Massbuild (Pty) Ltd t/a Builders Express, Builders Warehouse and Builders Trade Depot v Tikon Construction CC and another
[2020] JOL 48548 (GJ)

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 6986/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

14 September 2020
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DATE

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SIGNATURE

In the matter of:

MASSBUILD (PTY) LTD t/a BUILDERS EXPRESS, BUILDERS WAREHOUSE AND BUILDERS TRADE DEPOT — Plaintiff

And

TIKON CONSTRUCTION CC — First Defendant

CHRISTIAAN J T ROBBERTZE — Second Defendant

JUDGMENT

Judgment is handed down electronically via email transmission to the parties on 14 September 2020 and by publication on SAFLII

BESTER AJ

[1] The plaintiff sued the first defendant for what it claims is the outstanding balance on an account for goods sold and delivered, and the second defendant as surety for the first defendant's debt. The first defendant is in liquidation, and the claim was not pursued against the first defendant at this trial. The second defendant denies that he concluded a suretyship agreement with the plaintiff.

[2] The plaintiff sold goods to the first defendant on credit, during the period April 2015 to August 2016. The parties agreed that, notwithstanding the actual amount that the plaintiff contends is owed to it by the first defendant, the second defendant will be liable for a debt of R1 million in the event of the plaintiff proving the suretyship.

[3] The parties formulated the issues to be decided at trial in writing, as follows:

> "• Whether, on or about 16 March 2015, the plaintiff and the first defendant entered into a written agreement entitled Credit Application – Juristic Person, incorporating a deed of suretyship in favour of the plaintiff.
>
> • This issue incorporates
>
> o whether the second defendant signed the document attached to the particulars of claim as POC1;
>
> o the authenticity of POC1;

- whether sections 13(1) and 13(3) of the Electronic Communications and Transactions Act, 25 of 2002 apply;
- If so, whether the documents relied upon by the plaintiff comply with the requirements of Section 13(1) or 13(3)."

The evidence

[4] The plaintiff called two witnesses. Nateesha Mohabir and Yvette Nair were both employed by the plaintiff as risk assessment administrators during March 2015. They constituted two members of a four-member team of risk assessment administrators. Their functions included processing credit applications.

[5] The second defendant and his sister, Maudie Robbertze, also testified. The second defendant is the sole member of the first defendant. Ms Robbertze was the first defendant's financial manager in March 2015.

[6] What emerged from the evidence is a rather sparse picture. Each party's witnesses dealt with the events as they unfolded at their respective offices. They all had only a vague recollection of the events surrounding the opening of the first defendant's account with the plaintiff.

[7] The first defendant was a construction company. The second defendant was usually out on building sites and spent little time at the office. Ms Robbertze managed the first defendant's administration. She had a standing authority

to append the second defendant's signature on behalf of the first defendant as required in the ordinary course of business, which included the opening of trading accounts with suppliers as the need arises.

[8] According to the second defendant and Ms Robbertze, the second defendant had a strict policy against standing surety for the debts of the first defendant. They testified that, other than a surety with the first defendant's bank, no other sureties had been concluded.

[9] The first defendant had accounts with various other suppliers over the relevant period, but no other credit agreements were produced to show that the second defendant refused to sign surety in those instances. Whatever documents existed, the second defendant testified, had been handed over to the liquidators and the second defendant's attorneys. Ms Robbertze testified that, in any event, she usually did not keep copies of the credit agreements.

[10] The second defendant did not plead a lack of authority on the part of Ms Robbertze as a defence. He simply denied having signed the document at all, including in respect of the credit application. Because of the conclusions I reach below, it is not necessary to consider whether the issue of authority was fully canvassed, and whether actual or ostensible authority had been established by the plaintiff.

[11] To facilitate the signature of documents by the second defendant, Ms Robbertze utilised an electronic signature. This was in the form of a picture (scan) of a physical manuscript signature that had been set up in a software programme for the reading, creation and manipulation of electronic documents in the pdf format. The software programme she used, Adobe Acrobat, allowed Ms Robbertze to place the picture of the second defendant's signature in a document, which was then incorporated and saved as part of the pdf document.

[12] Ms Robbertze could not remember how she had dealt with the completion of the specific application form. She described her usual methodology and contended that she would have applied that same methodology also in this instance. Ordinarily, she said, she would complete the required details in the document, in pdf format, on her laptop. She would then print it out and sign the document in manuscript as witness. Thereafter she would scan the document into an electronic format, after which she would append the second defendant's signature to the newly scanned pdf document. She would also append an electronic version of his initials, as required.

[13] The few emails exchanged between the parties do not tell us much. On Tuesday, 17 March 2015, Ms Robbertze sent an email to Ms Mohabir, attaching the account application together with supporting documentation,

such as the second defendant's identity document and proof of the first defendant's bank account.

[14] On 18 March Ms Mohabir forwarded the email to Ms Nair, who in turn replied to Ms Robbertze, informing her that the application cannot be processed because the application was not signed by witnesses and was not initialed. In addition, because of the high credit limit applied for, she stipulated additional information that had to be provided. The application form attached to this chain of emails, reflect that it was not only the initials and witness signatures that had been omitted, but also the signature on behalf of the first respondent, and of the proposed surety, the second respondent, whose details had already been completed on the form.

[15] Later that same day, Ms Robbertze replied, attaching the completed application form to her email, together with the additional information requested. This is the document that the plaintiff relies on for its claim. Ms Robbertze explained her previous omission as follows:

> "My apologies. I've noticed I've attached the unsigned form before I even printed instead of the scan after signing."

[16] This offers some support for Ms Robbertze's evidence. If she had sent the document before she printed it to sign it herself, it suggests that the second

defendant's signature had not yet been added to the document by the time she had printed it out to append her own signature.

[17] Apart from identifying the emails, and their accompanying attachments in the bundle of documents, the plaintiff's witnesses could add little more than to confirm that, on the strength of the second application form, a trading account was opened for the first respondent after following the plaintiff's internal procedures. As far as the plaintiff's employees were concerned, the second respondent had signed the suretyship included in the application form and was bound thereby.

[18] The eight-page pro forma application form requires stipulated particulars of the applicant for credit to be completed. The form requires several signatures. It contains a declaration which requires a signature on behalf of the applicant for credit and a signature confirming that a resolution had been passed by the directors or members of the applicant to conclude the credit agreement. At the end of the terms of the agreement another signature on behalf of the applicant is required. The portion of the form identified as "deed of suretyship" requires the signature of the surety.

[19] Ms Robbertze completed the required details electronically and appended the second defendant's signature in all four required locations, as described above. In respect of the declaration signature, Ms Robbertze and Mr Anton

van Aswegen signed as witnesses. Mr van Aswegen is a quantity surveyor who was employed by the first defendant at the time, and who, according to Ms Robbertze, just happened to be in the office at the time she required a second witness. In respect of the signature as surety, Ms Robbertze signed as the only witness. No other witnesses were required in terms of the form.

[20] Ms Robbertze also appended the second defendant's initials to all the pages. Whereas the second defendant's signatures and initials were all electronically added, the witnesses signed in manuscript.

The dispute

[21] The evidence narrowed the issues in dispute between the parties. The authenticity of the document, and the fact that the second respondent's signature was affixed thereto as described by Ms Robbertze, were no longer contentious. However, the parties remained at odds as to the nature of the signatures and their legal consequences.

[22] Section 6 of the General Law Amendment Act, 50 of 1956, stipulates the formalities required for a valid contract of suretyship in the following terms:

> "No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

[23] The parties agreed that the document relied upon by the plaintiff embodies the terms of a suretyship.[1]

[24] The second defendant contended that the signature to the surety document was an electronic signature, and thus had to comply with the Electronic Communications and Transactions Act, 25 of 2002 ("the ECTA"). The plaintiff disagreed.

The provisions of the Electronic Communications and Transactions Act

[25] Broadly speaking, the ECTA has as its objects the enablement and facilitation of electronic communications and transactions in the public interest. To this end, amongst others, it seeks to promote legal certainty and confidence in respect of electronic communications and transactions,[2] and to ensure that electronic transactions in the Republic conform to the highest international standards.[3]

[26] Section 12 of the ECTA provides that a requirement in law that a document must be in writing (such as is the case for a contract of suretyship), is met if the document is in the form of a data message and accessible in a manner usable for subsequent reference.

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1 See generally *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 342 – 3 and *Sapirstein & Others v Anglo African Shipping Co (SA) Limited* 1978 (4) SA 1 (A) at 12 B – D.

2 Section 2(e).

3 Section2(h).

[27] Section 13 of the ECTA provides as follows:

> "(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.
>
> (2) Subject to (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.
>
> (3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if –
>
> (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and
>
> (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.
>
> (4) Where an advanced electronic signature has to be used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.
>
> (5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that –
>
> (a) it is in the form of a data mass message; or
>
> (b) it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred."

[28] Section 6 of the General Amendment Act of 1956 has not been amended to specify the type of signature required for a contract of suretyship. It follows that where the suretyship is embodied in a data message, the signature must meet the requirements for an advanced electronic signature, as stipulated in section 13(1) of the ECTA. As a result, the provisions of subsection 3 need not be considered further.

[29] A data message is defined in the ECTA as:

> "data generated, sent, received or stored by electronic means and includes –
>
> (a) Voice, where the voice is used in an automated transaction; and
>
> (b) A stored record"

[30] In turn, data is defined as *"electronic representations of information in any form*".

[31] The ECTA defines an electronic signature as *"data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature".* An advanced electronic signature is defined as *"an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37*".

[32] Section 37 provides that the Accreditation Authority[4] may accredit authentication products and services in support of advanced electronic signatures. Section 38 provides that the accreditation authority may not accredit authentication products or services unless the accreditation authority is satisfied that electronic signatures to which such authentication products and services relate complies with the requirements set out in section 38. The section also sets out factors to which the accreditation authority must have regard to prior to accrediting any such product or service. It is not necessary to delve into these details.

[33] The parties agree that the document relied upon by the plaintiff does not bear an advanced electronic signature. They disagree, however, as to whether the original of the written document relied upon by the plaintiff is a data message, which would require compliance with subsection 1.

Is the document a data message?

[34] The defendant contends that, because the signature of the second defendant was appended by Ms Robbertze in the Adobe Acrobat Software Programme, the deed of suretyship came into being as a data message, and that data message was then transmitted as the contract to the plaintiff. Therefore, the

[4] Section 34 of the ECTA provides that the Director General of the Department of Telecommunications and Postal Services is the accreditation authority and may appoint employees of the Department of Telecommunications and Postal Services as deputy accreditation authorities and officers.

signature had to be an advanced electronic signature to be valid, which it is not.

[35] The plaintiff, on the other hand, contends that the document sent to it was simply a representation of the agreement, in data message form, and that the original was in fact created in physical paper form. Therefore, when the deed of suretyship came into being, it was not a data message, although it was communicated to the plaintiff in the form of a data message.

[36] The plaintiff reasons as follows: Ms Robbertze, I should find, appended her signature, in manuscript, after she had added the second respondent's signature. Ms Robbertze's manuscript signature was intended, not to confirm that the second defendant's signature was appended to the document, but rather to confirm that the second defendant's mark indicated his intention to be bound by the contract. Her signature gave the suretyship legal validity. Consequently, the suretyship was embodied in a physical document, and it was thereafter scanned in and sent to the plaintiff.

[37] Thus, when the suretyship came into being, the plaintiff argued, it was a physical document and not subject to section 13 of the ECTA. I disagree, for several reasons.

[38] There is no basis to find that Mr Robbertze signed the document only after she had added the second defendant's signature. In the circumstances the

plaintiff has failed to establish the sequence in which the signatures were appended, which is a necessary ingredient of its argument.

[39] Further, Hoexter JA explained in *Jurgens*[5]:

> "The function of a signature is to signify that the writing to which it pertains accords with the intention of the signatory. It conveys an attestation by the person signing of his approval and authority for what is contained in the document."

[40] The second defendant was the person whose intention had to be evidenced through his signature. He was the intended surety, and thus the person to be bound by the terms of the document.

[41] Section 6 of the General Law Amendment Act allows for the written document to be signed on behalf of the surety. The parties agree that the document had not been signed by the second defendant, but (assuming she had authority) on his behalf by Ms Robbertze.

[42] The concept of a signature by proxy was considered in *Levitan NO*[6], where the court approved of what was stated in *Bowstead on Agency*[7]:

> "The general position in regard to signature by proxy is stated as follows by Bowstead on Agency...:

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5 Jurgens v Volkskas Bank 1993 (1) SA 214 (A) at 220 E.

6 *Leviton NO v Petrol Conservation (Pty) Ltd* 1962 (3) SA 233 (W) at 235J – 236A.

7 Bowstead on Agency, 12th ed. p 17.

> "As a general rule at common law a person sufficiently 'signs' a document if it is signed in his name and with his authority by someone else. Thus, an agent may be appointed to subscribe the name of the principal to the memorandum of association of a company, or to the instrument of dissolution of a building society, and such a signature is a sufficient compliance with [the relevant statutory provisions]."

[43] The plaintiff's argument is that Ms Robbertze's signature was the signature on behalf of the second defendant. The argument does not explain why then it was necessary to append the second defendant's electronic signature as well.

[44] It appears from the document itself, and Ms Robbertze testified, that she appended her signature as a witness to the fact that Mr Robbertze's signature was applied to the document. Her signature was not intended to be appended on behalf of the second respondent.

[45] The plaintiff's construct that Ms Robbertze's signature constitutes the signature of the surety, must fail.

[46] The parties agree that they did not exchange any physical documents pertaining to the credit application. All communication and exchange of documents happened electronically, via email.

[47] A suretyship is a bilateral jural act. In *Jurgens*[8] the Appellate Division explained as follows:

> "Suretyship is a bilateral jural act. … It is a contract which arises from agreement between creditor and surety, and it involves the acceptance of an offer. An offer is a manifestation of the offeror's wiliness to contract, made with the intention that it shall become binding as soon as it is accepted by the offeree. It is trite that an offer cannot be accepted unless and until it has been brought to the attention of the offeree." [9]

[48] The only document that was communicated to the plaintiff was the pdf document sent to it by email. That document is a data message as defined in the ECTA. Whether that constituted the acceptance of an offer, or whether the subsequent communication of the approval of the application constitutes the acceptance of an offer to stand surety by the second defendant, need not be decided, as the document was a data message throughout.[10]

[49] I therefore find that the document which the plaintiff seeks to enforce as a suretyship is a data message, and had to comply with the requirements of section 13(1) of the ECTA.

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8 Jurgens and Others v Volkskas Bank Limited 1993 (1) SA 214 (A) at 218 J – 219 A.

9 Internal references omitted.

10 Section 22(2) of the ECTA provides that an agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror.

[50] The parties agree that the signature does not comply with section 13(1). It follows that the plaintiff has failed to establish a valid and enforceable suretyship.

Order

[51] In the result, I make the following order:

a) The plaintiff's claim against the first defendant is postponed *sine die.*

b) The plaintiff's claim against the second defendant is dismissed with costs.

A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard:	29 and 30 January 2020
Judgment:	14 September 2020
Counsel for the plaintiff:	Adv AJ Lamplough
Instructed by:	Gjersöe Incorporated
Counsel for the second defendant:	Adv C Gibson
Instructed by:	Senekal Simmonds Inc

No appearance for the first defendant.