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DISPUTE RESOLUTION ALERT

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One suretyship, two agreements – are both covered?

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One suretyship, two agreements – are both covered?

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In the recent case of *Moss & another v KMSA Distributors* (673/2018) [2019] ZASCA 81, the Supreme Court of Appeal (SCA) considered whether a suretyship agreement, attached as an annexure to a certain agreement, also provided security to the creditor for debts incurred by the debtor under an earlier separate agreement concluded between the same parties.

The suretyship agreement stated that the sureties bound themselves “*jointly and severally with each and every one of the other Sureties, in relation to each of the undertakings as surety and co-principal debtor for the performance on demand of all obligations of whatsoever nature and howsoever arising (whether in contract or delict or any other cause whatsoever) which the debtor may presently or in the future owe to the Creditor whether jointly or severally or to their successors in title or assigns*”.

On 17 October 2011, KMSA Distributors (Pty) Ltd (KMSA) and Express Motor Trading 284 (Pty) Ltd (EMT) concluded a sale agreement in terms of which KMSA sold a business known as “Mean Machines” to EMT (sale agreement). Approximately nine months later, KMSA and EMT concluded a second agreement, in terms of which KMSA appointed EMT as an independent retail outlet of its products (dealer agreement). Mr Edmund Harold Moss and Mr Francois De Lange (the appellants) bound themselves as sureties and co-principal debtors for the debts of EMT by signing a suretyship agreement (containing the wording set out above), which was annexed to the dealer agreement.

In terms of the sale agreement, EMT owed KMSA various amounts relating to unpaid rental in respect of the premises from which EMT conducted its business. KMSA consequently instituted arbitration proceedings to recover the amounts from EMT. However, before the arbitration proceedings concluded, EMT was placed under voluntary liquidation by the appellants. The dispute was thereafter settled by KMSA and the liquidators of EMT, with the liquidators of EMT admitting a liability of R3 million on behalf of EMT. An arbitration award was made to that effect and that award was made an order of court.

KMSA subsequently launched an application in the Gauteng Division of the High Court, Pretoria (High Court) against the appellants, claiming R3 million from the appellants under the suretyship agreement. The appellants opposed the application and argued, *inter alia*, that on a proper interpretation of the suretyship, its operation was limited to the dealer agreement to which it was annexed. The High Court held that, although the genesis of the suretyship may have been the dealer agreement, the ultimate nature and extent of the appellants’ obligations was to be ascertained from the suretyship agreement. The High Court ordered the appellants to pay KMSA R3 million in terms of the suretyship agreement. The appellants applied for leave to appeal to the SCA and leave was granted by the High Court.

One suretyship, two agreements – are both covered?...continued

The SCA reached the conclusion that despite the wide terms included in the suretyship agreement, the suretyship only covered the obligations under the dealer agreement, due to the provisions included in the dealer agreement which limited the operation of the suretyship agreement.

On appeal before the SCA, the appellants persisted with their argument that the suretyship agreement's operation was limited to obligations under the dealer agreement, however, KMSA argued that the dealer agreement and the suretyship agreement should be interpreted as two independent contracts and that the terms of the suretyship agreement were wide enough to also include liability under the sale agreement.

The SCA considered the judgment in *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA), in which the SCA held that, when construing an agreement comprising more than one document, one must consider all the terms used by the parties in all the documents to determine the meaning thereof.

In light of the judgment above, the SCA considered the wording of the dealer agreement, together with the wording of the suretyship agreement. The dealer

agreement included a provision which stated that the annexures to the dealer agreement formed part of the dealer agreement and should not be interpreted in a separate manner or be separated from the dealer agreement for construction of a different meaning. The dealer agreement further included a provision which stated that the sureties bound themselves as sureties for the fulfilment of any of EMT's obligations or duties under the dealer agreement.

The SCA reached the conclusion that despite the wide terms included in the suretyship agreement, the suretyship only covered the obligations under the dealer agreement, due to the provisions included in the dealer agreement which limited the operation of the suretyship agreement.

This judgment highlights the importance of always ensuring that, should your agreement be set out in more than one document, the provisions of all the documents align and reflect the true intention of the parties to the agreement.

Kylene Weyers and Stephan Venter

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