THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 419/2001

Reportable

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION OF SA (PTY) LTD ***APPELLANT***

and

DALE CLIFFORD SILVER ***RESPONDENT***

CORAM : ***NIENABER, HARMS, OLIVIER, SCOTT et STREICHER JJA***
HEARD : ***9 SEPTEMBER 2002***
DELIVERED : ***20 SEPTEMBER 2002***

Suretyship – compliance with s 6 of Act 50 of 1956 – incorporation by reference – admissibility of extrinsic evidence

J U D G M E N T

SCOTT JA/…

SCOTT JA:

[1] The question in issue in this appeal is whether a deed of suretyship which does not identify the principal debtor as such can be saved from legal extinction by virtue of its reference to a loan agreement which does identify the principal debtor and which is stated in the deed of suretyship to give rise to the debt so secured. The facts may be stated shortly.

[2] The appellant sued the respondent in the Court below for payment of a sum of money said to be due and payable to it by the respondent as surety and co-principal debtor in terms of a deed of suretyship dated 10 December 1999. The document specified the amount of the principal debtor's indebtedness, that such indebtedness was in respect of money to be lent and advanced by the appellant to the principal debtor in terms of an agreement (defined as 'the loan agreement') and that the loan agreement was to be entered into simultaneously with the signing of the deed of suretyship. But it did not reflect the name of the principal debtor; a space left for the insertion of the latter's name was left blank.

[3] The appellant annexed to its summons a copy of a loan

agreement entered into between it as lender and a company, Auto Spares and Accessories (Pty) Ltd, trading as Engineplan ('Engineplan') as borrower and alleged in its Declaration that this was the loan agreement referred to in the deed of suretyship. It followed, so it was alleged, that the principal debtor was Engineplan. From the loan agreement it appears that the loan was for R6 000 000, being the same amount referred to in the deed of suretyship, and that it was signed by the respondent both on his own behalf and on behalf of Engineplan on the same day as the deed of suretyship was signed, *viz* 10 December 1999. The loan agreement provided further that any advance in pursuance of its terms was conditional upon the respondent first guaranteeing the obligations of Engineplan under the loan agreement in the form and subject to such terms as the appellant reasonably required.

[4] The respondent gave notice of exception to the appellant's Declaration as not disclosing a cause of action. The basis of the exception was that the contract of suretyship was invalid for want of compliance with the provisions of s 6 of the General Law Amendment Act 50 of 1956 in that, in short, (i) the deed of suretyship did not identify the principal debtor and (ii) extrinsic evidence was not admissible to cure the defect. The exception was heard by Goldstein J who found the facts of the case to be indistinguishable from those in *Trust Bank van Afrika Bpk v Sullivan* 1979 (2) SA 765 (T), which was a decision of the Full Bench and therefore binding on him. He accordingly upheld the exception and dismissed the action with costs. The appeal is with the leave of the Court *a quo*.

[5] Section 6 of Act 50 of 1956 provides:

> '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 of an

aval under the laws relating to negotiable instruments.'

(Nothing turns on the proviso in the present case.) 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. (Cf *Johnston v Leal* 1980 (3) 927(A) at 937G - 938A). 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 344 H – 345 E). 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.

[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 inquiry 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 recognised 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 -

991. It has also been recognised as applicable to contracts of suretyship governed by s 6. (See *eg Trust Bank of Africa Ltd v Cotton* 1976 (4) SA 325 (N) at 329 E – H, *F J Mitrie (Pty) Ltd v Madgwick and Another* 1979 (1) SA 232 (D) at 235 B – E.) But in *Fourlamel (Pty) Ltd v Maddison, supra*, at 345 E, 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.

[7] As previously stated, the Court *a quo* regarded itself as bound by the decision in *Trust Bank van Afrika Bpk v Sullivan, supra*. The facts were remarkably similar to the present. The space left for the insertion of the name of the principal debtor in the deed of suretyship had likewise been left blank. The deed of suretyship, however, referred to a deed of lease which identified the lessee and recorded that the defendant was binding himself as surety for the punctual performance by the lessee of all the latter's obligations under the lease. On appeal from the Magistrates' Court the issue arose as to the admissibility of extrinsic evidence identifying a deed of lease as the one referred to in the deed of suretyship. In coming to the conclusion he did, Viljoen J (with whom Human J concurred) held that before a document such as a lease agreement could be incorporated by reference into a deed of suretyship, the reference in the latter to the lease agreement had to be such that it was identifiable *ex facie* the deed of suretyship and by way of mere production and comparison. He added that if extrinsic evidence were necessary to identify the lease agreement, in the sense of what document was intended, it would be in conflict with the parol evidence rule and for this reason inadmissible (at 769 D – G). Some three years earlier and on very similar facts, Miller J in *Trust Bank of Africa Ltd v Cotton, supra*, held that in such circumstances extrinsic evidence was indeed admissible to identify the document referred to in the deed of suretyship. Viljoen J considered the earlier case to have been wrongly decided and in view, no doubt, of the conflict granted leave to appeal to this Court. In the event, the appeal was not proceeded with.

[8] Although in the present case the description contained in the deed of suretyship 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.

[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 v Anglo African Shipping Co (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 promissors 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 emphasised 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 Rottcher'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 sec 30 demand performance of an impossibility.'

The admissibility of extrinsic evidence for this purpose has been consistently recognised. (See for *eg 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 67 c – j; *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA) at 1009 A – D; *General Accident Insurance*

Company SA Ltd v Dancor Holdings (Pty) Ltd and Others 1981 (4) SA 968 (A) at 978 E – H.)

[10] It has sometimes been said that such evidence may 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 *consensus* between the parties. (See *Van Wyk v Rottcher's Saw Mills, supra*, per Watermeyer CJ at 991 – 992, Tindall JA at 996, Schreiner JA at 1007; *Sapirstein and Others v Anglo African Shipping Co (SA), supra*, at 12 C – E.)

[11] In the *Sullivan* case Viljoen J found in the decision of this Court in *Fourlamel (Pty) Ltd v Maddison, supra*, support for his view that extrinsic evidence was not admissible to identify the lease agreement referred to in the deed of suretyship. He referred to a passage in the judgment of Miller AJA in the *Fourlamel* case and (at 770 F – G) suggested that Miller AJA had changed his stance somewhat since delivering the judgment in the *Cotton* case in the Natal Provincial Division. (The latter judgment was delivered a mere five months earlier. See *F J Mitrie (Pty) Ltd v Madgwick and Another, supra*, at 235 A – B.) In the *Fourlamel* case a deed of suretyship had been signed by the surety before the document had been completed. The particulars which had not been inserted in the deed included the identity of the principal debtor. In an attempt to save the suretyship from invalidity the creditor sought to rely on a reference in the deed of suretyship to a deed of lease which it was said would disclose the identity of the principal debtor. Miller AJA held this to be impermissible. The reasoning of the learned judge appears from the passage quoted by Viljoen J in the *Sullivan* case at 770 H. It is sufficient to reproduce a portion of the quotation (at 345 G – H of Miller AJA's judgment).

> 'It is true that the document with which we are now concerned [the deed of suretyship] refers in the final paragraph thereof to
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> "the leased premises referred to in the deed of lease annexed hereto",
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> but that paragraph deals exclusively with the selection of *domicilium* and is in no way linked with any debt or debts for which respondent was to be a surety. Nor does the fact that the deed of lease requires the lessee to furnish the lessor with a guarantee in the form of a standard suretyship deed, achieve the

necessary link. The object of appellant in attempting to read the deed of lease into the document is to establish in writing the identity of the creditor and the principal debtor, left blank in the document as signed by the respondent. The mere fact that the lease is referred to in the context of a *domicilium executandi* provision in the document, does not by any means, without evidence of the verbal agreement of the parties, establish that the lessee described in the deed of lease is the principal debtor in respect of whose debts the respondent was undertaking to be a surety.'

What emerges from this passage is that it was not apparent *ex facie* the deed of suretyship that the deed of lease sought to be incorporated was the document giving rise to the indebtedness secured by the suretyship. This meant that not only would it have been necessary to adduce evidence identifying the deed of lease as the one referred to in the deed of suretyship but, in addition, evidence would have been necessary to establish that the debt created by that deed of lease was the debt being secured in terms of the deed of suretyship. The additional evidence would have been evidence of the verbal agreement of the parties and was therefore inadmissible.

[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 case similarly makes it clear that the debt secured is the loan in terms of the loan agreement sought to be incorporated. Extrinsic evidence identifying the loan agreement as the one referred to is all that would be required and is therefore admissible.

[14] An alternative argument advanced by counsel for the respondent was that even if evidence to identify the loan agreement was admissible, the failure of the deed of suretyship to identify the principal debtor precluded the loan agreement from being identified as the agreement in question. In my view there is no merit in this contention. In any event, whether or not the loan agreement can be identified is a question of fact that will in due course have to be decided by the trial Court.

[15] It follows that the appeal must succeed.

The following order is made:

(1) The appeal is upheld with costs.

(2) The order of the Court *a quo* is set aside and the following is substituted in its place:

'The exception set forth in paragraphs 1 to 4 of the Notice of Exception is dismissed with costs.'

D G SCOTT
JUDGE OF APPEAL

CONCUR:
NIENABER JA
HARMS JA
OLIVIER JA
STREICHER JA