Attempting to Escape Liability

3 October 2013
Routledge Modise

There are a number of ways in which a surety can have a suretyship agreement rescinded, thus escaping liability under the suretyship contract, one such way is for the surety to allege that he did not consent to, or had no intention of entering into a suretyship agreement with the creditor.

The suretyship agreement exists as an accessory agreement to the main or principal agreement and is concluded for the benefit of a creditor. Creditors, protect themselves from the failure of a debtor to perform in terms of the principal agreement/debt, by requiring a third person, the surety, to bind himself, either wholly or in part, as being liable to make performance on behalf of the principal debtor in the event of the principal debtor's failure to perform.

A suretyship agreement must comply with all the requirements of a valid contract and in addition, according to the General Laws Amendment Act 50 of 1956 ("the Act"), a suretyship agreement must also be in writing, and must be signed by or on behalf of the surety.

The parties must, when entering into a suretyship agreement, intend to enter into a contract of suretyship. The agreement needs to state the extent to which the surety binds himself and the period for which the surety can be held liable. This is especially so because the debtor can, without having regard to the surety, extend the principal debt by for instance borrowing more from the creditor, thereby also increasing the surety's obligation.

The surety cannot in the afore-going instance argue that he only agreed to be bound only for a certain amount, where same does not appear on the written agreement, especially where the surety binds himself "for the performance and payment of all the debts and obligations of the debtor of whatsoever nature and howsoever arising which the debtor now or in future owe to the creditor" and where the liability of the surety is unlimited."

There is a presumption that the signatories to document intended to enter into the transaction contained therein;[1] this therefore means that where, for instance, a party alleges that when he signed the suretyship agreement he did not know he was signing a suretyship agreement and had no intention to sign and bind themselves as surety, such as was the case in Form-Scaff (Pty) Ltd v Fisher,[2] and Diners Club SA (Pty) Ltd v Livingstone and Another, the surety has the onus of proving to the court that he did not intend to enter into a suretyship agreement and also that it would be unreasonable to allow the creditor to enforce such suretyship agreement against him.

Where the surety is unable to prove that he did not intend to enter into a suretyship agreement because he cannot be said to have been misled by the nature of the document or by misrepresentation on the part of the creditor, the surety will be bound by the principle of caveat emptor.[3] This was so in the recent decision of Absa Bank Ltd v Trzebiatowsky and Others,[4] where the party who had signed as surety sought to escape liability by arguing that she had no knowledge as to the contents of the documents which she had signed and as a result of her lack of knowledge, the deeds of suretyship were not binding on her. The court in dismissing her defence held that there was no basis to find that she had been justifiably misled by the document which she had signed, as the document did not depart from prior representations made by the creditor as to the nature or contents thereof.

The purported surety will also escape liability where there was a duty on the creditor to inform the party signing as surety that he is in fact signing a suretyship; this duty to inform arises only where the document departs from what is represented, where the provision is hidden or not apparent.[5]

However where one signs a suretyship agreement by reason of fraud or misrepresentation of a third party, unbeknown to the creditor, the surety will not be able to escape liability under the suretyship agreement. This is what the court said in the case of Slip Knot Investments 777 (Pty) Ltd v Du Toit,[6] where the party who had signed as surety relied on the omission of a third party to inform him of the nature of the document he was called upon to sign, in order to escape liability under the suretyship agreement.

On the facts of the afore-mentioned case, the court held that the surety was, even in the face of his mistake, bound by the agreement due to the creditor not having played a role in the misrepresentation or omission which caused the surety to bind himself as such. The creditor was therefore entitled to rely on the "appearance of liability" created by the fact of the surety having signed the document and the surety could not rely on his mistake to escape liability under the suretyship agreement.

Author: Keneilwe Banda

Checked by: SJ Thema (Partner in the Commercial Litigation Department at Routledge Modise Incorporated) [1] Tesoriero v Bhyjo Investments Share Block (Pty) Ltd 2000 (1) SA 167 (W) [2] 1995 (4) SA 493 (W). [3] Roomer v Wedge Steel (Pty) Ltd 1998 (1) SA 538 (N); [4] 2012 (5) SA 134 (ECP). [5] Opcit note 1; Prins v Absa Bank Ltd 1998 (3) SA 904 (C); Brink V Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA). [6] 2011 (4) SA 72 (SCA).

> Read the full article online