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

Case number: **1077/2013**

2/10/2013

In the matter between : -

RADIOSOURCE AFRICA CC Applicant / Plaintiff

and

2.10.2013

CATHERINE HELEN THOMPSON Respondent / Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

[1] The applicant (herein after referred to as "plaintiff") prays for summary judgment against the respondent (herein after referred to as "defendant") for the payment of an amount of R 357 682, 25, with interests and costs.

[2] The relief is claimed consequent upon a written Deed of Surety signed by the defendant on 25 July (no year is mentioned in the written deed), in favour of the plaintiff ("the creditor").

[3] In terms of the suretyship agreement, the defendant bound herself as surety and co-principal debtor with Industrial Lifting Instrumentation & Pump Supplies ("the debtor") for *"the due fulfillment of any obligations now or hereinafter of the debtor to the creditor and the due and punctual payment of the debtor of all monies which are now or may at any time hereinafter become owing by the debtor to the creditor from whatsoever cause howsoever arising and which without derogating from the generality of the foregoing, shall include any claim acquired by the creditor by cession."*

[4] Upon receipt of the summons, the defendant duly entered appearance to defend the claim, which resulted in the plaintiff, being of the view that the defendant does not have a *bona fide* defence to the claim and entered appearance solely to delay the plaintiff's claim, launching the present application.

ISSUES COMMON CAUSE:

[5] Prior to dealing with the defendant's defence to the claim of the plaintiff, it is necessary to state the facts that are common cause between the parties:

i) the debtor entered into two credit agreements with the plaintiff which agreements are referred to in the papers as "the First Credit Agreement" and "the Current Agreement" (herein after collectively referred to as "the agreement");

ii) the terms of the agreement were *inter alia* that:

a) the plaintiff would supply goods to the debtor at the latter's special instance and request;

b) the debtor agreed to pay all invoices within 30 days from date of statement;

iii) that plaintiff did supply goods and issued invoices to the debtor, but the debtor has failed to make payment timeously or at all;

iv) consequently and on 30 November 2012, the debtor was indebted to the plaintiff in the amount of R 357 682, 25;

v) the debtor has been placed under provisional winding-up and remains indebted to the plaintiff in the amount claimed;

vi) the defendant did enter into the Deed of Surety relied upon by the plaintiff in its particulars of claim.

DEFENDANT'S DEFENCE:

[6] The defendant relies on two defences:

i) she was in an unequal bargaining position when she signed the Deed of Surety; and

ii) she did not intend to bind herself as co-principle debtor for the past debts of the debtor.

FACTS:

[7] The defendant stated the following in the answering affidavit in support of the defences:

"5.1 The operating of the business of the principle debtor solely depends on goods provided and services rendered by the applicant.

5.2 The principle debtor was dependant on the products supplied and services rendered by the applicant.

5.3 As a result of the aforementioned, and in the event that I did not sign the deed of surety, the applicant would not have made available the goods and services to the principle debtor, I was therefore in an unequal bargaining position.

5.4 The deed of surety contained all standard terms and conditions in favour of the applicant. I was simply not in a position to negotiate the terms of the deed of surety and had to consent thereto without reference to an attorney.

5.5 *When signing the deed of surety, it was never my intention to bind myself as co-principle debtor for past debts incurred by the principle debtor.*

5.6 *I bonded myself as surety for future debts to be incurred and not any past debts."*

and

"6. When signing the deed of surety I was not aware that I was binding myself as co principle debtor for past debts incurred by the principle debtor. I therefore feel that upon signing the deed of surety I was under a misrepresentation and was not in a position to bargain."

UNEQUAL BARGAINING POSITION:

[8] The aforesaid paragraphs contain the totality of the evidence relied upon by the defendant in support of the defences raised by her.

[9] The question that immediately arises on the facts *supra*, is to which terms in the deed of surety the defendant would not have agreed. The defendant should, furthermore, at least explain why she deemed the offensive terms oppressive and/or unfair.

[10] The defendant chose not to disclose these important facts that forms the very core of her defence based on unequal bargaining position.

[11] It is clear that the defendant was not unwilling to bound herself as co-principle debtor, her only complaint is the fact that she was not in a position to negotiate the terms of the deed of surety.

[12] The well known test formulated in *Breitenbach v Fiat S.A. (Edms) Bpk* 1976 (2) SA 226 T 2t 228 C-E should be applied to the facts *supra*, to wit:

"......the word 'fully' should not be given its literal meaning in Rule 32 (3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirements of bona fides."

[13] The defence of unequal bargaining power is in essence a constitutional challenge to contractual terms. The approach to be followed in such instances were succinctly summarised by Ngcobo J in *Napier v Barkhuizen* 2007 (5) SA 323 CC at para [30]:

"In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary

to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda *to operate, but at the same time allow courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. ..."*

[14] Without being informed which term/s of the deed of surety is contrary to constitutional values, I am simply not in a position to find that the defendant has established sufficient facts to disclose a *bona fide* defence based on unequal bargaining power.

MISREPRESENTATION:

[15] This defence is based on the allegation that the defendant never intended to bind herself as co-principle debtor for past debts of the debtor and that she was not aware, when signing the surety, that she was binding herself as such.

[16] The consequences of appending one's signature to a document, was explained by Hoexter JA in *Jurgens and others v Volkskas Bank* 1993 (1) SA 214 A at 220 E- F:

"The function of a signature is to signify that the writing to which it pertains accords with the intention of the signatory. It conveys an attestation by the person signing of his approval and authority for what is contained in the document; and that it emanates from him."

[14] If the signatory was, however, misled by the person to whom the written document is presented, as to the true contents and legal implications of the document, the signatory will not be bound to the terms thereof. [See: *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 W; *Prins v ABSA Bank Ltd* 1998 (3) SA 904 C]

[15] The defendant does not disclose any facts to support the notion that she was misled by plaintiff as to the terms contained in the deed of surety. She merely states that she did not intent to agree to a term and/or that she was unaware that the term was contained in the surety.

[16] The specific portion of the deed of surety, the defendant alleges she was unaware of, appears earlier in this judgment. The portion dealing with past debts is not inconspicuous. It appears in the introductory portion of the deed in the same type print as the remainder of the paragraph. The fact that the defendant most probably did not study the document carefully, is not a defence in law.

[17] The facts alleged by the defendant in support of this defence is similarly bald, vague and sketchy and does not disclose a *bona fide* defence..

[18] In the premises, the plaintiff is entitled to summary judgment.

ORDER:

I make the following order:

Judgment is granted against the defendant for:

1. Payment of the amount of R 357 682, 25;
2. Interest on the aforesaid amount at the rate of 2% per month from 1 December 2012 to date of payment;
3. Costs of suit on the attorney and client scale.

N Janse van Nieuwenhuizen

Acting Judge of the North Gauteng High Court