

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2521/2007

In the matter between:-

ABSA BANK LIMITED

Plaintiff

and

PULE ISAAC LECOKO NO

1st Respondent

JACOBUS JOHANNES VAN DER MERWE 2nd Respondent

HEARD ON:

20 SEPTEMBER 2007

JUDGMENT BY:

RAMPAI J

DELIVERED ON:

31 JANUARY 2008

[1] This is an application for summary judgment. The plaintiff sues the second defendant for payment the sum of R764 664.04 and ancillary forms of relief. The claim is based on a suretyship contract which the second defendant signed on behalf of a business entity called “Die Goedgeleë Boerdery Trust” in favour of the plaintiff.

[2] The plaintiff’s claim is fully set out in the summons which the registrar issued on 12 June 2007 and the sheriff served upon the second defendant on 27 June 2007. On 13 July 2007

the second defendant filed notice of his intention to defend the action. On 3 August 2007 the plaintiff launched this application for summary judgment.

- [3] The notice of application was accompanied by a supporting affidavit signed by Ms Rozanne Niemann, the plaintiff's manager responsible for debt collection services. She confirmed the plaintiff's cause of objection, the quantum of the claim as well as the relief sought as set out in the summons from which this application for summary judgment stemmed. She concluded by expressing the opinion that, although the second defendant had entered an appearance, he had no *bona fide* defence to the plaintiff's claim and that he had done so for the sole purpose of delaying the action.
- [4] The summary judgment application is opposed. In his opposing affidavit the second defendant stated that the aforesaid trust was created during 2005 while the first defendant was still in his employ. On 13 September 2005 he took over the trust from the first defendant. Since then he was the only trustee. Subsequent to the take-over he called at the plaintiff's in connection with the bond obligations of the trust and the signing powers on its current account. He and the bank agreed that he would assume responsibility in connection with the bond obligations of the trust and that he would also have the signing powers on its current account. On the first occasion he apparently signed no documents.

[5] He once again visited the plaintiff. On the second occasion he signed certain documents relating to the two matters previously agreed upon. At the request of the plaintiff's personnel, he signed documentation in respect of the signing powers at the plaintiff's offices. However, as regards the signing of the documentation pertaining to the transfer of the bond obligations, the plaintiff's personnel sent him to the plaintiff's lawyers where he signed such documentation.

[6] During his second visit he signed the documents which were presented to him without reading them and under the mistaken but innocent belief that such documentation related to the mere assumption of the bond obligations of the trust and the signing powers on its current account only. He concluded by stating that he would not have signed, as he did, if only the plaintiff's personnel or its attorneys had drawn his attention to the danger that by signing he was binding himself as surety and co-principal debtor.

[7] A cursory overview of the principles of law is necessary. The plaintiff's claim is backed up by four annexures to the summons, namely:

Firstly, the mortgage bond over the farm registered in favour of the plaintiff – annexure "A";

Secondly, the certificate of balance in respect of the capital and interest as on 3 July 2007 – annexure "B";

Thirdly, the breakdown of the rates of interest in accordance with the provisions of the Usury Act, No. 73 of 1968, which

rates had been applied to the bond loan – annexure “C”;

Fourthly, the suretyship agreement – annexure “D”.

According to all these documents the second defendant appears, *prima facie*, to be indebted to the plaintiff. It is trite that the onus of proving otherwise rests on the second defendant.

[8] The respondent is required to show that he has a *bona fide* defence to the plaintiff’s claim and that he is not playing for time at the expense of the plaintiff. In his opposing affidavit he must fully disclose the nature and the grounds of his defence and the material facts upon which it is founded. *Vide* High Court Rule 32(3)(b).

[9] The opposing affidavit must contain a sufficient exposition of the facts, which if accepted as true, would constitute a good defence in law. *Vide* **ESTATE POTGIETER v ELLIOTT** 1948 (1) SA 1084 (C) on 1087; **WRIGHT v VAN ZYL** 1951 (3) SA 488 (C) at 492 C; **BREITENBACH v FIAT SA (EDMS) BPK** 1976 (2) SA 226 (T) at 227 F – H.

[10] If the second defendant’s opposing affidavit raises an arguable case, then he will have discharged the onus and the plaintiff’s summary judgment application will not succeed and leave to defend will have to be granted to him. *Vide* **EISENBERG’S v OFS TEXTILE DISTRIBUTORS (PTY) LTD** 1949 (3) SA 1047 (O) on 1055; **LOMBARD v VAN DER WESTHUIZEN** 1953 (4) SA 84 (C) at 89 A; **AREND AND ANOTHER v ASTRA FURNISHERS (PTY) LTD** 1974 (1) SA

298 (C) at 316 C.

[11] In determining whether or not the second defendant has put up an arguable case to justify letting him go on to have the main action tried, it is not expected of him to formulate his opposing affidavit with the precision of a pleading - **HERBERT v STEELE** 1953 (3) SA 271 (T) at 276 C.

[12] Our courts are reluctant to deprive a defendant of an opportunity of having a full blown hearing of a dispute in a case where he has a *prima facie* arguable defence. Because summary judgment is a drastic procedure with serious repercussions for the unsuccessful defendant, this extra-ordinary relief is never granted where there is doubt cast on the merits of the plaintiff's case. *Vide* **FIRST NATIONAL BANK OF SA LTD v MYBURGH AND ANOTHER** 2002 (4) SA 176 (C) at 180 E; **FOURLAMEL (PTY) LTD v MADDISON** 1977 (1) SA 333 (AD) at 347 H.

[13] Where, as in this case, the defendant's defence is based on misrepresentation, trial is the preferred civil procedure for the proper adjudication and substantive resolution of a dispute. *Vide* **ESTATE POTGIETER v ELLIOTT** 1948 (1) SA 1084 (C) on 1087.

[14] Now I proceed to examine the facts. The second defendant

took the trust over from the first defendant on 13 September 2005 and became the sole trustee thereof. He is now sued on the strength of what purports to be a limitless suretyship agreement signed here in Bloemfontein on 21 September 2005. The trust owes the plaintiff the sum of R764 664.04 plus interest thereon calculated at a rate of 12,5% per annum from 4 May 2007. The second defendant's signature appears on one of the documents the plaintiff relies upon. *Vide* p. 4 annexure "D". The document in question is a suretyship agreement. These facts are not in dispute.

- [15] The second defendant's defence is that at the time he appended his signature on the aforesaid annexure, he was unaware that he was signing as a surety. He was not warned that by so signing he was contractually binding himself as a surety and co-principal debtor with the trust in respect of its debts in favour of the plaintiff. On the day in question, documentation was merely placed before him, he then simply signed without first reading it. He signed in this way because he was under the *bona fide* belief that such documentation related to his assumption of the bond obligations of the trust and the signing powers on its current account. He averred further that his attention was not specifically drawn to the fact that he was committing himself to an unlimited extent in favour of the plaintiff for the repayment of all the debts owing by the trust to the bank. He concludes on a lamentable and exculpatory note. If only his

special attention was drawn to this serious commitment, he certainly would not have signed the document now being used against him. This then is the sum total of the second defendant's defence.

- [16] Mr. Snellenburg, counsel for the plaintiff, forcefully argued that the second defendant, on his own accord, approached the bank with the specific aim of taking over the obligations of the trust towards the bank. Moreover, he argued, there was no indication whatsoever, in the opposing affidavit, that the manner in which the plaintiff agent presented the documents to the second defendant was misleading in any way. Looking at the disputed document, he argued further, it was definitely not in a category of documents whose contents or form could be typified as misleading to the unwary. He contended that, in the circumstances, the plaintiff's agents did not misrepresent the true nature of the document to the second defendant, did not mislead him and were unaware at the time of the signing that the second defendant was labouring under any misapprehension or mistaken belief. Finally, he submitted that if the second defendant was mistaken, as he alleged, his was unilateral mistake which could not be regarded as *justus error* and that since it was not a reasonable mistake, it could not constitute a *bona fide* defence to offset an application for summary judgment.

[17] Mr. Zietsman, counsel for the second defendant, vigorously argued and urged me to turn the application for summary judgment down. The high watermark of his argument was this:

“Dit is nooit deur Eiser se regsverteenwoordigers verduidelik of onder Tweede Verweerder se aandag gebring dat hy ‘n onbeperkte borgstelling onderteken in terme waarvan hy homself in persoonlike hoedanigheid as borg en medehoofskuldenaar ten opsigte die verskuldigheid van die trust verbind nie.”

Vide par. 4.8 of the second defendant’s heads of argument on p. 7 thereof.

He submitted, that the second defendant had disclosed a *bona fide* defence grounded on the unilateral misrepresentation of the plaintiff. In support of this submission he cited several authorities, namely, **KHAN v NAIDOO** 1989 (3) SA 724 (N); **SHEPHERD v FERREL’S ESTATE AGENCY** 1921 TPD 62; **TROLLIP v JORDAAN** 1961 (1) SA 238 (A) at 256 D; **SISSONS v LLOYD** 1960 (1) SA 307 (SR) at 370; **PRINS v ABSA BANK LTD** 1998 (3) SA 904 (C); **DOLE SOUTH AFRICA (PTY) LTD v PIETER BEUKES (PTY) LTD** 2007 (4) SA 577 (C); **DU TOIT v ATKINSON’S MOTORS BPK** 1985 (2) SA 893 (A); **The Law of Contract**, 4th Edition, by R.H. Christie, p. 371 – 374 under the article “Unilateral mistake caused by the other party.”

[18] The crucial question in the case is whether the second defendant's mistake in signing the suretyship agreement without reading it, amounted to a deliberate misrepresentation or unilateral mistake caused by the plaintiff.

[19] In **NATIONAL AND OVERSEAS DISTRIBUTORS CORPORATION (PTY) LTD v POTATO BOARD** 1958 (2) SA 473 (AD) at 479 G – H Schreiner JA had this to say about a mistake in a contract:

“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 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.”

[20] The second defendant approached the bank to sign certain documents. From there he was sent to the plaintiff's attorneys. It seems he did not enquire why he had to go there. On his arrival there certain documents were merely presented to him. Again it seems he did not enquire what documents he was signing or required to sign. He simply signed. He did not read. He honestly believed he was

signing a document pertaining to the obligations of the trust to repay the bond loan. This he was prepared to do in his representative capacity as the sole trustee of the trust entity. It was never his intention to go beyond that by binding himself in his personal capacity as surety for the payment of the business debts of the trust. It later turned out that he signed a document he did not really intend signing. He was not warned about or alerted to the true nature of the document he actually signed. He was misled, he alleged. The plaintiff falsely represented to him that he was signing a document in one capacity whereas, in truth and in reality, he was made to sign a document in another capacity completely different from what was previously agreed upon. Therefore he contended that no valid and binding suretyship contract was concluded between him, in his personal capacity, and the plaintiff.

- [21] The second defendant's contention failed to persuade me. I hold the firm view that a valid and binding contract was concluded between the parties on the terms and conditions contained in the relative document. The second defendant cannot be heard to say that the failure of the plaintiff's agents to warn him about or to alert him to the true nature of the document was an act of misrepresentation or unilateral mistake caused by the plaintiff. Equally fallacious is his averment that on the first occasion he and the plaintiff had agreed that he should come back to sign documentation in

his representative capacity only.

[22] I browsed the opposing affidavit. Nowhere could I find an averment that he was blind and therefore could not read the document on his own. It is not his case that there was a legal duty which made it incumbent upon the plaintiff to warn him or to draw his attention to the fact that he was signing a suretyship agreement. There is no suggestion, let alone an averment, in his opposing affidavit, to the effect that he wanted to read the document but that he was deceptively discouraged or prevented from doing so by the plaintiff's agent who, for instance, told him that he was in a hurry to go somewhere or that reading the document was unnecessary. There is virtually no averment from which I can infer the existence of such a primary duty on the part of the plaintiff or its attorneys to help the second defendant to read. It was his primary duty to read the document he was required to sign. He was able to read. He chose not to read. He only has himself to blame.

[23] The document was plain and simple. It was not ambiguous at all. Its heading was printed in bold letters right at the top and on the vertical imaginary middle line. It is printed in black letters on a white sheet. The descriptive word "Borgstelling" appears on page 1 of a four page document. It is an Afrikaans word for the English word "suretyship". It also appears that the second defendant is Afrikaans

speaking, because his opposing affidavit is, like the suretyship document, written in the same language. The first page of the document, like the rest of the pages, was initialled by three persons, the second defendant and the two witnesses. The word “Borgstelling” on page 1 is so conspicuous that anyone who has anything to do with this particular page, even if he or she does not read it, cannot easily miss it, even if no-one draws his or her attention to it.

- [24] If the second defendant, as a businessman, had taken the trouble on his own accord, to read the relative document, he would have become aware of the true fact that he was required to sign a suretyship for an unlimited amount of money. But even if he genuinely did not read the entire document, the aforesaid peculiar features of the document, particularly page 1 thereof, strongly suggest or show that the heading of the document is so strikingly visible that it catches the eye of anyone who fleetingly glances at it without actually reading its contents. Compare the facts as well as the defence in this case with those in **STANDARD BANK OF SA LTD v EL-NADDAF AND ANOTHER** 1999 (4) SA 779 (W). I am persuaded by Mr. Snellenburg’s argument. There is nothing to indicate that the manner in which the document was presented to the second defendant was misleading. I am not convinced that the second defendant’s opposing affidavit discloses a *bona fide* defence. In my view the defendant has failed to discharge the onus.

[25] On page one of the relative document the following sound advice appears on the second line from the top:

“Ons beveel aan dat u onafhanklike regsadvies inwin om seker te maak dat u u verbintenis en die potensiële gevolge van hierdie borgskap verstaan.

Deur hierdie borgstelling te verskaf kan u afsonderlik en gesamentlik met die skuldenaar aanspreeklik gehou word vir die verpligtinge van die skuldenaar.”

[26] On page four of the same annexure the following confirmations are recorded:

“Ek die ondergetekende, bevestig hierdie borgstelling.

22.1 ten tye van ondertekening behoorlik voltooi was veral met verwysing na die naam van die skuldenaar en klousule 21; en

22.2 vir sover geen bedrag ter beperking van my/..... aanspreeklikheid ingevolge hierdie borgakte in klousule 21 ingevul is nie, my/..... aanspreeklikheid hierkragtens vir ‘n onbeperkte bedrag sal wees; en

22.3 in alle opsigte in ooreenstemming is met die ooreenkoms tussen my/..... en die Bank en nie as gevolg van een of ander gemeenskaplike fout tussen my/..... en die Bank, nie ons ware bedoeling weergee nie.”

The second defendant’s signature follows shortly below this final clause of the suretyship document.

[27] The legal effects of one’s signature on legal documents were encapsulated in the following *caveat subscriptur* principle:

“The starting point is as referred to by Harms JA in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A), at 239 H - I * quoting from the statement by Blackman J in *Smith v Hughes* (1871) LR 6 QB 597 at 607, namely:

‘If whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.’

As long ago as 1903 it was our law and it remains our law that when a party signs a contract it is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. For the defendant to succeed it needed to convince the Court that it was misled as to the purport of the words to which he signified his assent by appending his signature.”

DOLE SOUTH AFRICA (PTY) LTD v PIETER BEUKES (PTY) LTD 2007 (4) SA 577 (CPD) at 590 C – E per Dlodlo J

- [27] I am not convinced that the second defendant was misled as to the true purport of the words which he signified his contractual ascent by appending his signature on a document from which he now desperately seeks to extricate himself. To suggest, as the second defendant does, that the bank and the trust agreed, that the trust itself must be its own surety or furnish no sound security, is ridiculous. That is

what his contention boils down to.

[28] In determining whether the second defendant has a plausible case which justifies letting the dispute to go on trial, his defence has to be considered against the backdrop that:

“[30] **By its very nature a contract of suretyship is burdensome.** The surety undertakes responsibility for the fulfilment of another's obligation. No doubt for this reason the law affords protection to a surety in a number of different ways. At common law, for example, a surety will be released if the creditor does something in his dealings with the principal debtor which has the effect of prejudicing the surety (Caney's The Law of Suretyship 5th ed at 205). In order to be valid, contracts of suretyship must now also be embodied in a written document signed by or on behalf of the surety (s 6 of the General Law Amendment Act 50 of 1956). **But a balance must be struck.** Sureties do not assume the obligations of others against their wills, but with their free consent. Once having done so they cannot expect to be entitled simply to disabuse their minds of the fortunes of the principal debtor's liability and then require the law to protect them.... The typical surety in modern society is one who binds him- or herself as co-principal debtor and guarantees the debts of a company or close corporation which has little in the way of share capital or assets but is dependent on credit in order to conduct its business. More often than not the business is that of the surety or a spouse who for various reasons chooses to conduct it through the medium of a company or close corporation with limited liability. **A creditor will ordinarily refuse to afford credit to such a legal persona in the absence of a personal suretyship and few businesses can operate successfully without credit.** The very existence

of the debt is therefore dependent upon the existence of the suretyship while the object and function of the latter is, of course, to ensure proper payment of the former.”

JANS v NEDCOR BANK LTD 2003 (6) SA 646 (SCA) at par. 30 per Scott JA. I am in agreement. Generally sureties have themselves to blame. To grant leave to defend in these circumstances would almost be subversive of the whole law of suretyship contract.

- [28] In the business world of today it must be something of an exceptionally rare banking practice to come across a situation where a financial institution grants a mortgage bond to a trust which cannot provide adequate security for the loan, without requiring the trustee thereof to stand the borrowing trust surety in his personal capacity for the repayment of the loan. If the second defendant had declined to conclude a suretyship agreement with the plaintiff, the plaintiff would not have released the funds needed to inject life into the trust to become a trading business entity. The trust would not have come into existence or would have remained dormant. A surety is a potential debtor and, as such, should not be easily allowed to walk away when chickens come home to roast. He must not be readily allowed to duck and dive from the contractual obligation he freely assumed by simply making a bold statement: “I did not read” when he should have.

[29] In the circumstances I have come to the conclusion that the plaintiff's case is unanswerable. **TESVEN CC AND ANOTHER v SOUTH AFRICAN BANK OF ATHENS** 2000 (1) SA 268 (SCA) at p. 277. The second defendant has made out no arguable case. In the instant case no *justus error* could be attributed to the plaintiff's agents. If there was any mistake, I have some reservation as to whether there really was, then it was a unilateral and unreasonable mistake caused, not by the plaintiff but rather, by the second defendant himself. **NATIONAL AND OVERSEAS DISTRIBUTORS CORPORATION (PTY) LTD v POTATO BOARD** 1958 (2) SA 473 (AD) at 479 G – H. Since the plaintiff was not to blame for any mistake or misrepresentation, the second defendant cannot be heard to say his signature does not correctly symbolise or signify his intention to be bound by the terms and conditions of the suretyship. He cannot now be released from the bonds of the ordinary meaning and effect of the words which appear over his signature - **DOLE SOUTH AFRICA (PTY) LTD v PIETER BEUKES (PTY) LTD** 2007 (4) SA 577 (CPD) at par. 29. To suggest, as the second defendant's contention does, that there was no mutual assent as regards the import of the relative document, is untenable. I would, therefore, grant summary judgment in favour of the plaintiff. To do otherwise would not be compatible with proper exercise of

judicial discretion.

[30] No reason exists why the general rule of costs should not apply. The plaintiff has been successful with its action. Therefore the fruits of success must be awarded to the plaintiff.

[31] In the result, the following order is made:

31.1 The application for summary judgment is granted.

31.2 The costs shall be borne and paid by the second defendant.

M.H. RAMPAL, J

On behalf of the plaintiff:

Adv. N. Snellenburg
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the second
defendant:

Adv. P.J.J. Zietsman
Instructed by:
Kramer Weihmann Joubert Inc
BLOEMFONTEIN

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