STANDING SURETY: KNOW WHAT YOU SIGN

Standard Bank of South Africa Ltd v Herselman (328/2015) [2016] ZAFSHC 39 (3 March 2016)

There are many reported judgments where one party seeks to escape liability under a suretyship. A defence that the implications of the document was not explained, despite wording in the agreement requiring the signatory to acknowledge that all has been explained to him/her, are common. The present matter is another such example and highlights how important it is to read the details of the agreement, before putting pen to paper.

The Judgment can be viewed [here](#).

FACTS

Mrs Herselman signed a Deed of Suretyship in respect of certain loans granted to her husband by Standard Bank. These related specifically to some R 2 million loaned in respect of the purchase by Mr Herselman of two farms as well as other loans comprising of vehicle asset finance and overdraft facilities.

After Mr Herselman was declared insolvent, the bank proceeded against Mrs Herselman in terms of the Deed of Suretyship. Mrs Herselman denied that she was liable and argued that:

(i) the bank misrepresented to her that her liability as surety would be limited to two term loans granted to the principal debtor for the purchase of 2 farms;

(ii) the bank had granted credit recklessly, without first ascertaining whether she had the financial means to honour her indebtedness in terms of the suretyship agreement, if called upon to do so, as required by the National Credit Act.

Mrs Herselman testified that at the time she signed the Deed of Suretyship she was unemployed. She admitted having signed a form entitled "Financial Assessment for Sureties" which she said was handed to her for signature by a Bank employee who placed both the Deed of Suretyship as well as the Financial Assessment Form before her. She stated in the latter form that she had assets totalling R1,9 million and no liabilities. The form also contained the following declaration: "I hereby confirm that the information provided is accurate and a true reflection of my financial position. I am not under, nor have I applied to be placed under, administration order, sequestration or Debt Review, as at the date of signature of this document by me." Clause 16 of the form further conveyed that the Bank had explained its contents to Mrs Herselman, that her liability in terms thereof was predetermined whether or not the suretyship was limited or unlimited, and that in the full knowledge of its terms she signed as surety.

Mrs Herselman emphasized that the form was just placed before her without any explanation and that she was requested to sign it. She insisted that, despite the clear and unambiguous language of the terms recorded in the Deed of Suretyship, she was unaware of its precise terms because the contents of the document had not been explained to her.

HELD:

Misrepresentation

- Mrs Herselman did not plead rectification of the Deed of Suretyship. As such, she was prevented from placing evidence of a different contract before the court due to the effect of the *parol evidence* rule (which provides that once a contract has been reduced to writing, the writing is in general viewed as the exclusive memorial of the transaction and no evidence is admissible to prove the terms of the contract) and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract.

- In the absence of a rectification of the suretyship agreement, the unrectified contract stood as evidence of the true agreement between the parties.

- Her defence relating to being bound as surety only to the extent of the two loans advanced for the purchase of the 2 farms therefore had to fail.

Reckless credit

- Mrs Herselman was being sued in this matter as a credit guarantor, the Deed of Suretyship falling into that category of credit agreement described as a credit guarantee in section 8(5) of the National Credit Act (NCA). Mrs Herselman, as a surety in terms of a credit guarantee fell within the definition of a consumer in section 1 of the NCA.

- A surety must, from his/her own financial resources, be in a position to repay the indebtedness of the principal debtor and a creditor must comply with the affordability assessment criteria laid down in the NCA prior to determining whether to grant credit to a consumer.

- In terms of section 82 of the NCA, the bank was entitled to choose its own evaluative mechanisms and procedures to be used in carrying out the assessment, provided such mechanisms resulted in a fair and objective assessment of the relevant consumer's affordability.

- This *litmus* test was met as the bank obtained information from Mrs Herselman regarding the fact that (a) she had no debt; (b) she owned assets valued at approximately R2 million; (c) she had no credit agreements history and has not applied for any credit in her name in the past;(d) she had never been sequestrated or placed under administration order or debt review.

- From such credit record she appeared to be a person who would honour her obligations as surety for the principal debtor, having furnished all the relevant information requested by the Bank. At the date of signature of the Deed of Suretyship, the principal debtor's debt (Mr Herselman) consisted in the loans granted for the purchase of the 2 farms for R2 million and the value of Mrs Herselman's assets covered the loan amounts.

- Clearly therefore, having objectively and fairly assessed Mrs Herselman to be a person of sound creditworthiness and capable of honouring her husband's indebtedness to the bank, if called upon to do so, the bank performed a proper assessment and could not be faulted for awarding the credit after she signed the Deed of Suretyship.

- The defence of reckless credit thus had to fail.

The bank's claim was therefore successful.

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