IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE

CASE NO: 22732/2009

In the matter between:

STRUCTURED MEZZANINE INVESTMENTS (PTY) LTD Applicant
(Registration No: 2007/006512/07)

and

FRANCOIS BASSON N.O.

First Respondent
(In his representative capacity as duly
appointed trustee of the FXT Property Trust)

GABRIEL JOSHUA JORDAAN N.O.

Second Respondent
(In his representative capacity as duly
appointed trustee of the FXT Property Trust)

GERHARDUS ADRIAAN ODENDAAL N.O.

Third Respondent
(In his representative capacity as duly
appointed trustee of the FXT Property Trust)

FRANCOIS BASSON

Fourth Respondent
(Identity No:)

GERHARDUS ADRIAAN ODENDAAL

Fifth Respondent
(Identity No:)

GABRIEL JOSHUA JORDAAN

Sixth Respondent
(Identity No:)

JUDGMENT: WEDNESDAY 24TH APRIL 2013

GAMBLE, J:

INTRODUCTION

[1] Structured Mezzanine Investments (Pty) Ltd ("SMI") is a money-lender which operates primarily in the property development market. It provides a form of bridging finance (which it conveniently calls "m*ezzanine finance*") to developers who run short of capital towards the end of a project [1]. These loans are usually made at extremely high rates of interest and are secured by mortgage bonds over the subject property.

[2] In this matter SMI lent an amount of R10 m to the FXT Property Trust ("the Trust") in terms of a written agreement ("the loan agreement") concluded on 29 May 2008. The loan was to be repaid by 29 August 2009, in which event the interest rate would be 1,25% per week (i.e. 65% per annum). In the event that the full amount of the loan was not repaid by that date, the interest rate on the outstanding capital would increase to 1,5% per week (or 78% per annum). The loan was

[1] See Nedbank Ltd v Bestvest 153 (Pty) Ltd 2012 (5) SA 497 (WCC)

evidently to be utilized by the Trust to partly finance a sectional title development in Hermanus.

[3] The loan agreement contained a number of suspensive conditions, including the registration of a covering mortgage bond over the subject property and the execution of deeds of suretyship by each of the trustees (Messrs. Basson, Odendal and Jordaan) in their personal capacities.

[4] The Trust defaulted on its obligation to SMI and on 28 October 2009 SMI launched motion proceedings in this Court for repayment of the capital sum then outstanding (R16 631 071,41) by the Trust and the sureties jointly and severally. Interest was also claimed at the rate of 1,5% per week with effect from 29 August 2009, together with costs on the scale as between attorney and own client (both as per the loan agreement).

THE HEARING BEFORE VAN STADEN AJ

[5] The application was opposed by both of the Trust and the sureties and the matter eventually came before Van Staden AJ in May 2011. By that stage the Fourth Respondent (Basson) had been sequestrated. Van Staden AJ was satisfied that judgment should be granted against the Trust and made an order to that effect in a written judgment handed down on 31 May 2011. No order was sought by SMI against Basson due to his insolvency.

[6] In regard to the remaining sureties (Odendal and Jordaan) Van Staden AJ had certain reservations about the validity and enforceability of the suretyships. Van Staden AJ's concerns stemmed from the fact that the relevant loan agreement,

to which reference was made in the body of the suretyship, was not annexed to the suretyship as it was intended to be. The reason it was not so annexed was fairly fundamental: the suretyship was executed on 24 April 2008, whereas the loan agreement was signed on behalf of the Trust on 25 April 2008 and by SMI only a month later – on 25 May 2008.

[7] Faced with a fairly forceful submission by Adv. L.M. Olivier SC for the sureties, that the deed of suretyship did not comply with the requirements of s6 of the General Law Amendment Act, 50 of 1956 ("the Act") in that the nature and amount of the principal debt were not capable of ascertainment by reference to the provisions of the written document, Van Staden AJ was persuaded by Adv. J.F. Pretorius on behalf of SMI that the problem was potentially capable of resolution by the consideration of extrinsic evidence.

THE JUDGMENT OF VAN STADEN AJ

[8] Having considered the extrinsic evidence placed before him, Van Staden AJ made the following findings in his judgment:

> *"14. In my opinion the extrinsic evidence in this instance does not sufficiently establish the nature and amount of the principal debt in the suretyship contract.*
>
> *15. It does not appear from the founding affidavit or the replying affidavit to what extent the terms of the Memorandum of Agreement [i.e. the loan agreement] had*

been agreed upon at the time when the suretyship agreement was signed. It is for instance possible that the agreement had been finalized and reduced to writing and that only the signatures of the parties were outstanding.

16. *These aspects can probably be cleared up by extrinsic evidence…*

17. *Despite that fact that the suretyship contract contains a non-variation clause (clause 25), the Applicant [SMI] can also, if necessary, apply for the rectification of this contract…*

18. *In all the circumstances I conclude that the loan agreement referred to in the suretyship agreement has not been properly identified and proved…*

19……

20. *In the circumstances it is clear that the Applicant is entitled to an order as requested in the notice of motion in respect of the trustees of the trust. As far as the sureties are concerned, I concludethat the Applicant is not entitled to the order requested. The Applicant should however not be denied the opportunity to amplify its case and an*

order provided for in Rule 6(6) is appropriate in my opinion."

[9] After granting judgment against the Trust, Van Staden AJ then ordered as follows:

"*2. In respect of the claim against Fifth and Sixth Respondent [Odendal and Jordaan respectively] no order is made and the respective parties must pay their own costs.*

3. The Applicant is granted leave to renew the application against Fifth and Sixth Respondents on notice to them, on the same papers, supplemented by such further affidavit(s) as the case may require, for the relief set out in the notice of motion."

[10] It has been held that the effect of the granting of such relief under Rule 6(6) is the equivalent of an order for absolution from the instance in an action [2]. This Court must then consider the matter in its entirety with due regard to any additional evidence adduced subsequent to the order of Van Staden AJ.

FURTHER AFFIDAVITS FILED

[11] On 2 April 2012 SMI filed a supplementary affidavit in terms of Rule 6(6) and simultaneously gave notice that it intended applying for rectification of the

[2] African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 563 F; Erasmus, Superior Court Practice Vol 1, B1-53.

suretyship. Odendal and Jordaan filed short supplementary answering affidavits in June 2012 to which SMI replied at the end of August 2012.

[12] The matter thus duly augmented came before the Court again on 14 March 2013 with the representation as before. The Court is indebted to counsel for the comprehensive heads of argument filed and their helpful submissions in Court.

THE RELEVANT TERMS OF THE DEED OF SURETYSHIP

[13] It is necessary for the purposes of this judgment to repeat certain of the provisions of the suretyship. The document is a lengthy one running to some eleven pages and consisting of twenty five clauses, many in the customary form. For present purposes it is necessary only to recite the preamble and clause 1 thereof:

> *"We, the undersigned*
>
> *…Francois Basson*
>
> *...Gerhardus Adriaan Odendal*
>
> *…[and] Gabriel Joshua Jordaan…*
>
> *do hereby bind myself (sic) jointly and severally to and individually…in favour of…SMI…as surety for and co-principal Debtor in solidum, with…[the Trust] (hereinafter referred to as 'the Debtor') for:*

1. *The payment on demand of any sum of money together with all costs and charges including legal costs as between attorney and own client which the Debtor may now or in the future owe to SMI arising from the Loan Agreement concluded between SMI and the Debtor on or about April 2008 (a true copy which (sic) is annexed hereto)."*

[14] As has been pointed out above, no copy of a concluded loan agreement was attached to the deed of suretyship which was signed by Basson on 16 April 2008 and by Odendal and Jordaan on 24 April 2008. Further, the loan agreement was signed by Basson on behalf of the Trust on 25 April 2008 and by an authorized representative of SMI on 25 May 2008.

SMI'S CASE IN THE FOUNDING AFFIDAVIT

[15] The Founding Affidavit in these papers was deposed to by one Jean Prieur du Plessis, a director of SMI. In para 15 of that affidavit du Plessis introduces the loan agreement as follows:

> *"15. On or about 29 May 2008 the Applicant, duly represented, and the Trust, duly represented by…[Basson]… concluded a written loan agreement in terms of which the applicant agreed to lend and advance an amount of R10 m…to the Trust on the terms contained therein…(a) copy…(whereof)… is attached hereto as annexure "FA3".*

[16] Thereafter there is a detailed recital in the affidavit of the alleged "*material express, alternatively implied, further alternatively tacit terms of the loan agreement."* Of significance at this juncture are the allegations in para 16.6 of the founding affidavit which reads as follows:

> *"16.6 The loan agreement was subject to fulfillment of the following suspensive conditions which had to be fulfilled within 7 (seven) days from signature of the loan agreement:-*
>
> *16.6.1 signature of a deed of suretyship by the fourth, fifth and sixth respondents in terms whereof they would jointly and severally have (sic) guaranteed the obligations of the Trust under the loan agreement, in such form and subject to such terms and conditions as the applicant may reasonably required (sic); …*
>
> *16.6.2…….*
>
> *16.6.3 receipt and approval of a resolution by the Trust, authorizing the entering into of*

the loan agreement and authorizing the fourth respondent [Basson] to sign all documentation relating thereto on its behalf."

[17] In para 16.11 of the affidavit du Plessis alleges that:

"The suspensive conditions were inserted for the benefit of the applicant and should they not have been fulfilled, or waived as the case might (sic) be, within 7 (seven) days of signature of the agreement, the agreement would be of no force and effect…"

[18] In para 17 of the founding affidavit du Plessis alleges that "***subsequent*** *to the conclusion of the loan agreement, all the suspensive conditions…were fulfilled"* (emphasis added)

[19] In para 20 of the founding affidavit du Plessis introduces the suretyship thus:

"On or about 24 April 2008, and ***in persuance of*** *the loan agreement, the fourth, fifth and sixth respondents…bound themselves jointly and severally as sureties and co-principal debtors for the payment of any sum of money…the Trust may owe to the applicant in terms of the loan agreement." (emphasis added)*

Thereafter the relevant terms of the suretyship are repeated *ad nauseam.Du Plessis goes* on to allege a breach of the loan agreement, non-payment by both the Trust and the sureties, and the amount allegedly due in terms of a certificate of indebtedness.

[20] The Trust's answering affidavit (deposed to by Odendal) is terse and in substance a mere three pages. No substantive defence is set out to SMI's claim other than to ask the Court not to enforce a claim which is against public policy because of the high rates of interest. The affidavit does acknowledge conclusion of the loan agreement and the suretyship and raises no irregularities in relation thereto.

[21] In the replying affidavit, du Plessis seeks (somewhat piously, it must be said) to justify the interest rates and SMI's tough lending policies. Nothing more is said about the suretyship or the loan agreement.

[22] The allegations in the founding affidavit to which reference has been made above create obvious inconsistencies which SMI failed to address at any stage either before, or during the hearing before Van Staden AJ. Those inconsistencies are such that, had the claim been brought by way of action, it is conceivable that an exception would have been raised on the basis that SMI's case as pleaded was vague and embarrassing and therefore failed to disclose a cause of action.

[23] In this regard, du Plessis's allegations referred to in paras 15, 18 and 19 above are erroneous:

23.1 Firstly, the loan agreement was not concluded on 29 May 2008 but, at the latest, by 25 May 2008 as the signature of SMI's representative on the document on that date reflects.

23.2 Secondly, the last signatures to the suretyship were appended on 24 April 2008 and can hardly be said to be "*in pursuance of the loan agreement*" on which the earliest signature (that on behalf of the Trust) is in any event recorded as having been appended on 25 April 2008.

23.3 Thirdly, the conclusion of the suretyship as a suspensive condition of the loan was most certainly not **subsequent** to the conclusion of the loan but obviously pre-dated the latter.

23.4 Fourthly, the suretyship itself refers to an agreement of loan purportedly concluded during April 2008 on an unspecified day.

[24] In light of the aforegoing, it is understandable that Van Staden AJ came to the conclusions reached in this judgment of 30 May 2011.

SMI"S SUPPLEMENTARY AFFIAVIT FILED IN TERMS OF RULE 6(6)

[25] In his second bite at the cherry, Du Plessis attempted to explain away the obvious deficiencies in SMI's founding papers to which reference has already been made above, and which Van Staden AJ also found to exist. These explanations are not convincing but they are, in the result, of no great moment and amount to no more than a belated attempt at face-saving. They certainly do not constitute "*extrinsic evidence*" as contemplated in the order made by Van Staden AJ.

[26] As "*further evidence*", Du Plessis presents the following facts:

26.1 A four-page "*facility letter*" dated 18 February 2007 from SMI to Basson and Jordaan in which the details of the loan facility which SMI was prepared to grant to the Trust are set out in some detail.

26.2 In the facility letter the capital is stipulated in the sum of R10m, the interest rates of 1,25 per cent and 1,5 per cent per week referred to above are set out and the period of the loan is set at 12 months.

26.3 Also contained in the facility letter are various of the conditions put up by SMI, including security in the form of a second mortgage bond over the relevant property and the furnishing of "*joint and several suretyships*" by Basson, Odendal and Jordaan.

26.4 The terms and conditions stipulated in the facility letter were accepted by Basson on 7 March 2008 when he signed the document on behalf of the Trust.

26.5 An allegation that -

> *"a copy of a written document containing the exact same material terms as those contained in the loan agreement which was eventually signed, was attached to the suretyship and therefore in the possession of the Respondents at the time they signed the suretyship."*

26.6 A letter dated 8 May 2008 from Attorneys Jordaan and Associates (in which the Sixth Respondent is the principal attorney and which firm represents the Trust and the sureties in these proceedings) to SMI confirming, *inter alia*, that the latter had "*agreed to loan and advance an amount of R10m (ten million rand) plus costs to…(the Trust)…on the terms and conditions set out in the Loan Agreement…to be entered into between, inter alia, our client and yourselves".*

26.7 A resolution dated 24 April 2008 passed by the Trust (and signed by all three trustees) in which it was resolved that –

26.7.1 *"The Company (sic) borrows from …SMI the sum of R10m (ten million rand) as set out in the Loan Agreement annexed hereto marked "A"";*and

26.7.2 Basson was authorized "*in his sole and absolute discretion to settle the terms and conditions applicable to the loan and sign all documentation relating thereto…"*

[27] In addition to these facts and allegations Du Plessis explains the following steps taken on behalf of the Trust:

27.1 On 16 April 2008 Basson attended on the offices of SMI's attorneys in Cape Town.

27.2 At a meeting with SMI's attorney [3] that day, Basson "*signed all the documents, including the loan agreements and the deed of suretyship*" in the presence of the attorney.

27.3 Basson explained to SMI's attorney that he would meet with Odendal and Jordaan (who could not make the meeting) for purposes of procuring their signatures on

[3]The attorney's name is Jacques Odendaal but he will be referred to hereinafter as "SMI's attorney" to avoid confusion with the Fifth Respondent

the various documents, including the loan agreement and the suretyship.

27.4 Sometime between 16 and 24 April 2008Basson contacted a director of SMI and proposed three minor amendments to the draft loan agreement. It is contended that these were not contentious and that SMI agreed thereto. SMI also instructed its attorneys to make the necessary amendments to the draft loan agreement.

27.5 A copy of the loan agreement in its form prior to these three amendments, and as signed by Basson on 16 April 2008, was annexed by Du Plessis to the supplementary affidavit.

27.6 On 25 April 2008 SMI's attorney met Basson at the latter's office and was handed a number of documents by Basson. These included the signed deed of suretyship, the loan agreement as already signed by Basson on 16 April 2008 (in its unamended form), and the unsigned amended loan agreement.

27.7 During the aforesaid meeting with SMI's attorney Basson informed the latter that Jordaan had informed him, when signing the deed of suretyship the previous day, that he

wanted a further amendment to be made to the draft agreement *viz*. to clause 9.1.1 thereof which governs the procedure to apply on default by the debtor. [4]

27.9 Du Plessis says that according to Basson SMI's attorney was amenable to that amendment and a manuscript alteration was made to clause 9.1.1 of the amended draft of the loan agreement. This alteration is visible on the signed loan agreement filed with the founding affidavit.

27.10 On the same day (25 April 2008) Basson handed to SMI's attorney the trustees' resolution referred to above, which also bore the signatures of Odendal and Jordaan. Du Plessis draws attention, once again, to the fact that the resolution identified both the nature and the amount of the principal debt.

[28] Du Plessis summarizes the position that obtained at the time that the deed of suretyship was signed by Odendal and Jordaan (24 April 2008) as follows in the supplementary affidavit filed on behalf of SMI:

"23 From the above it is evident that, although the loan agreement in its final signed form as attached to the

[4]Evidently, Jordaan requested that seven days' written notice be given before SMI was entitled to take any legal action.

founding affidavit was not in the possession of Odendal and Jordaan at the time they signed the deed of suretyship, they were in fact in possession of a copy of the loan agreement in the exact same terms save for the four amendments referred to above, which amendments were effected subsequently. It is further evident that the four amendments did in no way whatsoever affect the principal debt. Accordingly, the document which was attached to the deed of suretyship at the time it was signed by Odendal and Jordaan properly and sufficiently identified the principal debt for which they signed surety. Furthermore, the four amendments which were effected were in fact proposed by Basson and Jordaan, ostensibly after consultation with Odendal. I re-iterate however, that those amendments did not in any way whatsoever affect the extent or nature of the principal debt."

THE SURETIES' ANSWER TO THE SUPPLEMENTARY AFFIDAVIT

[29] The supplementary answering affidavit filed by the sureties in terms of Rule 6(6) was deposed to by Odendal and confirmed by Jordaan. This affidavit, like its predecessor, is scant on detail and skirts the issues. The following are the only points worth detailing at this stage:

29.1 Odendal was not particularly interested in the legal niceties around the development which he says were left up to Basson as representative of the Trust. He attempts to shirk responsibility as follows:

> *"3…As I was merely an investor in the development I did not make it any of my business. Respondent and I did no (sic) worry to sign the suretyships as the 'loan' to First Respondent was intended as a short term bridging loan until the construction of the development was completed. It was estimated to take no longer than 12 months. There was not supposed to be any risk to the sureties."*

29.2 In relation to the availability of the loan agreement when the suretyship was signed, Odendal takes issue with Du Plessis:

> *"11. The Suretyships and resolution were signed by Jordaan and myself at Jordaan's offices on 24 April 2008 after Basson handed it to Jordaan for signature. The loan agreement was definitely not handed to us nor attached*

to any document we signed. We were asked to sign the suretyships at that stage and were told that the loan agreement would be concluded later. I did not even read the terms of the suretyship due to the factors set out above. Sixth Respondent and I were not aware (sic) what happened at the meetings between the meetings (sic) between Applicant and First Respondent nor what was said between them."

29.3 Odendaal denies that he was personally aware of the terms of the draft loan agreement, which he says was never attached to the suretyship document. He goes on to contend (for the first time) that the suretyship is invalid:

"7. At the stage when I deposed to the answering affidavit on 19 November 2009 the property and the development on it was (sic) still on track, and served as security for Applicant's loan to First Respondent, hence the short affidavit. The simple fact of the matter is that the loan agreement did not exist at the time of the conclusion of the Suretyships (sic). The provision of clause

25 of the suretyships made it clear that no addition to the suretyships shall be of any force or effect. Due to the fact that the loan agreement was not attached and did not exist, the suretyships are (sic) invalid."

29.4 Odendal stresses (and Jordaan, a practicing attorney confirms) that at no stage was any draft agreement annexed to the suretyship when he and Jordaan signed the document and he disavows knowledge of the terms of the loan at that stage:

"10. None of the material terms of the Loan Agreement are mentioned in the suretyships and were known (sic) to Sixth Respondent and I when we signed the suretyships.'"

29.5 Importantly, Odendal and Jordaan do not take issue with Du Plessis's conclusions set out in para 23 of the supplementary affidavit (as reflected in para28 above). Indeed, the paragraph is not dealt with in the supplementary answer which deals selectively with only certain of the paragraphs in SMI's supplementary affidavit.

[30] I am satisfied that Du Plessis's summary of events in the supplementary affidavit, and the conclusions to be drawn therefrom as set out in the said paragraph 23,are a correct and accurate reflection of the state of play at the time the suretyhip was signed. To the extent that there are disputes of fact put up by Odendal in the supplementary answer, I do not believe that such disputes survive the test in Plascon-Evans[5]:they are fanciful and designed to be apparent rather than real.The question that then arises is whether this additional evidence is admissible in light of the parol evidence and integration rules.

REQUIREMENTS FOR A CONTRACT OF SURETYSHIP

[31] In terms of s6 of the Act:

> *"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…"*

[32] In Sapirstein[6], the Court held that:

> *"What s6 requires is that the 'terms' of the contract of suretyship must be embodied in the written document. It was contended by counsel for plaintiff that this meant that the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification other than evidence by the parties (i.e. the creditor*

[5]Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634I-635C.
[6]Sapirstein v Anglo African Shipping Company SA Ltd 1978 (4) SA 1 (A) at 12B

and the surety) as to their negotiations and consensus. I agree with this contention. In my view, there can be no objection to extrinsic evidence of identification being given, either by the parties themselves, or by anyone else, unless the leading of such evidence can be said to amount to an attempt to supplement the terms of the written contract –

> *'by testimony as to some negotiations or consensus between the parties which is not embodied in the written agreement' (see Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) at 991)"*

[33] In the instant case there is no problem with identifying the creditor of the surety (SMI) or the principal debtor (the Trust), both of whom are adequately described in the deed of suretyship. However, Mr. Olivier SCargued that "*the nature and amount of the principal debt"* did not appear*ex facie*the suretyship and that, for this reason, the document did not comply with section 6 and was therefore invalid.

[34] In Fourlamel[7], Miller JA was prepared to assume that, as in cases involving contracts for the sale of land, the principles of incorporation by reference [8] were similarly applicable to contracts of suretyship under s6 of the Act:

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[7]Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 345F

[8]See for exampleVan Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) at 990-991; F.J. Mitrie (Pty) Ltd v Madgwick 1979 (1) SA 232 (D); Johnston v Leal 1980 (3) SA 927 (A) at 937H; Hartland Implemente (Edms) Bpk v EnalEiendomme BK en Andere 2002 (3) SA 653 (NC) at 667E- 668D-H; Industrial Development Corporation of SA (Pty) Ltd v Silver 2003 (1) SA 365 (SCA); Christie and Bradfield: Christies Law of Contract in SA (6th ed) p131

> *"It is a condition of the incorporation of other writing into a written document required by law to contain the terms of the contract, if such contract is to have validity, that such other writing be referred to in the written document. CERTUM EST QUOD CERTUM REDDI POTEST."*

[35] In the Industrial Development Corporation matter, *supra,* the suretyship did not reflect the name of the principal debtor and the point was taken that the document was invalid. Scott JA had the following to say in that regard at 368J-369C:

> *"[5]…Although it may at first blush appear not to be the case, the identity of the principal debtor is undoubtedly a material term of a contract of suretyship (Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 344H-345E). Unless, therefore, the identity of the principal debtor is embodied in the written document, the contract of suretyship will be invalid. In the present case the appellant relies on the reference in the deed of suretyship to the loan agreement which in turn discloses the identity of the principal debtor. It is contended that the loan agreement was incorporated by such reference into the deed of suretyship and that there was accordingly compliance with the section despite the blank space where the name of the principal debtor ought to have been inserted."*

[36] Scott JA went on to deal with the principle of incorporation by reference and held, definitively, that it was applicable to contracts of suretyship as well:

> *"[6] Incorporation by reference, as the name implies, occurs when one document supplements its terms by embodying the terms of another. Leaving aside for the moment the admissibility of extrinsic evidence that may be necessary to complete the identification of a document whose terms are sought to be incorporated, the first enquiry is whether the terms of a deed of suretyship may be supplemented in this way. Incorporation by reference in the context of contracts for the sale of land was recognized as long ago as 1920 in Coronel v Kaufman 1920 TPD 207 and subsequently adopted by this Court in Van Wyk v Rottcher's Mills (Pty) Ltd 1948 (1) SA 983 (A) at 990-1. It has also been recognized as applicable to contracts of suretyship governed by s6 (see, for example, Trust Bank of Africa Ltd v Cotton 1976 (4) SA 325 (N) at 329E-H; F.J. Mitrie (Pty) Ltd v Madgwick and Another 1979 (1) SA 232 (D) at 235B-E).But in Fourlamel (Pty) Ltd v Maddison (supra) at 345E) this Court was only prepared to assume that the principle was applicable to contracts of suretyship and refrained from finally deciding the issue. I am satisfied, however, that, once the principle of incorporation by reference is held to apply in the case of*

sales of land, there can be no justification for holding the principle not to be applicable in the case of contracts of suretyship."

[37] And, as in the present case, the suretyship in the Industrial Development Corporation case contained limited references to the missing term:

"[8] Although in the present case the description contained in the deed of sale goes a long way towards identifying the loan agreement, it was not in dispute that the identification would not be complete without the aid of some additional extrinsic evidence."

[38] In considering the admissibility of the extrinsic evidence in that case, Scott JA pointed out the following at 370 D-371A:

"[9] As a general rule the terms of a contract required by law to be in writing must appear from the document itself and may not be supplemented by extrinsic evidence. Nonetheless, extrinsic evidence has been permitted in a number of situations provided always that such evidence is not of negotiations between the parties prior to the execution of the written agreement or of their consensus. Thus in Sapirstein and Others vAnglo African Shipping Company (SA) Ltd 1978 (4) SA 1 (A) extrinsic evidence

was held to be admissible to establish the identity of both the principal debtor and sureties where the plaintiff sued on a multiple guarantee in which a number of promisors had bound themselves as sureties and co-principal debtors in solidum with each other for all sums of money which each "may have in the past owed or may presently or in the future owe" to each of a number of promisees. More relevant as far as the present case is concerned, is the rule admitting extrinsic evidence to relate what is in writing to the physical object referred to. In Oberholzer v Gabriel 1946 OPD 56 at 59 Van den Heever J emphasized the distinction between "the sufficiency of a demonstration of the subject-matter on the one hand and its application to physical phenomena on the other". As to the latter, the learned Judge observed: "There never has been and there cannot be a rule to exclude parol evidence…"As has frequently been stressed, such evidence is not only admissible but is very often essential. The rationale for its admissibility was explained by Watermeyer CJ in Van Wyk v Rotther's Saw Mills (Pty) Ltd (supra at 990) as follows:"It has been suggested that a written contract does not satisfy the provisions of the statute unless the mere reading of the document is sufficient to identify the land sold without invoking the aid of any evidence dehors the document, but a moment's

reflection and an appreciation of the fact that a written contract is merely an abstraction until it is related, by evidence, to the concrete things in the material world will show at once that suggestion makes s30 demand performance of an impossibility."

The admissibility of extrinsic evidence for this purpose has been consistently recognized (See, for example, Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) at 999 D-I; Kriel and Another v Le Roux [2000] 2 All SA 65 (SCA) at 67c-j; Headerman (Vryburg) (Pty) Ltd v Ping Bai1997 (3) SA 1004 (SCA) at 1009A-D; General Accident Insurance Co SA Ltd vDancor Holdings (Pty) Ltd and Others 1981 (4) SA 968 (A) at 978 E-H).

[10] It has sometimes been said that such evidencemay not be given by the parties themselves. This is not correct. It is admissible whether given by the parties themselves or anyone else. What they, or anyone else, may not do, is testify as to some negotiation or consensusbetween the parties. (see Van Wyk v Rottcher's Saw Mills (supra), per Watermeyer CJ at 991-2, Tindall JA at 996, Schreiner JA at 1007);Sapirstein and Others v Anglo African Shipping Company (SA)(supra) at 12 C-E))"

[39] Scott JA then discussed the decisions in Cotton[9], Fourlamel and Sullivan[10] and observed as follows:

> *"[12] In the Cotton case it was clear ex facie the deed of suretyship that the document sought to be incorporated did indeed give rise to the indebtedness secured by the suretyship. All that was required, therefore, was extrinsic evidence identifying that document as the document referred to in the deed of suretyship. In this important respect the Cotton case is distinguishable from the Fourlamel case. It was therefore correctly decided. In the Sullivan case, too, it appeared ex facie the deed of suretyship that the debt secured arose in terms of the lease agreement sought to be incorporated. What was required therefore was no more than extrinsic evidence identifying the actual lease agreement as the one referred to. It follows that, in my view, Sullivan's case was wrongly decided.*
>
> *[13] As previously stated, the deed of suretyship in the present matter similarly makes it clear that the debt secured is the loan in terms of the loan agreement sought to be incorporated. Extrinsic evidence identifying*

[9] rust Bank of Africa Ltd v Cotton 1976 (4) SA 325 (N)
[10] Trust Bank van AfrikaBpk v Sullivan 1979 (2) SA 765 (T)

the loan agreement as the one referred to is all that would be required and is therefore admissible."

[40] In my respectful view, a similar approach is warranted *in casu* where the nature of the principal debt is described (at least in part) in the deed of suretyship as "*any sum of money…now or in the future…(owing…) to SMI*" by the Trust. The further basis for the Trust's indebtedness is said to be the annexed "*Loan Agreement concluded between SMI and (the Trust)."*

[41] I have already found that the denial by Odendal and Jordaan that the partially signed, unamendedagreement was annexed to the suretyship is not worthy of serious credence. But even if I am wrong in this regard, it matters little to my mind that the document was not attached: it was readily capable of identification by the parties, was inexistence at the time the suretyship was signed, had been signed by Basson on behalf of the trust and the material terms thereof had been agreed upon.

[42] Mr. Olivier SC went on to argue that as of 24 April 2008 the loan agreement was inchoate and so, it was argued further, as there was no principal debt in existence at the time, the suretyship was of no force and effect. What was in existence at that time, as the admissible extrinsic evidence shows, was a draft agreement in which (it is common cause) the material terms had been agreed and reduced to writing. That instrument had already been signed by Basson on behalf of the Trust but not by SMI. The partially signed agreement was consistent (so far as the material terms of the suretyship were concerned) with –

42.1 the facility letter on which Basson had acknowledged acceptance of the terms and conditions on behalf of the Trust;

42.2 the resolution by the trustees signed on 24 April 2008 (the same day that they signed the suretyship) resolving to conclude the loan agreement; and

42.3 Jordaan's letter (*qua* attorney for the Trust) to SMI dated 8 May 2008 confirming the loan agreement and furnishing an undertaking to SMI to effect certain payments to it.

Each of those documents shows unequivocally that the nature and extent of the principal debt was a loan to the Trust of R10m by SMI, together with interests and costs thereon.

[43] Mr. Olivier SC made much of the fact that the loan agreement had not been finalized at the time the suretyship was signed, and that SMI only appended its signature thereto a month later. It is, however, not a requirement for a valid deed of suretyship that the indebtedness must exist at the time that the document is signed. In Frysch[11] Corbett JA observed as follows:

"The contract is accessory in the sense that it is of the essence of suretyship that there be a principal obligation. At the same

[11] Trust Bank of Africa Ltd v Frysch 1977 (3) SA 562 (A) at 584G-H

time it is not essential that the principal obligation exists at the time when the suretyship contract is entered into. A suretyship may be contracted with reference to a principal obligation which is to come into existence in the future…Where the only principal obligation guaranteed by the suretyship is one to come into existence in the future, then the liability of the surety under his guarantee does not arise until the principal obligation has been contracted…"

And at 585E-G Corbet JA noted the following:

"It is true that asuretyship contract will often indicate that the principal obligation to which it is accessory is presently in existence or is to be contracted in the future or that it covers obligations of both varieties. This is done mainly in order to identify the obligation to which the suretyship relates and in some instances this may be the only means of identification. Thus, for example, a suretyship contract which spoke only of the "existing debts" of the principal debtor, would not normally be construed as covering debts contracted after the conclusion of the contract. It does not follow, however, that a future obligation, which is otherwise clearly indicated as the subject-matter of the suretyship contract will not be covered thereby merely because it is not described therein as being a future obligation. Nor do I think that in such a case there would be any

grant for contending that the contract of suretyship was invalid or inoperative."

[44] In Sapirstein[12] Trengrove AJA made the following comment after reference had been made to the Frysch case:

"And, if such a contract of suretyship is recorded in writing, it follows that extrinsic evidence must necessarily be admissible to prove that the principal obligation has come into existence, and to establish the amount of the obligation if, as in this case, the guarantee is an unlimited continuing guarantee for payment of all sums of money which the principal debtor may in future owe to the creditors.

The provisions of s6 of Act 50 of 1956 do not invalidate a contract of suretyship of this sort provided, of course, such contract is embodied in a written document and is signed by or on behalf of the surety."

[45] Applying these principles to the present case one finds the following:

45.1 In February-March 2008, and as the facility letter records, the Trust knew that it was going to be borrowing "*R10m (ten million rand) plus costs associated with the*

[12] At p12A

transaction" from SMI: indeed it was the Trust that had sought the loan;

45.2 Its trustees knew too that the term of the loan was to be 12 months with a variable interest rate;

45.3 The trustees knew further from the facility letter that they would be required to sign suretyships on behalf of the Trust for its obligations to SMI;

45.4 On 16 April 2008 Basson signed a draft loan agreement on behalf of the Trust which made provision for a loan from SMI on the same terms as set out in the facility letter;

45.5 On 16 April 2008 Basson signed the deed of suretyship and bound himself as surety and co-principal debtor on behalf of the Trust, and on 24 April 2008 Odendal and Jordaan did likewise;

45.6 On 24 April 2008 the trustees formally passed a resolution resolving to borrow R10m from SMI on the terms set out in an attached draft loan agreement, and authorizing Basson to sign the necessary documentation on behalf of the Trust;

45.7 On 25 April 2008 Basson signed the final, amended draft of the loan agreement on behalf of the Trust which became effective and operative on 25 May 2008 when SMI appended its signature thereto;

45.8 The material terms in that final agreement were consistent with the terms of the facility letter and the earlier draft signed by Basson on 16 April 2008;

45.9 The parties subsequently implemented the terms of the loan agreement: R10m was advanced to the Trust by SMI on 29 May 2008 and the Trust mortgaged its property in Hermanusin favour of SMI by way of a second bond registered on 28 August 2008 in a similar amount.

45.10 A further R1,4m was advanced by SMI to the Trust on 27 October 2008;

45.11 The Trust failed to repay the loan on due date.

CONCLUSION

[46] In light of the aforegoing, I am satisfied that SMI has established, on a balance of probabilities, that the suretyship is valid and binding. The short-comings in the document, as to the nature and extent of the principal debt, have been remedied by the extrinsic evidence.

[47] I would add that both in these proceedings and in the sequestration proceedings of the Trust, the trustees have acknowledged unequivocally that they stood surety on behalf of the Trust in respect of its aforesaid obligations to SMI. In addition, there has been no suggestion by them that there was any other agreement of loan between SMI and the Trust other than that finally signed by SMI on 25 May 2008.

[48] In light of these findings it is unnecessary to consider the alternative claim for rectification of the agreement.

ORDER

[49] In the circumstances there will be judgment in favour of the Applicant against the Fifth and Sixth Respondents, jointly and severally, the one paying, the other to be absolved, for:

1. Payment of the sum of R16 631 071,41.

2. Interest on the aforesaid amount at the rate of 1,5% per week, calculated from 29 August 2009 until date of payment.

3. The Fifth and Sixth Respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application subsequent to the order of Van Staden AJ, on the scale as between attorney and client.

_____
GAMBLE, J

GAMBLE, J: ORDER: 24 APRIL 2013

In the circumstances there will be judgment in favour of the Applicant against the Fifth and Sixth respondents, jointly and severally, the one paying, the other to be absolved, for:

1. **Payment of the sum of R16 631 071.41**
2. **Interest on the aforesaid amount at the rate of 1,5% per week, calculated from 29 August 2009 until date of payment.**
3. **The Fifth and Sixth Respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application subsequent to the order of Van Staden AJ, on the scale as between attorney and client.**

……..
L. VAN BILJON
24 APRIL 2013

JUDGE	**:**	P.A.L. GAMBLE
FOR APPLICANT	**:**	Adv. J.F. Pretorius
INSTRUCTED BY	**:**	Sim and Botsi Attorneys c/o Smit Rowan Attorneys
FOR RESPONDENTS	**:**	Adv. L.M. Olivier (SC)
INSTRUCTED BY	**:**	Jordaan and Associates c/o Visagie Vos and Partners

DATES OF HEARINGS	**:**	14 March 2013
DATE OF JUDGMENT	**:**	24 April 2013