**REPUBLIC OF SOUTH AFRICA**

**THE NORTH GAUTENG HIGH COURT**
**JOHANNESBURG**

CASE NO. 21842/2015

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

1/07/2015
DATE

SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAAT SAK X67
PRETORIA 0001
2015 -07- 10
JUDGE'S SECRETARY
[illegible]
GRIFFIER [illegible] HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

MONSATO SA (PTY) LIMITED PLAINTIFF

And

SLATTER, JOHANNES JACOBUS DEFENDANT

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JUDGMENT

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SIBUYI AJ.

[1]. This is a summary judgment application wherein plaintiff seeks summary judgment against the defendant in respect of two claims for payment of R757 395,00 and R222 607, 00, respectively, together with interest thereon and costs on the scale as between attorney and client. The basis of plaintiff's claims against the defendant is a continuing covering suretyship agreement contained in a credit application document, annexure "C" to the plaintiff's particulars of claim ("the credit application"). The underlying debts, on which the plaintiff relies, arose from the sale and delivery of maize to a close corporation, J & J Graanbemarking BK ("the close corporation").

[2]. It is alleged that the defendant bound himself in his private and individual capacity as surety for and co-principal debtor with the close corporation in favour of the plaintiff for the due performance and payment by the close corporation of all amounts owing to or to become owing by the close corporation to the plaintiff in terms of the agreement or agreements of sale between them. The suretyship was given as continuing and covering surety for the present and future obligations of the close corporation to the plaintiff.

[3]. The credit application was in Afrikaans and incorporated in a 6-page document to which I refer in some detail herein below. The first page, which is not numbered, is a covering or title page identifying the documents as follows:

**"KREDIETAANSOEK**

INSLUITEND DIE MAATSKAPPY SE STANDARD

TERME EN VOORWAARDES"

[4]. It comprises of bold headed sections A to F. The underlined portions are completed in manuscript. In the numbered page 1 it reads as follows:

Ek/ons JOHANNES JACOBUS SLATTER ('die kliente') doen hiermee aansoek vir kredietfasiliteite vir die opening van 'n rekening met MONSATO Suid-Afrika (Edms) BEPEK ('die Maatskappy')

| | |
|---|---|
| AFDELING A | (moet voltooi word deur alle kliente); |
| AFDELING B | (moet voltooi word deur alle kliente); |
| AFDELING C | (moet voltooi word deur alle kliente); |
| AFDELING F | (bevat die bapalinge en voorwaardes tot hierdie kredietaansoek en sluit die borgstelling in en moet onderteken word deur alle kliente); |

[5]. The numbered pages 1 to 3 of the credit application is a printed form providing for factual particulars regarding the applicant for credit, including its financial and banking particulars. These parts of the document were completed in manuscript insofar as they were applicable. Section F of the credit application comprises of 2 pages. They are the

last 2 pages of the document, numbered as pages 4 and 5. The credit application's standard terms and conditions appear on these last two pages under the heading:

"AFDELING F:

VERKOOPSVOORWAARDES

Insluitend sessie van boekskuld en borgstelling"

[6]. The standard terms are then specified under five headings reading:

"1. VERKOOPSVOORWAARDES";

"2. DEURLOPENDE DEKKINGSBORGSTELLING";

"3. SESSIE";

"4. ALGEMEEN"; and

"5. OPENBAARMAKING VAN PERSOONLIKE INLIGTING".

[7]. The suretyship undertaking on which the plaintiff relies for its claims appears under the second heading in clause 2 of the standard terms and conditions as follows:

"2 DEURLOPENDE DEKKINGSBORGSTELLING

2.1 Die person wat hierdie aansoek namens die Klient teken:

2.1.1 waarborg deur sy/haar handtekening dat hy/sy die nodige magtiging het om dit te doen;

2.1.2 bind hierby homself/haarself in sy/haar pesoonlike hoedanigheid as borg en mede-hoofskuldenaar met die klient ten gunste van die maatskappy vir die stiptelike uitvoering van enige verplingtinge van die klient, en vir die betaling deur die klient aan die maatskappy van enige bedrag wat nou of ter enige tyd stiptelike uitvoering van enige verpligtinge van die klient, en vir die betaling deur die klient aan die maatskappy van enige bedrag wat nou of ter enige tyd verskuldig mag wees aan die maatskappy deur die klient;

2.1.3 verstaan dat sy/haar aanspreeklikheid vir die bedrag wat deur die klient aan die maatskappy verskuldig is nie beperk is tot enige kredietlimiet wat die maatskappy aan die klient toestaan nie;

2.1.4 erken en verstaan dat as borg en mede-hoofskuldenaar hy/sy afstand doen van enige voorregte waarop hy/sy regtens geregtig mag wees insluitende, maar nie beperk tot:

2.1.4.1 Uitwinning – die reg om tee is dat die maatskappy eers optree teen die klient vir die betaling van enige uitsaande skuld an die maatskappy voordat opgetree word teen die borg;

2.1.4.2 Sessie van aksie – die reg om van die maatskappy tee is dat die aksie vir betaling van die skuld aan die borg sedeer word voordat aksie teen die borg geneem mag worg;

2.1.4.3 Die voordeel om gelykdige aangespreek te word en skuldsplitsing – die reg van 'n mede-borg om slegs aanspreeklik te hou te word vir sy/haar pro rata gedeelte van die hoofskuld;

2.1.4.4 Die reg tot verrekening deur die maatskappy.

2.2 Hierdie borgskap word gegee as 'n deurlopende dekkingsborgestelling vir huidige, sowel as toekomstige aanspreeklikheid van die klient aan die maatskappy."

[8]. The last page of credit application, numbered page 5, (the second page of section F) is the signature page that the defendant signed to signify his agreement to the contractual terms and conditions contained in the credit application. It is bold headed and reads as follows:

**"Ek/Ons die ondergetekend waarborg hiermee dat alle inligting verskaf in hierdie aansoek waar en korrek is en stem ooreen dat alle transaksie gesluit met die maatskappy onderhewig sal wees an die terme en voorwaardes hierin vervat en onderneem om gebonde te wees aan alle terme en voorwaardes, en sonder om die algemeenheid daarvan te beperk, veral paragraaf 1 (die borgstelling), in sover die laasgenomde verband hou met die ondertekenaar."**

[9]. The signature page then continues (immediately below the above wording):

"Aldus voltooi deur die klient te SPRINGS

op hierdie 6de dag van MEI 2011

VOLLE NAAM: JOHANNES JACOBUS SLATTER

(HANDTEKENING): (Defendant's signature)
Vir en names die Klient, behoorlik daartoe gemagtig
AS GETUIE (volle name): M S RANJOMIA

(HANDTEKENING VAN GETUIE) (Witness' signature)

"

[10]. The underlined portions of the signature page are completed in manuscript. The remainder is part of the printed form. Lastly, the defendant and the witness only appended their initials on the numbered pages 1 to 4 of the credit application and not on the covering and last signature pages.

[11]. In due course the defendant entered appearance to defend, the plaintiff applied for summary judgment and thereafter the defendant filed an opposing affidavit wherein he denied liability. The defendant admitted in his opposing affidavit that he signed the credit application on behalf of the close corporation but denied that he had signed such document in his personal capacity or that he intended to bind himself personally, jointly and severally, as surety and co-principal debtor in *solidum* to the plaintiff. The defendant's alleged defence is to the effect that the *caveat subscriptor* rule does not apply to this matter. The basis for the alleged defence is that the plaintiff's representatives had misled him into signing the credit application containing the suretyship agreement, by not pointing out the suretyship undertaking to him. The defendant's version being that he "glanced over" the credit application document, initialed each page, and signed the last page without reading the document.

[12]. It is contended on behalf of the plaintiff, among other valid contentions,

that the signature page of the credit application is drawn and printed in a format that cannot but attract the attention of any person called upon to sign it. It draws particular attention to the suretyship undertaking in a clear unambiguous manner. In such circumstances the fact that the defendant alleges that he merely glanced over the page before he signed it, without taking cognisance of its contents or significance, does not afford him grounds for avoiding the operation of the *caveat subscriptor* rule. That to come to such a conclusion would emasculate the rule and would, indeed, "... introduce a degree of paternalism in our law of contract at odds with the *caveat subscriptor* rule".

[13]. However, I do not agree with the contention that the defendant does not allege any factual circumstances from which any further obligation to draw his attention to the suretyship undertaking can be inferred. The plaintiff's case, properly summarised from the opposing affidavit, is that he was not aware that he signing a credit application containing a suretyship agreement. The plaintiff did not bring this fact into his attention. Had he been made aware of the fact that the credit application document contained the suretyship agreement he would not have sign it.

[14]. I agree with the contention of the plaintiff's counsel that the credit application document does seem to draw defendant's attention to the suretyship obligation that he was undertaking by signing the document. However, the problems with that are twofold: firstly, the defendant

disputes that fact, and secondly, I can only come to this conclusion after having considered all the facts of this matter and the balance of probabilities. As correctly pointed out by defendant's counsel, at this stage of the proceedings, the defendant is not required to persuade the court of the correctness of the facts stated by him, where the facts are disputed, that there is a preponderance of probabilities in his favour, nor does the court endeavour to weigh or decide the disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. That must only happen at the trial stage.

[15]. I now have to consider the relevant question. Whether the facts alleged by the defendant constitute a good defence in law and whether such defence appears to be bona fide. In Brink v Humphries & Jewell (Pty) Ltd[1], when sued qua surety for payment of a debt, the appellant raised the defence of *justus error*, maintaining that when he signed the credit application form on behalf of the debtor, he had not known that it embodied a personal suretyship obligation. It was common cause that no one had informed the appellant that such an obligation was embodied in the form. The High Court dismissed the appellant's defence and gave judgment for the respondent. The SCA held, that the furnishing of a document which was misleading in itself, without more could constitute a misrepresentation which rendered the contract *void ab initio*[2].) In conclusion, the SCA, with Navsa JA dissenting, held that the

[1] See 2005 (2) SA 419 (SCA)
[2] See paragraphs [2] and [3] thereof

respondent's conduct in furnishing the form, which was misleading, had induced a fundamental mistake on the part of the appellant: He had been under the impression that he was signing a credit application form on behalf of the company, whereas he had undertaken, in addition, a personal suretyship for the debts of the company. It followed that the suretyship obligation was *void ab initio* and that the appeal had to succeed[3].

[16]. In the light of the above SCA decision, I am of the view that the defendant's above-mentioned defence, if ultimately proved at the trial of the matter, may amount to valid defence in law to the plaintiff's claims. This being the threshold to overcome an application for summary judgment, summary judgment must be refused. At the summary judgment stage of proceedings the rule does not require a convincing defence by the defendant but a *bona fide* defence, which is good in law.

[17]. Summary judgment is an extraordinary and stringent remedy, which ought to be granted only if there is no doubt that the plaintiff, has an unanswerable case. However, if doubt exists then summary judgment should be refused[4]. In the light of the above, I find that the plaintiff in this matter has no unanswerable case. Therefore, I am satisfied that the

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[3] See paragraphs [12] thereof
[4] See Tesven CC and Another v South African Bank of Athens 2000 (1) SA 268 (A) at 277H - 278A.

defendant has a *bona fide* to the plaintiff's claims and summary judgment must be refused.

I accordingly order as follows:

1 Summary judgment is refused.

2 Leave is granted to the defendant to defend the action.

3 The costs of this application are to be costs in the cause.

SIBUYI A J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

| | | |
|---|---|---|
| For the plaintiff | : | Advocate F. G. Barrie SC |
| Instructed by | : | Smit Sewgoolam Incorporated |
| For the defendants | : | Advocates H. P. West |
| Instructed by | : | Kruger & Okes Attorneys |
| Date of hearing | : | 5 June 2015 |