

Corporate & Commercial

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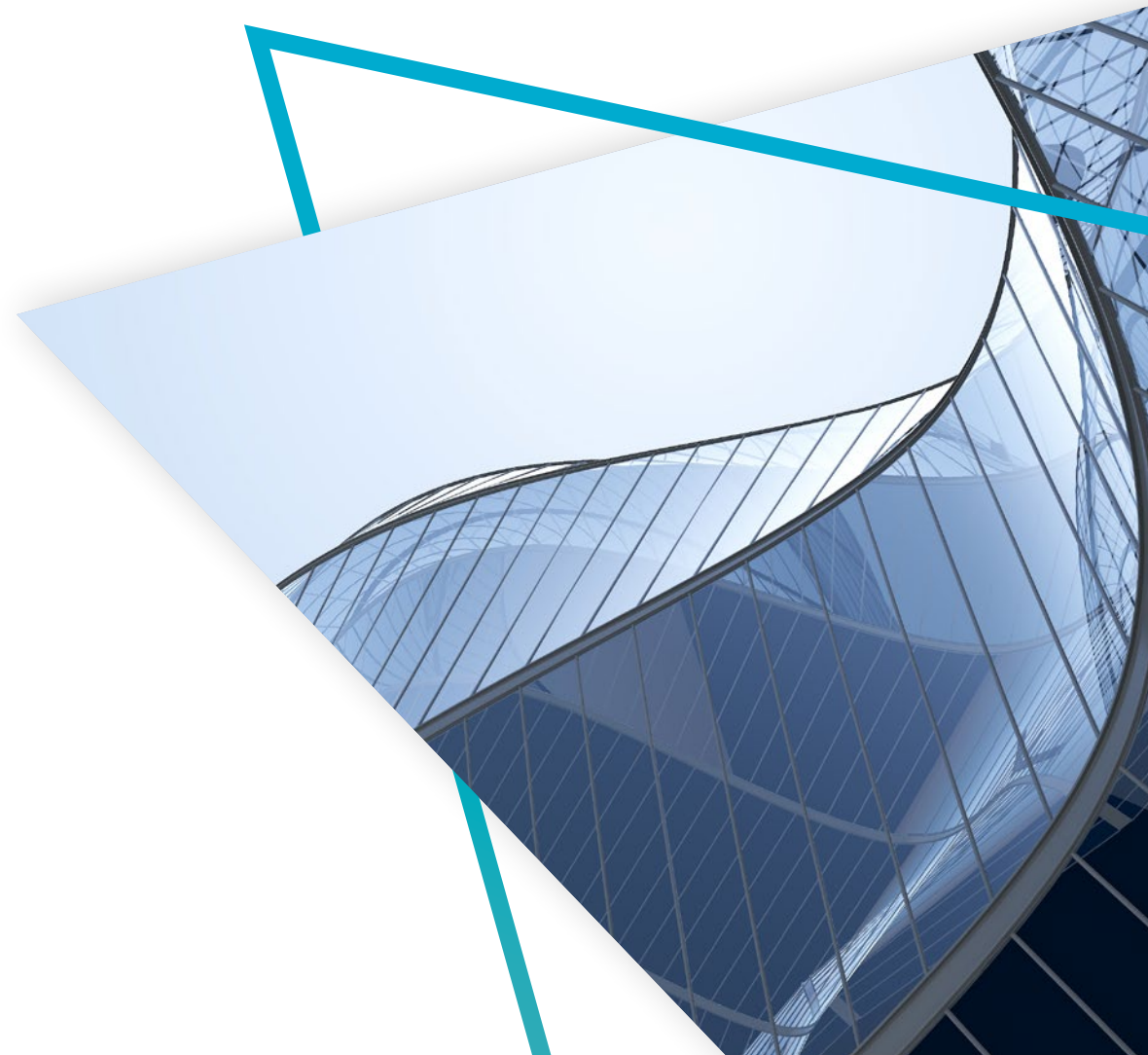
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SOUTH AFRICA

Signs of a suretyship or grounds for a guarantee?



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Signs of a suretyship or grounds for a guarantee?

Given the recent move towards the electronic signature of agreements and other legal documents, there has been some debate around the signing requirements for a guarantee; specifically, whether the requirements applicable to the signing of a suretyship also apply to a guarantee.

In the recent judgment of *Standard Bank of South Africa Ltd v Wardkiss Property Holdings (Pty) Ltd* (9324/22) [2023] ZAKZPHC 153 (19 December 2023), the court – in addition to determining whether a security document entitled “Guarantee” was, in fact, a guarantee, or a suretyship – provided clarity on the signing requirements for a guarantee.

Background

Standard Bank of South Africa Ltd (the applicant) provided Wardkiss (Pty) Ltd (Wardkiss) with several banking facilities. Wardkiss Property Holdings (Pty) Ltd (the respondent), represented by Mr A. H. Palmer, executed a document which appeared to be a guarantee (document) in favour of the applicant for the “*due, punctual and full payment of all the debts which Wardkiss has or may have in the future.*” The document was signed electronically by Palmer, but it did not contain an advanced electronic signature.

A few months later, Wardkiss placed itself in voluntary liquidation, and the applicant wrote to the respondent regarding payment of the amounts due in respect of the banking facilities. In its reply, the respondent argued that the document: (i) did not comply with the provisions of the General Law Amendment Act 50 of 1956 (GLAA) or the Electronic Communications and Transactions Act 25 of 2002 (ECTA), and (ii) was neither binding nor enforceable.

The reasons for the above contentions were as follows:

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. Since the document was a suretyship, according to the respondent, section 6 of the GLAA, which sets out the formalities in respect of contracts of suretyship, was applicable. This section requires, *inter alia*, that the written document which contains the terms of the contract, must be signed by or on behalf of the surety.

Accordingly, since a signature is required in terms of the above legislative provisions, and bearing in mind the ECTA requirement, the signature must be an advanced electronic signature. This means that the document was not binding, since Palmer only signed electronically and not by way of an advanced electronic signature.

Upon receipt of the respondent’s letter, the applicant, through its attorney, issued a formal written demand, and thereafter proceeded to institute legal proceedings, seeking judgment against the respondent for payment of the amount due, with interest.

Signs of a suretyship or grounds for a guarantee?

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Justine Krige | Sammy Ndolo
David Thompson | Roxanna Valayathum
Njeri Wagacha

Next Generation Lawyers:
Justine Krige

Hall of Fame:
Ian Hayes

Legal principles

The court referred to *Caney's: The Law of Suretyship in South Africa*,¹ where the differences between a guarantee and a suretyship are discussed in some detail.

One of the points of distinction mentioned was with reference to a guarantor's obligation, which is independent from that of the debtor, and which is to indemnify the creditor in respect of losses suffered through the debtor's non-performance. A surety, on the other hand, is only liable for losses resulting from the debtor's breach of contract. In other words, if the creditor suffers losses due to an invalid contract, the guarantor is still obliged to pay those losses, but a surety's obligation falls away.

Another point mentioned was that a surety undertakes that the debtor will pay its debts when they are due, and that only if they fail to do so, the surety will pay the debtor's debts. A guarantor, however, undertakes to pay upon the occurrence of a certain event, but does not undertake that that event will not occur.

The court also considered *Standard Bank of South Africa Ltd v Essa and Others* [2012] ZAWCHC where the court referred to "the distinction in law between a guarantee, which imposes a self-standing principal obligation on the guarantor, and a suretyship, which creates an obligation which is entirely accessory to that of a principal debtor".

¹ C F Forsyth and J T Pretorius *Caney's: The Law of Suretyship in South Africa* 6 ed (2010) at 33-34 (*Caney's*).

Analysis

The court noted that, although the document was titled "Guarantee", the label of a document is not important, as mentioned in *Absa Bank Ltd v Zurich Risk Financing SA Ltd* [2009] ZAGPJHC 85. Accordingly, the court concentrated on the content of the document, which made the following quite clear:

- The respondent undertook, as a principal and independent obligation, the due, punctual, and full payment of Wardkiss' debts.
- This undertaking was not merely an ancillary obligation, as would be the case in respect of a suretyship.
- The "Guarantee" would be effective regardless of the validity or enforceability of Wardkiss' debts.
- There was no provision that the respondent would only be liable to perform if Wardkiss failed to do so, which would fall squarely within the accessory nature of a suretyship, as described in *Caney's* and *Essa*.

Signs of a suretyship or grounds for a guarantee?

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Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2021 - 2023
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Band 1: Corporate/M&A and in
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Markets: Equity.

Ian Hayes ranked by
Chambers Global 2022 - 2023
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David Pinnock ranked by
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Peter Hesselning ranked by
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in **Band 2:** Corporate/M&A and in
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Sammy Ndolo ranked by
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Band 4: Corporate/M&A.

The court then proceeded to analyse the document by looking at what have been established as the three legs of interpreting a contract: the language used, the context and the purpose.

1. **Language:** The language of the document was consistent with that of a guarantee, considering the characteristics of a guarantee as set out above.
2. **Context:** Having regard to the emails exchanged between the parties, the applicant at all times requested that collateral be provided in the form of guarantees. Palmer accepted this, which culminated in the signing of the document. At no stage did Palmer indicate that he would rather provide a suretyship than a guarantee.
3. **Purpose:** The applicant wanted to ensure that it had sufficient collateral as security for the facilities it was providing to Wardkiss, which led to the document being signed by Palmer.

Considering the above, the court concluded that the document was, in fact, a guarantee, and that its wording clearly distinguished it from a suretyship.

Accordingly, it was not necessary for the guarantee to have been signed by Palmer by way of an advanced electronic signature, as required by section 13 of the ECTA. The court thus awarded judgment against the respondent.

Conclusion

This case provides clarity on the approach that the courts will follow in determining whether the security provided by a person is a suretyship or a guarantee, and makes it clear that, should such security be a guarantee, it does not have to be signed in wet ink or by way of an advanced electronic signature. It should be added that, if the judgment is taken on appeal, the Supreme Court of Appeal might have a different view, so watch this space.

Jess Reid and Ruan Jacobs

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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