GUARANTEE OR SURETYSHIP: THEIR DIFFERENCES MATTER

Standard Bank of South Africa Ltd v Wardkiss Property Holdings (Pty) Ltd (9324/22) [2023] ZAKZPHC 153 (19 December 2023)

The distinction "often turns on a knife edge", says academics, and telling a guarantee apart from a suretyship is vital before committing yourself to either. The judgment below is a practical illustration of the differences and consequences. This in the context of a company that signed a document, titled 'guarantee,' in respect of a related entity's obligations to a bank. When the latter was liquidated, the company sought to escape liability, arguing that the terms of the document was really that of a suretyship; that the legal requirements for signature of a suretyship were not complied with and that the document was therefore invalid.

The Judgment can be viewed here

FACTS

Wardkiss (Pty) Ltd ('Wardkiss') approached the Standard Bank of South Africa Ltd ('Standard Bank') for certain banking facilities. The application was approved and Wardkiss was provided with, amongst other things, an overdraft facility of R6 million, a business revolving credit plan in the amount of R2,5 million and a Covid-19 loan for R3 million.

One component of Standard Bank's collateral security in respect of these facilities, was receipt of a guarantee from Wardkiss Property Holdings (Pty) Ltd ('Wardkiss Holdings'). The latter, represented by Mr Palmer, executed a document titled 'Guarantee' ('the guarantee') in favour of Standard Bank for the punctual and full payment of all the debts which Wardkiss has or may have in the future. Palmer, duly authorised, signed the document with his electronic signature (not an *advanced electronic signature). *(*See notes at the end of the summary.)*

Wardkiss was subsequently liquidated and Standard Bank claimed payment in terms of the guarantee from Wardkiss Holdings. It now denied liability, arguing that the wording and purport of the document titled 'Guarantee' was really a suretyship; it was not a principal stand-alone obligation but rather ancillary to the debt and default of Wardkiss. As such, it required a pen and ink or advanced electronic signature*, failing which the suretyship is rendered invalid.

HELD

Differentiating a guarantee from a suretyship

- Academics and our courts have reiterated over the years that "[w]hile 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."
- The contract of guarantee remains distinct from a suretyship. With a contract of guarantee, the guarantor undertakes a principal, independent obligation to indemnify the promisee on the happening of certain events. A suretyship, on the other hand, creates an obligation for the surety which is entirely accessory to that of the principal debtor, for any "losses resulting from the debtor's breach of contract." The consequences are that "if the creditor suffers grave losses when it turns out that the debtor's contract is invalid, the guarantor's obligation 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 …".

Cape Town	T: 021 406 9100	Blouberg	T: 021 521 4000	Centurion	T: 012 001 1546
Claremont	T: 021 673 4700	Tyger Valley	T: 021 943 3800	Bedfordview	T: 011 453 0577
Fish Hoek	T: 021 784 1580	Illovo	T: 011 219 6200	East London	T: 043 721 1234
Helderberg	T: 021 850 6400	Fourways	T: 010 001 2632		

The wording of the 'Guarantee' document in the present matter

- The agreement between the parties was always that Warkiss Holdings would provide collateral security, by way of a guarantee, for the debt of Wardkiss and to this end the document was signed.
- The wording used in the document supports a finding that it was indeed a guarantee. For example: " … 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… "; " … 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."; "… this Guarantee shall be effective regardless of the validity or enforceability of the Debts, any related documentation, and any collateral security for the debt"; and "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".
- It was further recorded in the document 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.

Outcome

- It is apparent from the wording used that Wardkiss Holdings undertook, as a principal and independent obligation, the full payment of Wardkiss' debts and to pay to Standard Bank all amounts due and payable on demand.
- The guarantee further clearly states that it is not merely an ancillary obligation and that it shall be effective regardless of the validity or enforceability of Wardkiss' debts, as would be the case in respect of a suretyship .
- Notably, the guarantee contains no provision that Wardkiss Holdings will only be liable to perform if Wardkiss fails to do so, which would be the position had it been a suretyship.
- The language of the document is therefore consistent with that of a guarantee and it was not necessary for an ink or advanced electronic signature.

CONCLUSION

Judgment was granted in favour of Standard Bank.

**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."*