THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From:	The Registrar, Supreme Court of Appeal
Date:	30 May 2014
Status:	Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Odendal & another v Structured Mezzanine Investments (Pty) Ltd

The Supreme Court of Appeal (SCA) today dismissed an appeal against a judgment of the Western Cape High Court ordering Gerhardus Adriaan Odendal (Odendal) and Gabriel Joshua Jordaan (Jordaan) (the appellants) to honour the terms of a deed of suretyship which they had signed together with Francois Basson, in their capacity as trustees of FXT Property Trust (the Trust), as security for a loan from Structured Mezzanine Investments Limited (SMI) in favour of the Trust. SMI, a bridging financier approved an application by the Trust for a loan facility in the amount of R10 million to partly fund a sectional title development by the Trust in Hermanus. In its letter of approval, SMI recorded, inter alia, that as security for the loan: a second mortgage bond would have to be registered over ERF 10965 Hermanus (the property); that the trustees would have to bind themselves as sureties for all of the Trust's obligations; and, that an irrevocable guarantee would have to be furnished on behalf of the Trust to SMI. The terms and conditions recorded in the facility letter were accepted by Basson on behalf of the Trust. On 16 April 2008 Basson, duly authorised by the Trustees, signed a power of attorney authorising the registration of a mortgage bond over the property in favour of SMI as security for the loan. On the same day Basson signed the suretyship, as a surety and co-principal debtor in respect 'of any sum of money' which the Trust may 'now owe or in the future owe' to SMI arising from the loan agreement concluded between SMI and the Trust in April 2008.

The appellants contended on appeal that the deed of suretyship did not comply with the requirements of s 6 of the General Law Amendment Act 50 of 1956 (the Act), inasmuch as: firstly, the principal debt was not in existence at the time of the conclusion of the suretyship; and, secondly, clause 1 of the suretyship was not a reference to the loan agreement that in due course came to be concluded between the parties. It was contended by SMI that what saves the suretyship, despite its deficiency from extinction was the reference to the loan agreement ultimately concluded which it was said was incorporated by reference into the deed of suretyship.

The SCA held that the suretyship in essence amounted to a promise by each of the appellants to SMI to guarantee any indebtedness which the Trust may now or in the future incur to SMI. It is indeed so that a contract of suretyship is accessory in the sense that it is of the essence of suretyship that there be a valid principal obligation (that of the debtor to the creditor). But, that the loan agreement between the Trust and SMI had not yet been concluded was held, in and of itself, to be no barrier to the potential validity of the suretyship contract. The SCA held further that the appellants are potential principal debtors and potential sureties, and as sureties, they were liable to SMI for the principal debt created by the suretyship, namely the debt arising from the loan agreement between SMI and the Trust.

The SCA held that the deed of suretyship in this case identifies the principal obligation by direct reference to the loan agreement. The appellants were not strangers to either transactions-qua trustees, they had resolved to borrow the money from SMI on behalf of the Trust, authorised various actions to secure the loan, and the terms of the loan facility approval mirrored in material respects those of the loan agreement. Tellingly, in Jordaan's application for the sequestration of the Trust, he recorded that he and Odendal regarded themselves as indebted to SMI by virtue of the deed of suretyship that they had concluded in respect of the Trust's indebtedness to SMI. The SCA held that it must follow that the defence raised that the deed of suretyship was invalid for lack of compliance with s6 of the Act must fail, for reading the written loan agreement as incorporated into the suretyship, which expressly refers to it, the requirements of that section were satisfied.