

YOU ARE ON THE HOOK! - LEGAL CONSEQUENCES OF STANDING AS SURETY AND CO-PRINCIPAL DEBTOR.

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What is a suretyship?

This is a form of guarantee that one undertakes on behalf of another. Creditors usually require a deed of suretyship as a form of security where one (usually a director or a shareholder of a company) binds themselves for the performance of the debt of another (the principal debtor). The term "surety and co-principal debtor" means that the surety also binds themselves to the same extent as a principal debtor in scope and nature.

What are the consequences of signing a deed of suretyship as a surety and co-principal debtor?

You do not have the benefit of division.

Division is the entitlement of a surety to pay only his pro-rata share of the liability, the balance being divided between his co-sureties. A creditor can pursue one of the sureties and co-principal debtors for the entire debt. The unfortunate surety and co-principal debtor can then claim a contribution from his co-sureties after he/she has paid the creditor.

You do not have the benefit of excussion.

Excussion means pursuing legal action against a principal debtor first, before recovering the money from the surety. A surety and co-principal debtor is not entitled to the benefit or defence of excussion. Therefore, a creditor can pursue legal action against the surety without first pursuing the principal debtor.

If a principal debtor gets a moratorium (a prohibition on a creditor to pursue action against a debtor), that moratorium does not extend to the Sureties. Once a company is placed in liquidation, court proceedings and executions against it are stayed (a creditor cannot sue or levy execution against it).

Limited ("FNBB") v Khupe and others, where we represented FNBB, the principal debtor, had been placed in liquidation and as a result could not be sued without first seeking leave of court. FNBB proceeded against the sureties and co-principal debtors. The Court of Appeal had to decide the question of whether a moratorium granted to the principal debtor extends to a surety and co-principal debtor.

The court found that:

There are two types of defences available to a debtor and by extension to a surety against a creditor. These are:

- defence in personam; and
- defence in rem.

A defence in personam is purely personal and it is only available to the principal debtor and may not be raised by the surety. It arises from the personal immunity of the debtor in respect of an otherwise valid and existing obligation. An example of this defence is a statutory moratorium.

A defence in rem on the other hand is a defence which attaches to the claim itself i.e. if a claim is invalid or has been extinguished or discharged. The effect of a defence in rem is that the obligation that arises from the claim no longer exists having been vitiated on a ground justifying its termination.

The Court of Appeal concluded that a moratorium granted to a company in liquidation cannot extend to the sureties and co-principal debtors since it is a personal privilege in favour of the company.

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In the case of **First National Bank of Botswana**