IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA) 22/5/2015.

Case Number: 7988/2009

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

22/5/2015 ...... [signature]

DATE **SIGNATURE**

In the matter between:

FOREST SALES (PTY) LTD	**PLAINTIFF**
and	
BELGIUM IMPORT AND EXPORT CC t/a MAKATI DAKKE	**FIRST DEFENDANT**
DANNY LAMBERTUS NIJS	**SECOND DEFENDANT**
CORNELIUS ANDRIES BURGER	**THIRD DEFENDANT**

JUDGMENT

MOLEFE J

[1] The plaintiff claimed from the defendants, jointly and severally, the one paying the other to be absolved:

1.1 Payment in the sum of R578 036, 80;

1.2 Interest on the aforesaid sum at the rate of 15,5% a temporae morae to date of final payment;

1.3 Costs on party and party scale;

1.4 Further and/or alternative relief.

[2] The claim is based on a credit facility agreement between the plaintiff and the first defendant and the suretyship agreement ("guarantee") between the plaintiff and the second and third defendants as sureties and co-principal debtors to the first defendant's indebtedness to the plaintiff. The first defendant was liquidated during December 2008 and the third defendant was sequestrated. The claim is now only against the second defendant.

Background and common cause facts

[3] On 10 April 2008, the plaintiff and first defendant duly represented by the second and third defendants entered into a credit facilities agreement (Annexure 'A'). The second and third defendants bound themselves as sureties and co-principal debtors in *solidium* to the plaintiff for the payment on demand of all sums of money which the first defendant may from time to time owe or be indebted to the plaintiff in a deed of suretyship titled "Guarantee" (Annexure 'B').

[4] Pursuant to the aforesaid agreements, the plaintiff sold and delivered goods to the first defendant at the first defendant's special instance and request during the period April 2008 to November 2008 for the sum of R578 036, 80. The plaintiff alleges that the amount is due, owing and payable by the second defendant as surety.

[5] The defence raised by the second defendant in his plea is that he was not aware that he was signing a suretyship and had he been aware, he would not have signed same. The second defendant contends that Annexure "B" does not constitute a deed of surety.

It is also denied by the second defendant that plaintiff is a registered credit provider.

[6] The duty to begin was imposed upon the plaintiff by agreement between the parties and the plaintiff reduced the capital amount claimed by R205 548, 60 to R326 671, 69.

The plaintiff called two witnesses and the second defendant called one witness.

[7] Mr Richard Bruce Todd testified that he is a member of the plaintiff and have personal knowledge of this claim as his job is in sales and accounts. The plaintiff is a timber agent, sourcing timber and selling it. On 10 April 2008 he went to see the third defendant, Mr Cornelius Burger in Brits for the signing of the credit facility and suretyship agreement. They both went to second defendant's farm where he had an office adjoining the house. Although he knew Mr Burger, it was the first time he met the second defendant. Both Mr Burger and the second defendant signed the documents in his presence. The credit facility was approved.

[8] The process followed for a consignment to be delivered to the first defendant was that a request was made by the third defendant and Mr Todd would source the supply, and give the prices of the required timber to the third defendant. He would then place an order and the timber would be delivered to the first defendant with a delivery note and an invoice would then be send to the first defendant for payment.

[9] Under cross-examination, Mr Todd testified that he was not involved in the physical delivery of the timber and had no personal knowledge of the signatories of the delivery notes.

[10] Mr Neil Grant Todd testified that he was a co-member of the plaintiff and was in charge of the administration and acted as the plaintiff's secretary and public officer. After the issue of summons, the parties entered into a settlement agreement and the defendant undertook to make monthly payments of R100 000, 00 towards the debt[1].

The defendants never contested the outstanding amount nor that the goods were delivered. The initial credit limit was set at R200 000,00 but the credit was extended to almost R600 000, 00 at the 1st defendant's request, duly represented by the third defendant as they required more timber.

Mr Neil Todd confirmed that he signed the certificate of indebtedness dated 15 April 2015[2] and certified that the outstanding balance due is R326 671, 69, made up of the capital amount of R205 548, 00 and interest charges up to and including February 2015 in the amount of R121 123, 09.

[11] The second defendant, Mr Danny Lambertus Nijs, in his evidence, conceded that he signed both the credit application forms and the guarantee on 10 April 2008. The documents were given to him by Mr Burger who only informed him that they were applying for credit. He never read the documents and the guarantee was not presented to him as a single document. He was not aware that he was signing a suretyship agreement and contended that a suretyship agreement is normally signed

---

[1] Bundle page 46, letter dated 24 February 2009
[2] Bundle page 47, letter dated 15 April 2008

after the credit application has been approved. He testified that had he known that the guarantee was a suretyship he would not have signed it or would have considered signing a limited suretyship. He denied that Mr Todd came to his farm nor that he (Mr Todd) was present when the documents were signed.

[12] Under cross-examination, Mr Nijs admitted that he made a mistake by not reading the documents before signing. He conceded that although the suretyship agreement is titled "guarantee", it is a suretyship agreement. He denied that a reasonable person in his position as a director of a number of companies should have read the documents before signing.

[13] I would first like to deal with the issue of the registration of the plaintiff as a credit provider in terms of the National Credit act No 34 of 2005 ("the Act").

Section 40(1) of the Act provides that:

> *"(a) A person must apply to be registered as a credit provider if –*
>
> *a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements; or*
>
> *b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1)".*
>
> A credit agreement entered into by a credit provider who is required to be registered, but who is not so registered, must not offer, make available or

extend credit, or enter into a credit agreement, otherwise the credit agreement is unlawful and void.

[14] In *casu*, the credit application reflected the estimated monthly purchases by the first defendant as R500 000 and the maximum credit limit required at R1 000 000. There was no other evidence before the court that the principal debts owed to the plaintiff exceeded the prescribed threshold. In my view therefore, a case has not been made out that the plaintiff was required to register as a credit provider in terms of the Act.

[15] Plaintiff's counsel[3] submitted that although the Annexure "B" is titled "guarantee", the second defendant in his evidence confirmed that it was a suretyship agreement and that the signatures on the document are his and the second defendant is therefore bound by the suretyship agreement. In this regard counsel for the plaintiff relied on ***Slipman 777 (Pty) Ltd v Du Toit 2011 (4) SA p72 SCA (par 9-12)*** wherein Malan JA held:

> *"A person who is induced to sign a suretyship agreement by the fraud or misrepresentation of a third party and who is unaware of the nature of the document he is signing, will nevertheless be bound by the agreement if the lender is innocent and unaware of the mistake. The lender would in such a case be entitled to rely on the appearance of liability created by the surety's signature, and the surety would not be entitled to set up his unilateral mistake to escape liability under the agreement".*

Plaintiff's counsel referred the court to ***Brink v Humphries Jewell 2005 (2) SA 419 SCA*** wherein the court held at 424 E-F that "*the appellant's error appeared to have*

---

[3] Advocate B Hitchings

been justus in that the form itself was a trap for the unwary and the appellant was justifiably misled by it".

[16] Counsel for the second defendant[4]submitted that the second defendant's version that there was a justified error on his part should be accepted. It was contended on the second defendant's behalf that he was not alerted that he was signing a suretyship agreement and should therefore be excused. Counsel relied on ***Tesoriero v Bhyjo Investments Share Block (Pty) Ltd 2000 (1) SA 167 (W) 175 (F)*** – wherein it was held that it is a justified error if it is shown that where a person who signed as surety was misled as to the nature or contents of the document by the other contracting party.

[17] At common law no formalities were required for the formation of a valid contract of suretyship, but with the enactment of the General Law Amendment Act of 1956[5], no contract of suretyship entered into after 22 June 1956 is valid unless the terms thereof are embodied in a written document signed by, or on behalf of the surety. The 'terms' referred to include the terms that identify the creditor, the surety and the principal debtor, and those that establish the nature and amount of the principal debt, and probably also the *incidentalia*, or additional terms agreed by the parties[6].

It is my view that Annexure 'B' does not fall foul of section 6 of the General Law Amendment Act. The second defendant confirmed that he signed the suretyship agreement. The only conflict in the evidence of the plaintiff and the second defendant is whether the plaintiff was present or not when the documents were

---

[4] Advocate J Möller
[5] Act 50 of 1956 as amended by Act 80 of 1964 Section 34
[6] Lotz (Henning) 'Suretyship' LAWSA First Re-issue vol 26 at 195

signed, which is not a relevant nor material contradiction as it is not disputed that the second defendant signed the documents.

In fact, the defendant's version confirms that if there was any misrepresentation, it was not by the lender/plaintiff.

[18] It is common cause that the onus is on the second defendant to prove that there was a *justus error* in his part. Annexure "B" is headed "**GUARANTEE**" and the suretyship obligation is to be found in clause 1 thereof:

> *"1.I/We, the undersigned, DANNY LAMBERT NIJS ID No: 671014 5081 087, CORNELIUS ANDRIES BURGER ID No: 711011 5243 081 of BELGIUM IMPORT AND EXPORT CC t\a MAKATI DAKKE Company Registration No: 2003/018/36/23 do hereby bind myself/ourselves jointly and severally as surety/ies and co-principal debtors 'in solidium' to FOREST SALES CLOSE CORPORATION (hereinafter referred to as "the Creditor") for the payment on demand of all sums of money which BELGIUM IMPORT AND EXPORT CC Reg No: 2003/018136/23 (hereinafter referred to as "the Debtor/s") may now and from, time to time hereafter owe or be indebted to the creditor and its successors and assigns from whatsoever cause arising, whether such indebtedness be incurred by the Debtor/s solely or jointly or in partnership with any other person or persons, company or companies".*

[19] In my view, this surety clause was not hidden in fine print. A number of reported cases have dealt with problems which arise when a credit application form has embodied a personal suretyship by individuals who signed the form on behalf of the applicant. That is not what happened in the present case. Requirement of personal surety when granting credit to small companies is a prevalent practice. A

reasonable businessman, like the second defendant in *casu*, could not have expected credit to be granted to his company without some form of security.

[20] I am of the view that in *casu*, the plaintiff effectively guarded against the possibility that the suretyship would be overlooked amongst the other clauses of the credit application by heading the front page of Annexure "B" **"GUARANTEE"** in bold, so as to draw the attention of the signatory to it before he signed. The suretyship section hardly skulks away furtively. It is not hidden in fine print. The Annexure "B" document cannot be said to give rise to an obligation on the part of the plaintiff to take further steps to guard against the signatories overlooking the presence of the suretyship clause in it.

[21] In ***Langeveld v Union Finance Holdings (Pty) Ltd 2007 (4) SA 572 W 576 A-C*** it was held that:

> *"there was a strong praesumptio hominis that anyone who had signed a document, had the animus to enter into the transaction, and this person was burdened with the onus of convincing the court that he or she had not in fact entered the transaction by virtue of the maxim caveat subscriptor. This applied to suretyships".*

[22] While courts should come to the rescue of parties who have been misled, they should be mindful of what was stated in ***National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 A at 479 G-H***:

> *"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not*

> *appreciated at the time of the acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded".*

The second defendant's version is that he was misled by his own partner (co-member) to sign a suretyship agreement and certainly not by the plaintiff. There is therefore no basis in the evidence for a contention that the mistake was reasonable nor that the misrepresentation, if any, was made by the plaintiff.

[23] I am satisfied that the second defendant has failed to discharge the onus of proving that he was unaware that he was signing an undertaking as a surety and may not escape liability. The second defendant cannot escape liability on the ground of a justified error, as he was not misled by some act or omission of the other contracting party.

Costs

[24] The plaintiff's counsel submitted that a punitive costs order on an attorney-and-client scale should be imposed on the second defendant as it was evident from the cross-examination of plaintiff's first witness that the second defendant had no defence. An award of attorney-and-client costs will not be granted lightly as the court looks upon such orders with disfavor and is loath to penalize a person who has exercised a right to obtain a judicial decision on any complaint. I have considered the circumstances in this case and I am of the view that the defendant exercised his right to obtain a judicial decision on his defence and a punitive costs order would be inappropriate.

[25] In the circumstances, the following order is made against the second defendant:

24.1 Payment of R326 671, 69;

24.2 Interest thereon at the rate of 15,5% per annum a temporae morae to date of payment;

24.3 Costs on a party and party scale.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Plaintiff	:	**Adv. B Hitchings**
Instructed by	:	**Breytenbach Mostert Skosana Inc.**
Counsel on behalf of Defendant	:	**Adv. J Möller**
Instructed by	:	**Van Rensburg Attorneys**
Date Heard	:	**29 April 2015**
Date Delivered	:	**22 May 2015**