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LESLEY MAMMAN

FIDUCIARY MATTERS

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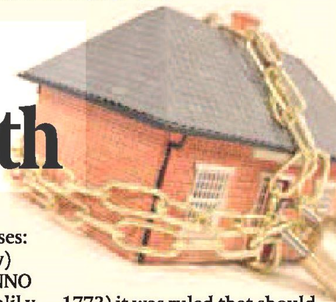
Suretyships in the event of death



Businesses are generally placed in some legal entity as various benefits can be enjoyed by a person not conducting business in his own name. A suretyship is usually required when an entity applies for finance but has no security to offer for it. As with the general principle of contract, if a person dies before fulfilling his obligations as surety, they are carried through to his estate.

If a business owner stands surety and then dies, the creditors may call up the debt immediately. Often the terms of the suretyship agreement permit the creditor to collect the outstanding debt directly from the estate of the deceased surety, without first having recourse to the business.

> **"Advisers would do well to alert clients to the potential challenges of entering into suretyships"**

The executor could try to recover part of the debt from any surviving sureties or the business, but it usually means that the deceased's dependents and heirs may be partly or wholly deprived of their inheritance.

In terms of Roman Dutch law the obligations of a surety are transferred to his estate if he dies before fulfilling them, unless the terms of the contract show that it was not intended that they should be transferred. In accordance with the general principles of contract, the suretyship continues to operate and binds the surety's estate after his death. This was confirmed in two court cases: SA General Electric Co (Pty) Ltd v Sharfman & Others NNO 1981(1) SA 592(W) and Kalil v Standard Bank of South Africa Ltd 1967 (4) SA 550 (A).

The position relating to a continuing suretyship is, however, not that clear. According to Forsyth and Pretorius in Caney's The Law of Suretyship, the effect of death on a suretyship that provides for liability to be incurred in the future, including, specifically, a continuing suretyship when the liability is incurred after the death in question, would depend on whether the suretyship agreement provides that it will be applicable to debts incurred by the principal debtor after the death of the surety. Where the terms of the agreement do not specifically bind the surety's estate in respect of debts incurred by the principal debtor after his death, nor expressly limit his undertaking to those incurred during his lifetime, it will not be taken that the suretyship extends to debts incurred after the death of the surety.

Some problems which could arise through suretyships include: the estate administration may be delayed until the estate has been released from the liability; debts of a business may have to be settled at the expense of heirs and dependents; the executor could be forced to sell estate assets (with the consent of the heirs) to provide liquidity; the estate may be declared insolvent if the debts exceed the assets.

Note too that where the estate of the surety is dutiable, the executor must act carefully when dealing with the claim by the creditor. In a 2003 case in the Gauteng Income Tax Special Court (ITC 1773) it was ruled that should the executor merely pay on receipt of a claim from the creditor without determining that the principal debtor is not able to pay, the executor will not be allowed to include the claim as a deduction for estate duty purposes, as the debt would not be regarded as "due and payable" in terms of section 4(b) of the Estate Duty Act.

Advisers would do well to alert clients to the potential challenges of entering into suretyships.

This article was written by Lesley Maman, a FISA member and attorney with Friedland Hart Solomon Nicolson

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