ARE YOUR INITIALS ALSO YOUR SIGNATURE?

Firstrand Bank Limited v Initiative for Specialized Resource Management (Pty) Ltd and Others (046733/2023) [2024] ZAGPPHC 987 (26 September 2024)

Billion Property Developments v Nevzomark (Pty) Ltd and Another (2023/104985) [2024] ZAGPPHC 1045 (13 October 2024)

In two judgments handed down by the Pretoria High Court within two weeks of each other, the same question had to be answered, namely whether initialing a suretyship satisfies the legal requirement that a suretyship must be signed to be valid. Both courts came to the same conclusion, answering in the affirmative, though for different reasons. The outcome will not be the same in all instances, however, and the courts' reasoning below highlights factors that our courts must consider in these enquiries. It remains necessary to apply caution, as outcomes will vary depending on the circumstances.

SHORT DISCUSSION OF THE FACTS AND SUMMARY OF THE JUDGMENTS

Firstrand Bank Limited v Initiative for Specialized Resource Management (Pty) Ltd and Others (046733/2023) [2024] ZAGPPHC 987 (26 September 2024)

Billion Property Developments v Nevzomark (Pty) Ltd and Another (2023/104985) [2024] ZAGPPHC 1045 (13 October 2024)

In both the above judgments, the validity of a suretyship was contested in circumstances where the surety had not signed the document in the space provided for signature, but had initialed each page thereof. For a valid suretyship to come in existence, section 6 of the General Law Amendment Act, 50 of 1956 ('the Act') requires the following:

> ***"Formalities in respect of contracts of suretyship***
>
> *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…".*
>
> *(Our emphasis.)*

In addressing the question whether the suretyship was signed and therefore valid, the court in the *FirstRand Bank* matter, reasoned as follows:

- The word 'signature' is not defined in the Act.
- LAWSA postulates that a signature may take the form of initialing and that whether initials suffice as a signature for purposes of the Act, depends on the intention with which the initials were made.
- A similar argument is endorsed in Caney's *Law of Suretyships*, where it is argued that the main function of a signature is to "authenticate the identity of the signatory" and "to evidence an intention to be bound". Therefore, the question whether initials suffice as a signature depends on the person's intention at the time of appending his initials to the document.
- There is, in addition, case law supporting the acceptance of initialing as a person's signature (handed down by the erstwhile Transvaal High Court). On the other hand, there is also judgments where this equation was found to be unacceptable—notably because they dealt with initialing on wills where signatures are required in terms of the Wills Act. Those courts correctly stated that actual signatures were required in order to provide a safeguard against fraud, uncertainty and speculation in the context of the drafting of wills. Those judgments are therefore distinguishable from the present matter. The context of the present matter is quite different.

The court then concluded that "based on the modern trend that emphasizes the intention to be bound" rather than insisting on a full signature, that the initialing of the suretyship was sufficient for compliance with section 6 of the Act. (Regrettably, the judgment did not provide the background to the dispute or the facts on which a deduction was made that it was the person's intention, in the circumstances, that the initials serve as signature.)

The judgment in *Billion Property Developments* was handed down by the same court a few weeks after the *FirstRand Bank* judgment. In the former, the suretyship was attached to a lease agreement which was signed by the representative of the lessee company, on its behalf. The lease agreement reflected the full signature of the representative, but the suretyship attached thereto, was only initialed. This court reasoned as follows:

- In the 1952 judgment in *Van Niekerk v Smit and Others*, it was confirmed that a signature includes a signature by initials. Accordingly, the court declared that the initialing of the suretyship met the requirements of section 6 of the Act. (This court did not explore or mention whether a person's intention was relevant or not; neither did it explain whether the context in the Van Niekerk matter was similar to the facts of the present matter.)
- In addition, this court referred to the *caveat subscriptor* rule and held that the person who signed "is deemed to have known that he was named as a surety for the lease agreement. By signing the lease agreement and attaching his initial to the deed of suretyship, he accepted the obligations arising from the suretyship agreement, which is accessory to the lease agreement."

NOTE

- It is unfortunate that the court in *FirstRand Bank* did not set out in its judgments the basis on which it ascribed an intention to the persons who appended his initials. On the face of it, it could be argued that business persons pay attention when signing agreements and do so by placing a signature in the space provided therefore, as opposed to initialing a document as forming part of a main agreement.
- Similarly, in *Billion Property Developments*, there is no reference to the intention of the person who appended the initials. Nonetheless the court appeared to ascribe intention to the person that signed, without providing reasons for that opinion, and concluded that: "Although the lease agreement is between [Billion Property Developments] and [Nevzomark (Pty) Ltd], by virtue of its accessory nature to the lease agreement, the deed of suretyship forms part of the lease agreement. So, by signing the deed of suretyship, the [representative of Nevzomark (Pty) Ltd] undertook to be liable for the debts of [Nevzomark (Pty) Ltd] under the lease agreement."
- Neither court investigated the legislature's intention with requiring a suretyship to be signed, which should have informed the finding that initialing sufficed in the same way that the judgments dealing with the signing of wills, .