

SURETYSHIPS: AN UNAVOIDABLE NECESSITY

People often do not read documents to which they append their signatures! If, for example, you apply to the bank for a credit card, or for financing of a vehicle your business is acquiring, you assume a basic understanding of the gist of the documents being handed to you for signature, and sign it on the assumption that it would contain 'standard' provisions. Whether or not certain provisions in some types of agreements are 'standard' and expected, it is undoubtedly risky to sign any legal document without ascertaining the implications thereof. More so when you bind yourself as surety for someone else's debts. Find out why.

Generally a signatory is considered bound to the terms of a document he has signed, an underlying contractual premise without which everyday business transacting will be impossible.

Suretyships are commonplace requirements when a credit provider agrees to advance funding to a business (whether incorporated as a company, close corporation or trust) as the credit provider seeks reassurance that someone can be held liable in the case of default on the side of the debtor. As can be deduced from the foregoing, a suretyship involves three parties: the creditor, the debtor and the party standing in for the debt if the debtor defaults (the surety). When the debtor defaults, the surety "steps into the shoes" of the debtor – it has the obligations of the debtor vis-à-vis the creditor, but also has all the defences that the debtor may have against claims from the creditor.

There is no absence of case law in which sureties seek to evade liability under a suretyship – understandably, because no-one really wants to find himself legally liable for the debt of another person! An example in point is the recent judgment of the Gauteng High Court on 14 February this year in the matter of *Plastomark (Pty) Ltd v Ashley and another*. It involved an action in which a lender (Plastomark) issued summons against three sureties, as the debtor was liquidated and unable to repay the outstanding debt. The background to the matter was that Plastomark advanced funds to Gazelle Engineering (Pty) Ltd, the debtor. When Gazelle Engineering's financial problems arose, it was taken over by First Tech. This was subsequent to the loan having been made to Gazelle Engineering. First Tech and Plastomark continued trading with each other. The sureties sought to evade liability for some R 13 million rand owing to Plastomark and argued that the whole amount of R 13 million was not outstanding, as in the continued transactions between Plastomark and First Tech, various amounts were paid to Plastomark from invoices it submitted to First Tech.

The Court rejected what it called the “astonishing contention” by the sureties: the payments made in respect of the invoices were in respect of debts having arisen subsequent to and separate from the loan in question. Judgment was therefore granted in favour of Plastomark.

Take care to read and appreciate the liability undertaken when signing a suretyship and obtain legal assistance when you think it is advisable.

For assistance, contact us on info@stbb.co.za.

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