IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 71766/2014

DELETE WHICHEVER IS NOT APPLICABLE

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

28/05/15 ....

DATE SIGNATURE

2/6/2015

In the matter between:

SKYGISTICS (PTY) LTD Applicant

And

JOHANNES DANIEL TREURNICH Respondent

JUDGMENT

KGANYAGO AJ

[1] The applicant has brought an application against the respondent seeking the following orders:

1.1. Payment in the amount R4 074 035-18;

1.2. Interest on the aforesaid amount of R4 074 035-18, calculated at the prime rate of interest plus 2% per annum (as announced by First National Bank) duly capitalised from date of demand being 30th May 2014 to date of final payment.

[2] In the alternative the applicant is claiming against respondent for:-

2.1. Payment in the amount of R2 700 000-00,

2.2. Interest on the aforesaid amount of R2 700 000-00, calculated at the

prime rate of interest plus 2% per annum (as announced by First National Bank) duly capitalised, from the date of demand being 30th May 2014 to date of final payment.

[3] The applicant is also seeking costs against respondent on attorney and own client.

[4] On the 11th March 2007 the applicant and respondent representing Always Goods to Invest 31 CC t/a AGI31 ("AGI31") entered into a written agreement for credit facilities ("First agreement"). In terms of the first agreement, the respondent bound himself as surety for the due payment by AGI31. It was a material term of the agreement that the applicant may from time to time sell and deliver goods to AGI31, up to

the amount of a total debt owed and not exceeding the sum of R500 000-00 as per the suretyship agreement.

[5] Subsequent to signing the first agreement there was a need to increase the credit facilities and on the 10th June 2010 a new agreement ("second agreement") was entered into. In terms of the second agreement the credit facilities was increased and the respondent bound himself as surety for the due payment by AGI31 for an amount not execeeding R2 700 000-00.

[6] AGI31 breached the second agreement by failing to make payment to the applicant. AGI31 was expecting a VAT refund from South African Revenue Services ("SARS") in the amount of R2 471 000-00. The respondent on behalf AGI31 signed a cession agreement on the 14th April 2011 ceding its VAT refund to the applicant.

[7] In the session agreement, the respondent acknowledged that AGI31 was indebted to the applicant in the sum of R3 468 619-96. In that cession agreement, AGI31 undertook to repay R2 700 000-00 towards the outstanding balance to the applicant by not later than the 27th April 2011.

[8] On the 04th June 2011 AGI31 made payment to the applicant in the amount of R2 406 399-48 pursuant to the VAT refund and further payment in the amount of R 290 000-00 was made on the 27th June 2011.

[9] From October 2011 to April 2014 AGI31 breached the second agreement by failing to make payments of the amounts due. The applicant brought a winding-up application against AGI31, which application was not opposed. AGI31 was finally wound up.

[10] The applicant is now pursuing its claim against the respondent by virtue of having signed the suretyship agreement binding himself as surety for the due payment by AGI31. In terms of the certificate of balance signed by Cornelius Gysbertus Johannes van Niekerk ("Cornelius")on behalf of the applicant, as at 17th September 2014 the capital amount owing was R4 074 035-18.

[11] The respondent in his answering affidavit has raised the following defences.

11.1 The misrepresentation by Cornelius;

11.2. The dispute of fact on papers; and

11.3. That he was not aware of the terms of the suretyship agreement that he had signed.

[12] I will deal first with the question whether the respondent has established a case of misrepresentation entitling him to cancel the second agreement. A party seeking to avoid a contract on the ground of misrepresentation must prove that the representation relied upon was made, it was a representation as to a fact, the representation was false; it was material, in the sense that it would have influenced a reasonable person to enter into a contract; and it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided. See ***Novick and Another v Comair Holding Ltd and Others 1979 (2) SA 116 (W).***

[13] In **Brink v Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA) at paragraph 2 the court said:**

> *" The applicable principles of law are well established and require little discussion. The basis of the caveat subscriptor rule relied upon by the respondent is the doctrine of quasi-mutual assent. The locus classicus on the point is the following passage in George v Fairmead (Pty) Ltd:*
>
> *' When can error be said to be iustus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect said: Has the first*

party-the one who is trying to resile-been to blame in the sense that by his conduct he has led the other party,as a reasonable man, to believe that he was binding himself?... If his mistake is due to misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

[14] In his answering affidavit the respondent denies that the material terms as recorded represents the intentions of the parties at the time of signing the second agreement. He contend that Cornelius made representations to him at the time.

[15] According to him it was not necessary for the applicant to enter into a further credit facility as there was already an agreement in place with AGI31. The respondent contend that he was under the believe that the surety will terminate upon payment of the VAT refund and debtors collections. According to the respondent, he was sure that this could cover the outstanding amount as he was sure that VAT will be refunded and further that they will be able to recover debtors collections.

[16] The respondent contend that it is upon this basis that he agreed to sign the suretyship agreement. According to the respondent it was absurd for him to enter into the agreement pertaining to any future amounts, and

had he knew of the clause requiring him to cancel the suretyship agreement he would have exercised that right immediately after payment.

[17] The first agreement which the respondent has signed is similar to the second agreement word by word. The only difference between the first and second agreement is that the respondent in the first agreement was binding himself as surety to the amount not exceeding R500 000-00 whereas in the second agreement the amount was not exceeding R2 700 000-00.

[18] When the first agreement was cancelled the respondent wrote a letter to the applicant informing them that they are cancelling the first agreement and also that they have agreed to enter into a new agreement. In that letter of cancellation, the respondent further wrote that he should be released as a surety in his personal capacity as the contract has been cancelled.

[19] This in my view is an indication that the parties have discussed the need to have a second agreement and the respondent was fully aware what the discussion were all about. After that discussion they found it necessary to enter into a new agreement, hence the surety amount was increased to R2 700 000-00. Before they agreed on signing the second agreement the parties agreed on its terms. Therefore, the submission by the respondent that the second agreement was not necessary is without merit.

[20] From the letter of cancellation of first agreement, it is clear that the respondent was aware of the clause requiring him to cancel the suretyship agreement. I have already pointed out in paragraph 17, supra, that the second agreement is similar to the first agreement word by word except for the amounts. He was even specific that the surety in his personal capacity should be cancelled. If indeed in the second agreement, he was made to believe that he will be released from the suretyship agreement on payment of the VAT refund, he would have written a letter to the applicant to be released as a surety as he already knew the procedure and it was not the first time he cancels a suretyship agreement.

[21] The cession agreement which was signed on the 14/04/11 was clear, they were required to pay the applicant R2 700 000-00 by the 27/04/11. They paid R2 406 399-48 on the 04/06/11 in the form of VAT refunds and R290 000-00 on the 27/06/11. They have paid more than the amount of the surety. Thereafter the respondent despite been aware of the procedure of how to be released as a surety remained quite and did not take any initiatives to be released. That in my view is an indication that he wanted to remain as surety for AGI31 for that amount. It was only during 2014 when there was a demand for payment which is after three years that he raised the issue of misrepresentation. I am not persuaded by this argument.

[22] Under the circumstances in my view, the material terms recorded in the second agreement represent the intentions of the parties at the time of signing of the agreement. The second agreement was therefore, not induced by any form of misrepresentation.

[23] The second issue to be determined is whether there is any dispute of fact or not. According to the respondent, a genuine disputes of fact have been raised which warranted referral of the matter to trial or for the hearing of oral evidence.

[24] In **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371(SCA) at paragraph 13** the court said:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiquosly addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the avernment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate

but, instead of doing so, rests his case on a bare or ambiquous denial the court will generally have difficulty in finding that the test is satisfied."

[25] In **Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) 398 (A) at 430 H-431A** the court said:

" But if, notwithstanding that there are facts in dispute on the papers before it, the court if satisfied that on facts stated by the respondent, together with the admitted facts in the applicant's affidavit, the applicant is entitled to relief (whether in respect of all his claims or one or more) it will make an order giving effect to such finding, with an appropriate order as to costs."

[26] On the aspect of dispute of fact, the respondent is alleging misrepresentation and also that the applicant is claiming more than the limit of the surety amount of R2 700 000-00. In paragraph 22 supra I have already found that the second agreement was not induced by any form of misrepresentation, and therefore on this issue it does not need to be taken any further.

[27] Whether the applicant is entitled to claim more than R2 700 000-00 or not, does not as such raise a real, genuine or bona fide dispute of fact. It is an issue which can be disposed on arguments. See **Plascon-Evans Paints v Van Riebeck Paints 1984 (3) SA 623 (A).**

[28] I have already pointed out in paragraph 21 supra, that after payment of R2 406 399-48 and R290 000-00, the respondent did not take any initiatives to release himself from the suretyship of R2 700 000-00. In my view that was an indication that he wanted to remain bound as surety for the due payment by AGI31 to the amount not exceeding R2 700 000-00. In the first agreement he had bound himself for R500 000-00. When it was increased to R2 700 000-00 the parties have entered into the second agreement. There is no evidence that the second agreement was at any stage amended. Therefore in my view the respondent is bound as a surety for the due payment by AGI31 to the amount not exceeding R2 700 000-00.

[29] The third issue to be determined is whether the respondent was not aware of the terms of the suretyship agreement. The respondent does not dispute having signed the suretyship agreement. The second suretyship agreement which he had signed, had the same terms and conditions as the first one, except that for the second one that amount of the surety has been increased. In **Afrox Healthcare BPK vs Strydom 2002 (6) SA 21 (SCA)**, the court held that persons who signed a written agreement without reading it did so at their own risk and were consequently bound by the provisions contained therein as if they were aware of them and have expressely agreed thereto. The court further held that there were

exceptions, such as in the event of a legal duty to point certain of the provisions in the contract. See also **Stiff v Q Data Distribution (Pty) Ltd 2003 (2) SA 336 (SCA).**

[30] As I have already pointed out in paragraph 29 supra, this was the second suretyship agreement to be signed by the respondent which had the same terms and conditions as the first one except for the amounts, it cannot therefore, be held that there was a legal duty on the applicant to point out certain of the provisions in the contract. The respondent has already demonstrated that he was aware of terms of the first agreement as he was able to follow the procedure of releasing himself as a surety.

[31] The only legal duty which the applicant can be held responsible in the second agreement, is to point to the respondent that the amount has changed from R500 000-00 to R2 700 000-00. However, the respondent is not complaining about the issue of the amount, that in my view is an indication that he was fully aware of the terms. The respondent is merely trying to be selective in relation to been aware of the terms of the suretyship agreement. I am therefore not pursueded that he was not aware of the terms of the suretyship agreement.

[32] In relation to calculation of the outstanding balance, paragraph 13.4 of the second agreement read as follows:-

"Applicant agrees that a statement signed by an officer of Sygistics (Pty) Ltd as to the balance owing Skygistics (Pty) Ltd by the applicant from time to time shall be submitted in evidence in any be legal proceedings without proof."

Cornelius has signed a certificate of balance on the 25th September 2014 showing that the outstanding balance was R4 074 035-18. That certificate is also accompanied by a breakdown of how he had arrived at that amount. In my view that is sufficient proof of the outstanding amount. I have already held in paragraph 28 supra that the respondent will only be held liable for an amount not exceeding R2 700 000-00.

[33] Counsel for the respondent has also argued that the respondent has signed a blank suretyship agreement and therefore it did not comply with the formalities in terms of section 6 of the General Law Amendment Act no 50 of 1956. It read as follows:

"No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms are embodied in a written document by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

[34] According to the respondent the details of the name of debtor and the creditor were completed at a later stage. In **Trust Bank of Africa Ltd v Frysch 1977 (3) SA 562 (A)** at 584 G-H the court said:

"The contract is accessory in the sense that it is of the sense of suretyship that there be a principal obligation. At the same time it is not essential that the principal obligation exists at the time when the suretyship contract is entered into. A suretyship may be contracted with reference to a principal obligation which is to come into existence in the future."

[35] In **Sapirstein and Others v Anglo African Shipping Co (SA) Ltd 1978(4) SA 1 (A)** at 12 B-D the court said:

" What s6 requires is that the "terms" of contract of surety must be embodied in a written document. It was contended by counsel for the plaintiff that this meant that the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence by the parties (ie the creditor and surety) as to their negations and consensus. I agree with this contention. In my view, there can be no objection to extrinsic evidence of identification being given, either by the parties themselves, or by anyone else, unless the leading of such evidence

can be said to amount to an attempt to supplementary the terms of the written contract."

[36] The deed of suretyship in this case identifies the principal obligation by direct reference to goods already sold and delivered or which may in the future become due, owing and payable in respect of such additional goods which the creditor may from time to time sell and deliver to the Principle Debtor at this request up to an amount of total debt owed to or not exceeding the sum of R2 700 000-00.

[37] In my view this is sufficient to indentify the obligation of the respondent in the suretyship agreement. He had already signed the first agreement and was therefore not a stranger to these type of transactions. It therefore follows that the defence raised that the deed of suretyship lacks compliance with section 6 of the Act must fail.

[38] In the circumstances, it is the court's finding that the applicant has succeeded with their claim in the alternative against the respondent.

[39] In the result the following order is made against the respondent:-

39.1 Payment of the amount of R2 700 000-00 to the applicant.

39.2 Interest of the aforesaid amount of R2 700 000-00 calculated at the prime rate of interest plus 2% per annum (As announced by First

National Bank) duly capitalised, from the date of demand being 30th May 2014 to date of final payment,

39.3 Costs of the suit on party and party scale.

M.F KGANYAGO

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 29 APRIL 2015

For the Applicant: Adv J Hershensohn

Instructed by: Hogan Lovells (South Africa) incorporated as Routlegde Modise

For the Respondent: Adv C Cremen

Instructed by: Kramer Villion Norris Attorneys

Date of Judgment: