTY HOLDINGS (PTY) LTD
(Reg No. 2015/421528/07)

RESPONDENT

ORDER

The following order is granted:

1. Judgment is granted against the respondent for:
 - 1.1 Payment of the sum of R3 000 000.
 - 1.2 Payment of interest on R3 000 000 from the date of service to the date of payment at the prevailing legal rate.
 2. The respondent is directed to pay the applicant's costs of suit.
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JUDGMENT

E Bezuidenhout J

Introduction

[1] The applicant, Standard Bank of South Africa Ltd, seeks judgment against the respondent, Wardkiss Property Holdings (Pty) Ltd, for payment of the amount of R3 million, together with interest at the legal rate of 7,75% from date of service of the application to date of payment. It also seeks its costs of suit.

[2] It is common cause that the applicant was approached by, and subsequently approved the banking facilities in respect of another entity, Wardkiss (Pty) Ltd (Wardkiss), providing it with *inter alia* an overdraft facility limited to R6 million, a business revolving credit plan in the amount of R2,5 million and a Covid-19 loan for the amount of R3 million. Wardkiss is now in liquidation.

[3] The respondent, represented by Mr AH Palmer, executed what appears to be a guarantee in favour of the applicant for the due, punctual and full payment of all the debts which Wardkiss has or may have in the future.

[4] The parties are in agreement that the only issue that requires determination is whether annexure 'K', titled 'Guarantee', and upon which the applicant relies as its security, is a suretyship or a guarantee. For the sake of convenience, I will continue to refer to it as 'the guarantee'.

[5] It is common cause that the guarantee has been signed electronically by Mr Palmer, duly authorised on behalf of the respondent, on 21 July 2020.

Background

[6] Mr Palmer is a 50% shareholder of the respondent. Another entity, Global Property Investments (Pty) Ltd, is the shareholder of the remaining 50% interest. Mr Palmer approached the applicant during February 2020, requesting banking facilities for Wardkiss.

[7] The applicant attached a number of emails to its founding affidavit which set out the applicant's requirements for the approval of the banking facilities in respect of Wardkiss. In an email dated 25 February 2020, attached as annexure 'A', written by

Mr V Naidoo, the collateral required was *inter alia* a guarantee by Mr Palmer, restricted to R11 million, and a guarantee by the respondent, restricted to R6 million.

[8] In a further email dated 4 March 2020, attached as annexure 'B', dealing again with the collateral required, the initial guarantee by Mr Palmer was amended to be restricted to R6 million and the guarantee in respect of the respondent was amended to be restricted to R3 million.

[9] In an email dated 6 March 2020, written by Mr Palmer to Mr Naidoo, and attached as annexure 'C', the proposals regarding the guarantees in respect of Mr Palmer, restricted to R6 million, and the respondent, restricted to R3 million, were agreed to.

[10] The respondent, in its answering affidavit attested to by Mr Palmer, does not take issue with the content of the annexures.

[11] The applicant alleges that the terms of the contract entered into between the applicant and Wardkiss is contained in a so-called banking facilities letter dated 20 July 2020, attached as annexure 'D'. It was signed by Mr Naidoo on behalf of the applicant and by Mr Palmer on behalf of Wardkiss, although Mr Palmer alleges that he cannot recall the manner in which the document was signed. During argument it was however clear that it was accepted that he signed it electronically. He did not dispute the content of annexure 'D'.

[12] In terms of clause 1 of annexure 'D', an overdraft facility of R6 million was made available to Wardkiss. It was also granted a business revolving credit plan for R2,5 million.

[13] Clause 3 of annexure 'D' sets out the collateral required. It included *inter alia* a guarantee restricted to R8,5 million by Mr Palmer and a guarantee restricted to R3 million by the respondent, an unrestricted cession of book debts and a notarial general bond for R6 million over certain movable assets.

[14] The terms and conditions, which were accepted by the signatory on behalf of the respondent, defined 'collateral' as 'any security provided to us to secure payment of your loan obligations in terms of the Overdraft Agreement'. It did not contain a definition for 'guarantee' but did define surety as 'a person who undertakes to pay, in full or in part, the amount owing in terms of this Overdraft Agreement in the event of default by you'.

[15] The respondent, in its answering affidavit, and in response to the terms of annexure 'D', states that the guarantee to be executed by the respondent for R3 million was not a principal obligation but an ancillary obligation which was nothing more than a suretyship sought from the respondent for the debts of Wardkiss. There is no indication that this point or issue was raised by Mr Palmer during the negotiations with the applicant for the facilities of Wardkiss.

[16] The applicant also attached the business revolving credit plan agreement as annexure 'E'. Its content was not disputed by the respondent. It was signed by Mr Naidoo. In clause 12, with the heading 'Collateral' printed in bold, it was stated that 'we hold the following Collateral'. Reference was made *inter alia* to the same two guarantees as referred to in annexure 'D'. The document, on page 6, contained an acceptance by the borrower, where the signatory on behalf of the respondent, Mr Palmer, confirmed *inter alia* that they were aware of the importance of all the wording printed in bold, that they have been free to secure independent advice in respect of the agreement, and that they were aware that they must not accept the agreement unless they understood their rights and obligations and the risks and costs of the loan.

[17] Part B of annexure 'E' contained the terms and conditions. In clause 1, with the heading 'Definitions', it defined collateral as 'any security and undertaking provided to us to secure the repayment of your loan obligations in terms of this Agreement'. It further defined 'collateral provider' as 'each person and/or entity who is to provide collateral to the Bank in respect of the due performance by you of your payment and other obligations in terms of this Agreement'. It also defined 'guarantor(s)' as 'a person(s) who undertake (s) to pay, in full or in part, the amount

owing in terms of the Agreement in the event of a default by you under this Agreement'. There was no definition for 'surety'.

[18] The respondent raised the same issue as before, namely that the guarantee was nothing more than a suretyship. The respondent did not attach any correspondence to its affidavit to gainsay or elaborate on what was contained in the email correspondence between Mr Palmer and Mr Naidoo, leading up to the agreements being signed.

[19] The applicant also described and attached annexure 'F' which contained the terms of a Covid-19 emergency loan agreement concluded, in terms of which the applicant lent and advanced to Wardkiss an amount of R3 million. Clause 11 dealt with the collateral required, which included a guarantee restricted to R3,3 million by Mr Palmer. Mr Palmer signed the document on 10 September 2020. The document was not signed on behalf of the applicant. The applicant did, however, advance the money to Wardkiss.

[20] It is common cause that Wardkiss placed itself in voluntary liquidation on or about 5 February 2021. On 24 January 2022, the amount due in respect of Wardkiss' overdraft facility was R6 501 440.98, together with interest. On 25 January 2022, the amount due in respect of the revolving credit plan was R2 477 159.27, together with interest. On 31 January 2022, the amount due in respect of the Covid-19 loan was R3 542 677.95, together with interest. The applicant wrote a letter containing a notice in terms of sections 344 and 345 of the Companies Act 61 of 1973 to the respondent on 7 February 2022. The respondent's attorney replied on 22 February 2022. The letter is attached as annexure 'M1' to the founding affidavit. It appears from the letter that some settlement proposals and negotiations had been anticipated but then the section 344 notice was received. It nonetheless contained a number of proposals but the following was stated at para 8:

'In regard to the alleged guarantee obligation of Wardkiss Property Holdings (Pty) Limited for Wardkiss (Pty) Limited (In Liquidation), our client denies that this guarantee or suretyship complies with either the provisions of the General Law Amendment Act 50 of 1956 or the Electronic Communications Act 25 of 2002 and denies that it is either binding or enforceable....'

The applicant, through its attorney, issued a formal written demand on 10 May 2022, calling upon the respondent to pay the amount owed in terms of the guarantee.

The guarantee

[21] The applicant attached, as annexure 'K', the guarantee executed by Mr Palmer on behalf of the respondent on 24 July 2020. It is common cause that it was signed electronically by Mr Palmer. The guarantee did not contain an advanced electronic signature.

[22] The applicant contends that annexure 'K' is a guarantee and that it is accordingly not necessary that there should be compliance with sections 1 and 13(1) of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA). Section 13 of the ECTA makes provision for two types of electronic signatures, namely an advanced electronic signature and an electronic signature. An advanced electronic signature is required where a signature is required by law. Section 13(1) reads as follows:

'Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.'

[23] The respondent contends that the security upon which the applicant relies is not a guarantee but a suretyship. Section 6 of the General Law Amendment Act 50 of 1956 sets out the formalities in respect of contracts of suretyship. It requires *inter alia* that the written document which contains the terms of the contract, must be signed by or on behalf of the surety. The security signed by Mr Palmer was only signed electronically and not by way of an advanced electronic signature. If it is found that the security provided by the respondent was a suretyship, then it is not binding as it does not contain an advanced electronic signature but only the electronic signature of Mr Palmer.

[24] Annexure 'K' deserves closer scrutiny. The document is titled 'Guarantee'. Clause 1 bears the heading 'Liability and Obligations of the Guarantor'. Clause 1.1 reads as follows:

‘1.1 I/We Wardkiss Property Holdings (Proprietary) Limited Reg Number 2015/421528/07 the undersigned (“Guarantor”) hereby unconditionally:

1.1.1 guarantee and undertake as a principal and independent obligation (and not merely as ancillary obligation) to and in favour of the Standard Bank of South Africa Limited (registration number: 1962/000738/06) (the “Bank”) or to anyone who takes transfer of the Bank’s rights under this guarantee (“Guarantee”):

1.1.1.1 the due, punctual and full payment of all the debts which Wardkiss (Proprietary) Limited Reg Number 1999/007635/07 (the “Debtor(s)”), now owes or may in the future owe to the Bank in terms of or arising in connection with agreements concluded or to be concluded between the Debtor(s) and the Bank (“Debts”); and to pay the Bank, on first written demand from the Bank and without delay, any and all amounts which are or may become due and payable in respect of the Debts.’

[25] Clause 2 bears the heading ‘Continuing Security’. Clause 2.1 reads as follows:

‘For its duration, this Guarantee is a continuing covering guarantee and shall remain in full force and effect notwithstanding any temporary fluctuation in or extinction of the Debts or any prior payment under this Guarantee.’

[26] Clause 2.4 is of particular significance, and reads as follows:

‘Without derogating from clause 2.3, this Guarantee shall be effective regardless of the validity or enforceability of the Debts, any related documentation, and any collateral security for the debts.’

[27] Clause 4, with the heading ‘Warranties’, deals with the warranties, representations and undertakings by the Guarantor. In terms of clause 4.1, the Guarantor warrants, represents and undertakes *inter alia* in favour of the Bank that the obligations expressed to be assumed by the Guarantor under the guarantee are valid and binding on, and enforceable, against the Guarantor (clause 4.1.3) and that all the provisions and restrictions contained in the guarantee are fair and reasonable in the circumstances and part of the overall intention of the parties in connection with the guarantee (clause 4.1.4). It was further recorded in clauses 4.1.4.1 and 4.1.4.2 that the Guarantor understands and appreciates the risks, costs and obligations and

was given the opportunity to read and understand the guarantee and is aware of all the terms printed in bold.

[28] Clause 5 deals with the Bank's rights, and reads as follows:

'5.1 The Bank shall be entitled, at any time, in its sole and absolute discretion, whether before or after the due dates for payment of the Debts, without reference or notification to the guarantors and without affecting its right and the Guarantor's liabilities hereunder, to:

5.1.1 release (or omit to perfect) any other securities of whatsoever nature (including, but not limited to guarantees, suretyships and indemnities) held by it (or given to it) in respect of the Debts;

5.1.2 grant the debtor (or any surety, guarantor or indemnifier in terms of an agreement referred to in clause 5.1.1) extensions of time for payment; and

5.1.3 compound, or to make any other arrangements with the debtor (or any surety, guarantor or indemnifier in terms of an agreement referred to in clause 5.1.1) for the reduction or discharge of the debtor's indebtedness.

5.2 The rights of the Bank under the Guarantee shall in no way be affected or diminished if the Bank at any time obtains additional guarantees, suretyships, securities or indemnities in connection with the Debts or to the extent that the Bank has already obtained any guarantees, suretyships, securities or indemnities in connection with any of the Debts.'

[29] Clause 6 deals with the renunciation of benefits and the right to deduct any amount. In terms of clause 6.1, the Guarantor (without prejudice to or limitation of any other provision of the guarantee) 'and to the extent permissible in law', renounces the benefits of 'all otherwise applicable legal immunities, defences and exceptions to the extent that they will be applicable in the absence of this renunciation, including the defences and exceptions of "cession of actions", "excussion", "division"...'.

Submissions

[30] Counsel for the applicant as well as the respondent filed helpful heads of argument, for which I express my appreciation. Counsel for the applicant submitted further comprehensive supplementary heads of argument to deal specifically with the issue to be determined, and included references to numerous authorities.

[31] Both counsel referred me to *Caney's: The Law of Suretyship in South Africa*,¹ where a suretyship is defined as:

'... an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), that the principal debtor, who remains bound, will perform his obligation to the creditor and that if and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor.' (Footnotes omitted.)

For 'there to be a valid suretyship, there has to be a valid principal obligation between the debtor and the creditor'.² A 'surety only takes upon himself the risk of a breach of contract by the principal debtor for the surety is not liable for any non-performance based upon the invalidity or extinction of the obligation in question'.³ In discussing the relationship between a suretyship and the contract of guarantee, the following is stated:⁴

'It is clear that the word "guarantee" in common parlance and in many contractual contexts means (and is intended by the parties to mean) simply to undertake the obligations of a surety. This is not what is meant by guarantee in this context, for the contract of guarantee is distinct from suretyship . . . With a contract of guarantee, on the other hand, the guarantor undertakes a principal obligation to indemnify the promisee on the happening of certain events . . . Difficulties begin to arise, however, when the event on which the guarantor becomes bound to indemnify the promisee is in fact the performance by a third party of some obligation which that third party owes to the promisee.' (Footnotes omitted.)

[32] The authors proceed to discuss the differences between a guarantee that a debtor will perform and a suretyship, with reference to various authorities. The first point of distinction mentioned is with reference to a guarantor's obligation, which is independent from that of the debtor, and which 'is to indemnify the creditor in respect of losses suffered through the debtor's non-performance'.⁵ A surety, on the other hand, is only liable for any

'losses resulting from the debtor's breach of contract. Thus if the creditor suffers grave losses when it turns out that the debtor's contract is invalid, the guarantor's obligation

¹ C F Forsyth and J T Pretorius *Caney's: The Law of Suretyship in South Africa* 6 ed (2010) at 28-29 ('*Caney's*').

² *Ibid* at 29.

³ *Ibid* at 30.

⁴ *Ibid* at 32.

⁵ *Ibid* at 33.

remains in force and he will have to pay those losses but a surety's obligation falls away and he will not have to pay [anything].⁶

This is very much in line with what is contained in clause 2.4 of the guarantee. The second point of distinction mentioned is that 'a surety undertakes that the debtor himself will perform, and only that if he fails to perform that the surety will do so'. A guarantor, on the other hand, 'undertakes to pay on the happening of a certain event but does not promise that that event will not happen'. In conclusion, it was stated that 'it remains difficult to tell them apart particularly where the event guaranteed is the performance of a contractual obligation. As Hahlo and Kahn remark "the distinction often turns on a knife edge"⁷ (Footnotes omitted.)

[33] Counsel for the applicant referred me to *Standard Bank of South Africa Ltd v Essa and others*⁸ where Binns-Ward J stated the following:

'In contending that the suretyships do not qualify as "credit guarantees" within the meaning of the Act the defendants rely on the distinction in law between a guarantee, which imposes a self-standing principal obligation on the guarantor, and a suretyship, which creates an obligation which is entirely accessory to that of a principal debtor. While the distinction between these types of contracts is easy to state in the abstract, in practice it can sometimes be difficult to determine into which of the types a particular agreements falls. It is also a not infrequent occurrence for parties to describe what is unquestionably a contract of suretyship as the provision of a guarantee.' (Footnotes omitted.)

The court *inter alia* referred to the same passages from *Caney's* which were quoted above. It was, however, seized with deeds of suretyships executed by the defendants.

[34] It was submitted on behalf of the applicant, with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁹ that when interpreting a document such as a guarantee, 'the inevitable point of departure' is the language used in the guarantee. A court furthermore has to take the context and purpose into account when interpreting a contract.¹⁰

⁶ Ibid.

⁷ Ibid at 34.

⁸ *Standard Bank of South Africa Ltd v Essa and others* [2012] ZAWCHC 265 para 13 ('Essa').

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at 604C-D ('Endumeni').

¹⁰ *University of Johannesburg v Auckland Park Theological Seminary and another* [2021] ZACC 13; 2021 (6) SA 1 (CC) para 66.

[35] Counsel for the applicant also referred to *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others*¹¹ where Unterhalter AJA held that:

[25] . . . The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, “(t)he inevitable point of departure is the language of the provision itself”.

[26] . . . *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.’ (Footnotes omitted.)

[36] The applicant, in support of its views, places reliance on the wording of clause 1 of the guarantee, which, as mentioned above, is titled ‘Guarantee’ and also relies on the exchange of emails between the applicant’s employee, Mr Naidoo, and Mr Palmer, to provide the context and purpose of the guarantee.

[37] It was submitted on behalf of the respondent, with reference to *List v Jungers*,¹² that one should be cautious not to place reliance on individual words. Diemont JA held as follows:¹³

‘It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word. Apart from the fact that to decide on the more usual or ordinary meaning of a word may be a delicate task . . . it is clear that the context in which the word is used is of prime importance.’

¹¹ *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) paras 25-26 (‘*Capitec*’).

¹² *List v Jungers* 1979 (3) SA 106 (A) at 118D (‘*Jungers*’).

¹³ *Ibid* at 118D-E.

[38] I was also referred to *Absa Bank Ltd v Zurich Risk Financing SA Ltd*¹⁴ where Blieden J noted that the nature of the liability created by a document ‘... turns not on what the document is named or styled as. Its label is unimportant. What matters is the kind of liability sought to be created by the parties, as evidenced by the language they elected to employ in the context in which their wording appears.’

[39] It was further submitted by the respondent that it is clear from the wording of the guarantee as a whole, that the respondent’s obligations are in respect of ‘the due, punctual and full payment of all debts’ which Wardkiss owes the applicant in terms of the agreements concluded between the applicant and Wardkiss. As the obligation of the respondent was dependent on the due, punctual and full payment by Wardkiss of its obligations to the applicant in terms of the agreements, the obligation of the respondent was argued to clearly be accessory to that of Wardkiss. The guarantee did not give rise to an independent obligation and is therefore a suretyship and not a guarantee.

[40] In response to this submission, it was argued on behalf of the applicant that the existence of a contractual debt of a third party, as the event for which the guarantee is provided, does not mean that it is a suretyship instead of a guarantee. Reference was made to *Jungers, Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd*¹⁵ and *Cazalet v Johnson*¹⁶ where in each case the document relied upon contained an undertaking to pay the debt of a third party if the latter did not pay it. In each instance, the court interpreted the document to be a guarantee, a principal obligation, and not a suretyship.

[41] It was also submitted on behalf of the respondent that the guarantee makes provision for the renouncing of benefits, which defence is only afforded to a surety, and which demonstrates that the parties intended to conclude a suretyship. Reliance was placed on *Caney’s*¹⁷ where it was stated that ‘if a contract is one of suretyship, the surety will be entitled to the suretyship benefits . . . but otherwise not’.

¹⁴ *Absa Bank Ltd v Zurich Risk Financing SA Ltd* [2009] ZAGPJHC 85 para 5 (‘Absa’).

¹⁵ *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd* 1973 (3) SA 263 (D).

¹⁶ *Cazalet v Johnson* 1914 TPD 142

¹⁷ *Caney’s* at 26.

[42] In response to this last submission, the applicant submitted that the existence of clause 6.1.1 does not transform the guarantee into a suretyship. It simply closes the door on the respondent opposing a claim for payment under the guarantee by contending that the applicant is obliged to first seek payment from (or excuss against) Wardkiss.

Discussion and analysis

[43] There is a saying that if it looks like a duck, walks like a duck and quacks like a duck, then it just may be a duck. It later became known as the duck test, a humorous term for a form of inductive reasoning.¹⁸ It has not been easy to find a clear and exact definition of a guarantee. In most instances, it is described by comparing it with a contract of suretyship. Carl Hugo, a professor in banking law at the University of Johannesburg, provided the following description:¹⁹

'When dealing with guarantees it is important to emphasise that the term "guarantee" can in law refer to two distinctly different instruments, namely an independent guarantee (often referred to as a demand guarantee) and an accessory guarantee (akin to suretyship). In the case of the former the beneficiary's right to be paid by the guarantor is to be determined solely with reference to the guarantee itself (and not with reference to the underlying debt secured by the guarantee). In the case of the accessory guarantee, however, the beneficiary will only be entitled to be paid by the guarantor if, in terms of the underlying debt relationship, it is indeed entitled to payment; the guarantor is entitled to raise any defence against the beneficiary that the principal debtor would have been able to raise against the beneficiary in the underlying debt relationship. From a legal perspective this is a fundamental difference which is often not properly understood or appreciated by the parties concerned.'

(Footnote omitted.)

[44] Counsel for the applicant referenced a number of cases and submitted that the cases will only be helpful to the extent that they demonstrate a uniform approach to interpret a contract in accordance with the rules for interpreting contracts. The obvious problem with looking at other cases is that the facts and the wording of the contracts in each case would differ from case to case and from contract to contract.

¹⁸ https://en.wikipedia.org/wiki/Duck_test (accessed 18 December 2023).

¹⁹ C Hugo 'Letters of credit and demand guarantees: a tale of two sets of rules of the International Chamber of Commerce' (2017) 1 *TSAR* 1 at 14.

[45] Annexure 'K' is titled 'Guarantee', but as mentioned in *Absa*, the label of a document is not important. I will instead concentrate on the content of the guarantee. It is clear from the wording of clause 1.1 of the guarantee that the respondent undertook, as a principal and independent obligation, the due, punctual and full payment of the debts of Wardkiss and to pay to the applicant on first written demand, without delay, all amounts due and payable.

[46] The guarantee also clearly states that it is not merely an ancillary obligation, as would be the case in respect of a suretyship (see clause 1.1.1). The guarantee also makes it clear that it shall be effective regardless of the validity or enforceability of the debts of Wardkiss (see clause 2.4).

[47] The guarantee contains no provision that the respondent will only be liable to perform in the event that Wardkiss fails to do so, which would fall squarely within the accessory nature of a suretyship, as described in *Caney's* and *Essa*.

[48] In my view, looking at what has been established as the three legs or triad in respect of the interpretation of a contract, namely, the language used, the context, and the purpose, it is clear, firstly, that the language of the guarantee is consistent with that of a guarantee, bearing in mind the characteristics of a guarantee as set out above.

[49] As far as the context is concerned, the applicant placed reliance on the various emails exchanged between the parties. The applicant, through Mr Naidoo, at all times referred to, and requested, that collateral be provided in the form of guarantees, one by Mr Palmer and one by the respondent. Mr Palmer accepted these proposals, which culminated in the signing of annexures 'D', 'E' and 'K'. At no stage did Mr Palmer counter with a proposal that he would rather provide a suretyship instead of a guarantee. He was asked to sign the guarantee and then proceeded to sign it, again with no indication that he would have preferred to sign a suretyship instead or that the guarantee was incorrectly worded or wrongly described. The respondent did not take issue with the content of the emails attached and the documents signed, relying instead only on the legal submission that the nature of the guarantee was an ancillary obligation and not a principal obligation.

[50] The purpose of the guarantee is, in my view, rather obvious. The applicant wanted to ensure that it had sufficient collateral as security for the facilities it was providing to Wardkiss. As mentioned above, the collateral required consisted of more than just the guarantees by the respondent and Mr Palmer. Annexure 'D' did not only refer to collateral but also made reference to further 'supporting security' which included a further continuing covering mortgage bond by the respondent in respect of a property in Sydney Road and a cession of life cover by Mr Palmer, restricted to R6 million. The applicant was clearly intent on ensuring that it had sufficient collateral, which led to the guarantee being signed by Mr Palmer.

[51] In my view, bearing in mind the principles as set out in *Endumeni*, *Capitec* and *Caney's*, I have no doubt that annexure 'K' is indeed a guarantee, and that its wording, clearly distinguishes it from that of a suretyship. There is furthermore nothing in my view that supports the suggestion that the parties intended to conclude a suretyship instead of a guarantee, bearing in mind the clear words of the document, the context and its purpose. It looks like a guarantee, it behaves like a guarantee, and in my view it is a guarantee.

[52] It follows that it was not necessary for the guarantee to have been signed by Mr Palmer by way of an advanced electronic signature, as required by section 13 of the ECTA. The applicant is therefore entitled to judgment against the respondent.

Costs

[53] As far as costs are concerned, I have no reason to deviate from the general rule, namely that costs follows the result. The applicant, represented by both senior and junior counsel, has not asked for costs of two counsel in its Notice of Motion. At the hearing I was however requested to award costs of two counsel due to the complexity of the matter and its importance to the applicant. Counsel for the respondent was opposed to such an order. Whilst I understand the importance of the matter I am not convinced that the costs of two counsel is justified. I will accordingly not include that in the costs order.

Order

[54] I accordingly make the following order:

1. Judgment is granted against the respondent for:
 - 1.1 Payment of the sum of R3 000 000.
 - 1.2 Payment of interest on R3 000 000 from the date of service to the date of payment at the prevailing legal rate.
2. The respondent is directed to pay the applicant's costs of suit.

E BEZUIDENHOUT J

Date of hearing: 12 June 2023
Date of judgment: 19 December 2023

Appearances:

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