

DEED OF SURETYSHIP

1 LEGAL DEFINITION

A suretyship is a form of personal security given by a debtor (commonly referred to as the principal debtor) to a creditor in terms of which a third person (commonly known as the surety) binds himself to perform the obligations of the debtor, if the debtor fails to do so.

2 PRACTICAL USE

Suretyships are used in everyday business practice by creditors to decrease their exposure when extending credit by binding an individual(s) or another enterprise(s).

Most Credit Applications and Standard Trading Terms and Conditions of Creditors contain a suretyship. Although it has been a source of much debate, the present legal position does not require a suretyship to be clearly marked as such. The underlying principle that a party who signs an agreement should be aware of the contents, still applies. Although an abbreviated suretyship is still of great value, it might still allow the surety to raise certain valid defences. It is therefore suggested that, if at all possible, a separate and detailed suretyship be obtained, especially in cases where a high credit limit is granted.

The suretyship however does not guarantee payment of the outstanding debt. The suretyship will only hold real value as long as the surety has the necessary financial resources to pay the debt when called upon to do so.

3 **REQUIREMENTS AND FORMALITIES**

3.1 The suretyship is a contract. This means that the basic principles of Contract Law apply to suretyships. A valid suretyship can also only exist if the principal debt exists. The surety will therefore only be liable once the indebtedness of the principal debtor to the creditor has been established.

3.2 The Suretyship must also comply with the provisions of the General Law Amendment Act 50 of 1956. This Act, amongst other things, stipulate that:-

3.2.1 The contract must be in writing.

3.2.2 The identity of all the parties must be clear. These parties are:-

- (1) The creditor
- (2) The principal debtor (i.e. the Credit Applicant/customer)
- (3) The surety.

3.3 The principal debtor does not have to be a party to the contract, does not need to be aware of it and does not need to consent to it. All three parties however need to be **different** parties as a person cannot stand surety for his own debts.

4 **POSSIBLE DEFENCES**

A surety can raise any defences which the principal debtor may have been entitled to.

4.1 This means that the surety may dispute:-

4.1.1 The rendering of the services;

4.1.2 The delivery of the goods;

4.1.3 The computation of the amount claimed;

4.1.4 The fact that the amount claimed is not due;

as well as various other defences to which the principal debtor would normally have been entitled to.

Other possible defences are:-

4.2 The suretyship does not comply with the provisions of the General Law Amendment Act, in other words, that the parties are not identifiable.

4.2.1 It is however possible to lead oral evidence regarding the identity of the parties. This often happens when suretyships contain blank spaces. Although it is crucial that the essential terms of the suretyship be reflected in the document, oral evidence will be allowed to identify the identity of a party.

4.3 No knowledge that the agreement contained a suretyship.

4.3.1 Although this defence is often raised, this defence will, in terms of current case law not succeed as a signatory to an agreement is obliged to make himself aware of the contents of a document which he is signing.

4.4 CANCELLATION OF THE SURETYSHIP

The Suretyship can maintain that in giving notice to the creditor, that he had terminated his liability. The surety will however have the duty to prove the accuracy of this allegation. In practice, most suretyships specifically stipulate

that the suretyship shall remain in full force and effect and that the surety shall not be entitled to withdraw or cancel the suretyship, unless and until all indebtedness, commitments and obligations of the principal debtor to the creditor have been fully discharged.

4.5 **JOINT SURETYSHIP INTENDED**

If a suretyship intends that more than one surety should bind himself, the remaining surety shall be able to successfully dispute liability until all the intended sureties have signed the Suretyship.

4.6 **EXCUSSION AND DIVISION**

In common law, the creditor is obliged to first claim and recover from the principal debtor, before proceeding against the surety. In practice, this defence is normally not applicable, as most suretyships specifically stipulate that the surety binds himself "*as surety and co-principal debtor*" and by specifically renouncing the common law defence of excussion and division.

4.7 **AMENDMENT OF THE SURETYSHIP**

The surety may base his defence on the fact that a written amendment to the suretyship had been agreed to by the creditor. In practice it sometimes happens that the surety will attempt to amend the terms of the suretyship in one of the following manners:

- 4.7.1 By stipulating that the suretyship shall only remain valid in respect of goods sold and delivered and/or services rendered and disbursements

incurred by the principal debtor during a specific period.

4.7.2 By stipulating that the suretyship shall lapse after a certain date.

4.7.3 By stipulating that the amount claimable by the creditor from the surety will be restricted to a certain amount.