

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO. 2022-8473

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>25 July 2024</u> DATE	 SIGNATURE

In the matter between:

**SOUTH AFRICAN SECURITIZATION
PROGRAMME (RF) LIMITED**

First Plaintiff/Applicant

SASFIN BANK LIMITED

Second Plaintiff/Applicant

SUNLYN (PTY) LTD

Third Plaintiff

and

MAXIDOR SA (PTY) LTD

First Defendant

TAMRYN INVESTMENT HOLDINGS (PTY) LTD

Second Defendant

CLINTON DORASAMY

Third Defendant/Respondent

JUDGMENT

GOTZ AJ

Introduction

- [1] In this application, the first and second plaintiffs in an action (but not the third plaintiff) seek summary judgment, in terms of rule 32(2) of the Uniform Rules of Court, against the third defendant (“**Mr Dorasamy**”),
- [2] Mr Dorasamy is the sole respondent in the summary judgment application.
- [3] The first defendant, I am told, is in final liquidation. The second defendant has been granted leave to defend by the applicants.
- [4] I have decided that leave to defend the action should also be granted to Mr Dorasamy. Although I understand that this is not always done in such cases, I have elected to give reasons for this decision.

Background

- [5] In the period 26 June 2019 to 10 September 2020, the first defendant (“**Maxidor**”) and the third plaintiff (“**Sunlyn**”) concluded no less than three “*Master Agreements of Hire*” in terms of which Sunlyn leased certain office equipment to Maxidor.
- [6] The first Master Agreement of Hire (Deal Number 8494-1) between Sunlyn and Maxidor was concluded on or about 26 June 2019. In terms of this rental agreement, Maxidor agreed to pay rental for the equipment in the amount of R50,597.00 plus VAT per month. The rental period for this agreement was 60 months. Notably, the second defendant, Tamryn Investment Holdings (Pty) Ltd, signed a guarantee in terms of which it bound itself jointly and severally as co-principal debtor with Maxidor in favour of Sunlyn.
- [7] On 29 June 2020, Sunlyn and Maxidor concluded a second Master Agreement

of Hire (Deal number 8494-2), in terms of which Maxidor rented additional equipment in return for the payment of rental in the amount of R33,677.00 plus VAT per month, with effect from the commencement date. The rental period was 36 months. There was no guarantee attached to this second agreement.

- [8] Sunlyn and the First Defendant then concluded a third Master Agreement of Hire (Deal number 8494-3) on 10 September 2020 for the leasing of more office equipment. The rental payable in terms of this agreement was the much smaller amount of R676.00 plus VAT per month. The rental period for this agreement was 60 months. It is common cause that Dorasamy signed the guarantee attached to this third Master Rental Agreement. I will deal with the nature and terms of the guarantee in further detail below.
- [9] Each of the three Master Agreements have similar material clauses, including that: Sunlyn would rent to the first defendant, and the first defendant would hire, the goods as described in the schedule to the rental agreements; the rental payable would escalate at 15% per annum as well as an acceleration clause which provided that if Maxidor failed to make any payment payable on the due date, Sunlyn would be entitled to claim immediate payment of all amounts owing for the remaining period of each agreement, whether such payments were then due for payment or not.
- [10] The agreements also provided that Sunlyn would be entitled to cede all or any of its rights under the rental agreements without notice to Maxidor.
- [11] The particulars of claim contain a number of allegations to the effect that Sunlyn did indeed cede its rights under all three of the Master Agreements to the second plaintiff ("**Sasfin**"). Moreover, the plaintiffs allege that subsequent to the cession, Sasfin sold and transferred all its rights, title and interest in respect of the third Master Agreements to the first plaintiff ("**SASP**").
- [12] Maxidor breached each of the three Master Rental Agreements.

[13] Accordingly, Sasfin and SASP, respectively, elected to invoke the acceleration clause in the agreements. The applicants thus allege that Maxidor is indebted to Sasfin and SASP in the following amounts:

- a. in respect of the first Master Rental Agreement: R 3 215 114.36 (Claim A);
- b. in respect of the second Master Rental Agreement: R 1 146 347.19 (Claim B); and
- c. in respect of the third Master Rental Agreement: R 55 400.19 (Claim C).

[14] In addition, the applicants claim interest on these amounts at the rate of 13.5% per annum from 22 December 2021 to date of payment.

[15] Sasfin and SASP pray for summary judgment against Mr Dorasamy for the total of these amounts, as well as costs on the attorney-client scale, on the basis of the guarantee that he signed and which is attached to the third Master Rental Agreement.

Mr Dorasamy's primary defence

[16] The respondent challenges the validity and the ambit of the guarantee that he signed. In essence, while admitting that his signature appears on the page headed guarantee, he alleges that he did not know that he was signing a guarantee in favour of a Maxidor. He also says that, at the very least, he should not be liable for the amounts payable under the first and second Master Agreements (Claims A and B). It will be recalled that Mr Dorasamy's guarantee was attached to the third Master Agreement and, moreover, the second defendant signed the guarantee attached to the first Master Agreement. Mr Dorasamy asserts that his liability should, at best for the applicants, be limited to that claimed under Claim C and he seeks rectification of the guarantee to make this clear.

- [17] Mr Dorasamy's affidavit resisting summary judgment reveals that he worked for Maxidor for 19 years. He alleges that in 2020, he was appointed as the company's General Manager. He explains that around this time, the first defendant was under financial pressure and sought to alleviate this by establishing an office in Kwa-Zulu Natal, which required office equipment supplied by Sunlyn. He describes the pressure faced by the employees, including himself, due to the financial strain on the company. He mentions that it was explained to him that the office in Kwa-Zulu Natal needed equipment, and Sunlyn's services were to be enlisted for this purpose.
- [18] Mr Dorasamy says that, although there was no formal written delegation, he was authorised to sign agreements whose terms had already been considered and approved by the Directors of Maxidor. This authorisation was necessary to ensure the company's daily operations were not impeded.
- [19] Mr Dorasamy emphasises that in his 19-year tenure with the first defendant, he had never before signed as a surety or guarantor in a personal capacity. He states that signing suretyships or providing guarantees was not standard business practice for the employees of the company. He also asserts that it would be illogical for him to willingly bind himself or guarantee the performance of Maxidor, as he had no influence over the company's ability to perform beyond diligently executing his duties as an employee.
- [20] It appears that Mr Dorasamy was retrenched in December 2021. He says that at the time, he received no severance package or notice pay, leaving him to fend for his family without any assurance of payment from Maxidor.
- [21] Mr Dorasamy acknowledges that he signed both the second and third Master Agreements on behalf of the company but asserts that at the time of signing the contracts, he was acting within the course and scope of his employment and furthering the business interests of Maxidor. He highlights that he did not complete his personal details on the agreements. He also says that he did not

“consider its content so as to effectively gauge my personal liability (if any)” and “I did not know that I was signing an agreement (the guarantee) that would bind me personally for the 1st Defendant’s debts”.

- [22] Time and again, Mr Dorasamy emphasises that he was merely a General Manager, not a director, of the first defendant and that he held no interest or shares in the company. He concludes his affidavit by saying:

"33. In amplification to the aforementioned, because I was not, and still am not the director of the 1st defendant, when I signed the agreement I was unaware that I would be signing an agreement binding me to the 1st defendant's liability. This was never explained to me. All I knew was that I was signing a rental agreement, and nothing beyond that, such signature, was within my scope of employment.

34. I submit that it is material error in that I did not have any intention to sign an agreement which, albeit cannot bind me, binds me to the 1st defendant's debts in my personal capacity." (Emphasis added.)

- [23] Mr Aucamp, who appeared on behalf of the applicants, characterised this alleged “material error” as a unilateral one. There was some debate between the parties as to whether the “error” that Mr Dorasamy has pleaded is a mutual error, or a unilateral one. Ms Pama-Sihunu, who appeared for Mr Dorasamy, suggested that the error to which he has referred was a mutual one, although she also dealt with the matter on basis that it was unilateral. In my view, that characterisation question can be left to the trial court. Even if Mr Aucamp is correct, and we are dealing with a unilateral error on the part of Mr Dorasamy, I am satisfied that a triable defence has been raised.

- [24] The “guarantee” that Mr Dorasamy signed is a single page in a “bundle” of separate but connected pages. The first page in the bundle is headed “Master Agreement of Hire”. Rather unusually, it is the signature page of the contract and it reflects Mr Dorasamy’s signature. Someone has written in the word “Director” after “Position of signatory”, being Mr Dorasamy. The second page

of the bundle is headed “Terms of business”. In exceptionally small font, it sets out the general terms of the agreement. The third page is headed “Schedule to Master Agreement of Hire”. On this page, the parties have written in the rental amount payable, the term of the agreement (60 months) and the annual escalation rate. It is also signed by Mr Dorasamy. The fourth page is headed “Addendum to Master Agreement of Hire” and its purpose appears to be to identify the equipment that is being leased to Maxidor. The guarantee is the fifth page of the bundle.

- [25] The word “GUARANTEE” appears in bold at the top of the page. The page contains a number of clauses, also in a relatively small font, although by no means illegible. Clause 1 reads as follows:

“1. I/ We the Guarantor/s listed below, do hereby bind myself/ourselves jointly and severally as co-principal debtor/s and for the primary continuing obligation and punctual payment by Maxidor SA (Pty) Ltd Registration Number 2012/0008950/07 (the "User") to Sunlyn (Pty) Ltd, Registration Number 1988/000147/07 and/or its cessionary/ies (hereinafter the "Hirer") of all amounts whatsoever due and owing arising out of or incidental to all Agreement/s and/or the schedule/s and/or the Annexure/s thereto ("the Agreement/s") concluded between the Hirer and the User, whether actual or contingent, present or future and howsoever arising (the “Guaranteed Obligations”);”

- [26] Mr Dorasamy signed in a block below the various clauses, which is distinctly headed: “Signature of Guarantor”.

- [27] The applicants have sought to rely on *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA). In that case, the Supreme Court of Appeal had to determine if the material mistake of person signing a suretyship agreement, which mistake was induced by the fraud of an independent third party could sustain a plea of *iustus error*. The facts, briefly, were as follows. The respondent, a farmer, was the trustee of a trust, along with his brother and his

nephew. One day, his nephew telephoned the respondent's friend, a Ms Potgieter, and told her that he had certain documents that required the respondent's signature. The documents, it was said, concerned business transactions of the nephew's father (the respondent's brother) in Africa. The respondent knew of his brother's dealings in Africa and regarded them as risky. Potgieter relayed the conversation to the respondent and informed him that the documents had to be signed before a commissioner of oaths, with some urgency and returned by telefacsimile the same day. He was, however, busy and requested her to wait. After two further calls to her from his nephew, Potgieter again spoke to the respondent and emphasised the urgency of the matter. She then gave the respondent a bundle of documents comprising some 75 pages pertaining to a R6 million loan to the trust, which had already been signed by both his brother and his nephew. The suretyship was amongst them. The respondent was prepared to sign the documents without reading them because he believed that he was not personally affected and the two other trustees had already signed. He assumed that his brother and nephew had agreed to the terms on which the appellant would advance monies to the trust and that his signature was required as a mere formality. The respondent and his son went to the manager of the First National Bank, a commissioner of oaths, to sign the documents. The manager happened to know of the transaction which, the respondent said, also reassured him that the documents related to his brother's trust only. Thereafter the documents were duly signed and sent to the respondent's brother. Although he did not read the documents, the respondent alleged that he had never expected a suretyship to be amongst them and that no one had drawn his attention to the suretyship.

- [28] Relying on *iustus* error, the respondent in that case sought to argue that the suretyship in favour of the appellant, Slip Knot Investments, was invalid. The SCA held that when seeking to determine whether a mistake is *iustus* the courts must answer the following question:

"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 a 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.”¹ (Emphasis added.)

- [29] Characterising a mistake of the kind that the respondent had pleaded as ‘unilateral’, the SCA cited *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 4 73 (A), in which it was held (at 479G–I):

“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. In the present case the plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable.”

- [30] In the present case, of course, Mr Dorasamy has expressly pleaded a material mistake.² He says that the guarantee was never explained to him and that all he knew was that he “*was signing a rental agreement, and nothing beyond that*”. Notably, I do not understand the authorities to require an express averment that the mistake was reasonable. That appears to be a question of evidence. It may well be necessary to plead the circumstances in which the mistake arose, as Mr Aucamp has argued, but I am of the view that Mr Dorasamy has indeed made an attempt to do so. He has explained the circumstances in which he signed the documents. Important in this regard is the factual allegation that he was an employee in the company at the time of signing the document, not a director,³ that employees had not historically been

¹ Relying upon *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471B–C.

² Paragraph 15 of his plea.

³ This, in my view, at least partly distinguishes the facts of the present case from *Slip Knot Investments*, *supra*. The respondent in that matter was a trustee of the trust, and therefore stood in a fiduciary relationship with the entity seeking credit. While the Court *a quo* had made much of the fact that the respondent was a farmer, the SCA held (at para 12): “*The court below emphasised the fact that the respondent was a farmer and not a businessman and that he had nothing to do with the trust and the loan advanced to the trust. This is incorrect. The respondent was a trustee of the trust. He may have been a farmer but this is of no consequence. The respondent had his own*

asked to stand surety for, or guarantee, the company's obligations, as well as his repeated assertion that it was not, at any material time, brought to his attention that he was signing a document that could bind him personally.⁴

[31] It is important for me to emphasise that I am not making any finding that these allegations are true, or that if they are proven to be true that they are the only relevant considerations, or even that they alone will ultimately be sufficient to establish that Mr Dorasamy is not bound by the Guarantee. It may well be that the applicants will prove at the trial that Mr Dorasamy did know what he was signing a document that could bind him personally, or that if he did not know, that was not due to any misrepresentation on the part of Sunlyn. But for present purposes, I cannot find that Mr Dorasamy's allegations disclose no defence at all.

[32] I should mention in this regard that the enquiry into whether there was any "misrepresentation" by Sunlyn could in principle extend to whether there was an innocent omission in circumstances where there was an obligation to do more.

[33] Mr Aucamp argued that it is inconceivable that Mr Dorasamy could have been misled in respect of the nature of the guarantee he was signing. The word "GUARANTEE" is recorded on the document in bold and capital letters and in much bigger font than the rest of the document. It is, he submitted, impossible not to notice. He also drew attention to *Constantia Insurance Company Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) at para 19, in support of his argument that a contracting party is not bound to inform the other party of the terms of the proposed agreement. As I read the *Constantia Insurance Co Ltd v Compusource* judgment, however, it is far more supportive of the respondent's argument. It illustrates that "*the full picture*"⁵ must be considered, including

trusts and managed them. He must have known what a trust was and what the duties and responsibilities of a trustee were." The other basis on which *Slip Knot Investments* may be distinguishable is that Mr Dorasamy appears to lay the blame for his mistake at the door of Sunlyn, not (or at least not exclusively) on any third party. *Slip Knot Investments* is primarily authority for the proposition that a misrepresentation on the part of a third party who is not a counter party to the contract cannot sustain a defence of *iustus error*.

⁴ Paragraph 15 of Mr Dorasamy's plea.

⁵ *Ibid*, at para 20.

whether the terms sought to be imposed could reasonably be expected in the contract under scrutiny.⁶ The SCA's further findings in that judgment⁷ have also been invoked by the respondent's Counsel in this case. The SCA's conclusion (at para 23) is particularly relevant:

"In all the circumstances, I am therefore satisfied that the reasonable person in the position of Fegen and Binnington would not have inferred simply from the fact of Rust's acceptance of the quotations that his true intention was to bind Compusource to the provisions of clause 3.5. I believe that the reasonable person would thus have enquired from Rust at the time whether he appreciated the meaning of the clause. If his answer was in the negative, as we now know it would have been, the reasonable person would have explained the clause to him. The legal consequence of the failure by Fegen and Binnington to follow this approach, is that Compusource cannot be held bound by the provisions of a clause to which its representative did not and could not reasonably have been thought to agree." (Emphasis added.)

[34] As to the nature of the guarantee, the present case is also complicated by the fact that the applicants are alleging that the guarantee that Mr Dorasamy signed was an unlimited one. They interpret the clause to mean that he guaranteed not only Maxidor's obligations arising from the third Master Agreement, but also those far more onerous commitments flowing from the first and the second Master Agreements, and any other obligations to Sunlyn that might arise in future. While that is a matter of interpretation that will need to be resolved by the trial court,⁸ if the applicants are correct, it is also a factor which must be considered in an assessment of whether Mr Dorasamy was reasonably misled, albeit perhaps innocently, as to the scope or ambit of what he was signing.

[35] I also note that the SCA has been known to adopt a more lenient approach in

⁶ See also, *Slip Knot Investments*, supra, at para 12: "A contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract."

⁷ Ibid, at paras 20–23.

⁸ This judgment should not be read as accepting that Mr Dorasamy's guarantee did extend to the obligations arising from the first two Master Agreements.

cases of *iustus* error involving suretyships. In the case of *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA)⁹, by way of example, Cloete JA, delivering the majority judgment, upheld a signatory's appeal, finding that he was not bound by a suretyship, on the basis of *iustus* error, because "*the form was a trap for the unwary and the appellant [signatory] was justifiably misled by it*"¹⁰. The SCA reached this conclusion despite the fact that, amongst other things, the signatory was a "*brilliant businessman*", as well as a director of the company, and he had set up his own mistake by failing to read a fairly straightforward one page document. The SCA held:

"[2] ... an innocent misrepresentation by the other party suffices: The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. Where the misrepresentation results in a fundamental mistake, the 'contract' is void ab initio. In this way the law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature, while at the same time protecting such a person if he/she is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document.

[3] In deciding whether a misrepresentation was made, all the relevant circumstances must be taken into account and each case will depend on its own facts. For present purposes, all that need be said in this regard is that the furnishing of a document misleading in its terms can, without more, constitute such a misrepresentation."

[36] As the SCA highlighted, each case will depend on its own facts. Those facts, in my view, must be fully explored in evidence in a trial.

⁹ [2005] 2 All SA 343 (SCA).

¹⁰ *Brink v Humphries* at 426C.

- [37] A court deciding a summary judgment application has an overriding discretion.¹¹ What is meant by this is if the court has any doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. Thus, "[t]he grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law".¹²
- [38] The defendant is not required to give a complete account of the facts, in the sense of giving a preview of all the evidence. Affidavits in summary judgment proceedings are treated with a certain degree of indulgence, and even a tersely stated defence may be sufficient indication of a *bona fide* defence. Nevertheless, the defence must not be averred in a manner that is needlessly bald, vague or sketchy.
- [39] The test is whether on the set of facts before it, the court is able to conclude that a defence raised by the defendant is bad in law. As have I noted above, there are several cases in which a defence of *iustus* error, in not dissimilar circumstances, has succeeded.
- [40] The SCA in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA),¹³ dealing with the purpose of summary judgment applications, held as follows (at para 32):

"[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In

¹¹ *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at paras 10 and 11.

¹² *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423G.

¹³ [2009] 3 All SA 407 (SCA).

the Maharaj case^[14] at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment.”

[41] In my view, Mr Dorasamy has put up sufficient allegations in his plea and in his affidavit opposing summary judgment to meet the threshold required of him in this summary judgment application.

[42] On the basis of the facts that are alleged, when viewed through the prism of the prevailing law on the subject, the defence that the respondent has advanced is *bona fide* and there is a reasonable possibility that he may succeed on trial.¹⁵

Other defences

[43] The respondent has raised a number of other defences. Given the conclusion to which I have come, it is not necessary to consider them.

Costs

[44] Both parties asked for costs in the event that they are successful. I see no reason why costs should not follow the result.

Order

[45] In the circumstances, I make the following order:

1. The application for summary judgment is refused;

¹⁴ *Maharaj v Barclays National Bank Limited, supra.*

¹⁵ *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 462 E–H.

2. Leave to defend the action is granted to the third defendant;
3. The applicants shall pay the respondent's costs of this application, including the costs of Counsel.




GOTZ AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 8 February 2024 (supplementary heads filed on 23 February 2024)
Date of Judgment: 25 July 2024

Appearances:

For the Applicants: S Aucamp instructed by Smit Jones & Pratt Attorneys

For the Respondent: K Pama-Sihunu instructed by JC Davis Attorneys