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Suretyship: The meaning and implication thereof

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Nowadays signing as a surety becomes a prerequisite for almost any agreement. Surety is when a person binds himself contractually on behalf of someone else's debt and accepts liability where the latter person defaults.

A surety agreement is supplementary to the main agreement and cannot stand in isolation. The intention of the parties to enter into a suretyship agreement must be clearly pointed out and the agreement must identify the parties, the nature and amount of the principal debt as well as the extent and period for which the surety can be held liable for. It is trite law that a signatory to an agreement is obliged to familiarize himself with the contents of the document which he is signing and it is known as the *caveat subscriptor* principal. A signatory will therefore be deemed to be bound as surety if he signed as such.

A suretyship agreement must at least contain the following elements in a written document signed on behalf of the surety:[1]

[1] Incredible Sand (Pty) Ltd V Anette Vos (2376/2018) [2018] 8.

1. The identity of the creditor;
2. The identity of the surety and the capacity within which the surety is signing;
3. The identity of the principal debtor;
4. The nature and amount of the principal debt must be determinable by reference to the provisions of the written document. Therefore, there must be an existing principal obligation.

The surety is only liable when the principal debtor fails to perform in terms of the principal agreement between himself and the creditor. The surety will never be liable for an amount in excess of what has been agreed between the principal debtor and creditor (principal obligation). In the event where a surety pays the creditor, the surety has a right of recourse in the amount equal to the payment made to the creditor.

It is important to consider the effect of signing a surety. If you establish a legal entity to do business in (i.e. a private company or a close corporation), one of the main benefits is that your personal liability is separated from the legal entity's debts and obligations. The law confers a certain degree of protection and distinguish between different entities, but when personal surety is signed it nullifies the protection the law affords you and crosses the legal boundary. Consequently, you will be held personally liable for all the legal entity's debts you signed surety for. Always make sure you understand the full effect of any suretyship you sign.

Article by **Herman Janse van Rensburg (BCom, LLB)**, Candidate Attorney at Malan Lourens Viljoen Inc.

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