Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 2240/2010
Date Heard: 16/02/12
Date Delivered: 23/02/12

In the matter between

ABSA BANK LIMITED **Plaintiff**

and

PAUL DENEYS TRZEBIATOWSKY **First Defendant**

BARBARA TRACEY TRZEBIATOWSKY
(formerly WOOD) **Second Defendant**

PAUL DENEYS TRZEBIATOWSKY N.O. **Third Defendant**

MARK BRADLEY N.O. **Fourth Defendant**

GAVIN McNISCH N.O. **Fifth Defendant**

(in their capacities as Trustees of the Trez Trust)

J U D G M E N T

REVELAS J

[1] The issue to be decided in this matter is whether the directors of three companies who in obtaining financial assistance from the bank for a business venture, and had signed deeds of surety in favour a bank in their personal capacities, can escape liability on the basis that they did not understand the nature of the documents they were required to sign.

[2] The plaintiff, Absa Bank, instituted action against the five defendants, jointly and severally, for payment of an amount of R7 809 810.43, plus interest and costs, arising from a loan and deeds of suretyship signed as security for repayment of the loan. The third, fourth and fifth defendants are cited in their capacities as trustees of the Trez Trust, and the plaintiff obtained summary judgment against them. The first and second defendants, who had signed deeds of suretyship in their personal capacities, were granted leave to defend the action.

[3] The two defendants contended that they were unaware, when they signed the suretyship agreements, that they would incur personal liability for the repayment of the loans made to three companies to be formed: Shelfcat 4 (Pty) Ltd, Shelfcat 23 (Pty) Ltd and Star Coded Designs (Pty) Ltd (the companies). Both defendants were directors of the three companies. The first defendant is also cited as the third defendant, in his capacity a trustee of the Trez Trust. The defendants' main contention is that, had the plaintiff's relationship manager, Mr Neels van Niekerk, who was present at most of the discussions concerning the financing of the intended business venture as well as the relevant signature meeting of 7 October 2008, alerted them to the nature and consequences of the documents they were about to sign, they would not have signed the suretyships.

[4] The facts that gave rise to this action are briefly the following: The first defendant and the second defendant were married on 29 June 2008, after having been involved in a close relationship for a long time. Sometime during 2007, or prior thereto, the second defendant introduced

a Mr Christopher Sam to the first defendant after she caused an alarm security system to be installed at Mr Sam's home. It was then that she learned that Mr Sam was desirous of selling three Woolworths stores, (one in Jeffrey's Bay and the other two in Port Elizabeth), as he intended immigrating. The first defendant, a businessman, became interested in buying into the Woolworths franchise, which to him presented a promising business opportunity. Protracted negotiations followed as the parties were unable to agree on a purchase price.

[5] Initially the parties intended that the three companies in question would purchase all the assets in terms of an ordinary sales transaction. Mr Sam, however, raised concerns about capital gains tax. This led to a differently structured agreement, to the effect that the companies (to be formed) would purchase all the shares in the franchise held by Mr Sam's Family Trust. It was agreed that the Trez Trust would stand surety for the companies in this transaction.

[6] The first defendant consequently approached the plaintiff for financial assistance which brought Mr Neels van Niekerk into the picture. According to Van Niekerk, the second defendant, at his behest, came to the bank on 7 October 2008, to sign the personal surety documents, to which she appended her signature on that very day. She had been appointed as a second director of the companies and was she was furthermore tasked with *inter alia,* purchasing all the textiles for the three Woolworths stores.

[7] The first defendant wearing the hat of trustee of the previously dormant Trez Trust and by virtue of the resolution passed the month before (18 September), also signed deeds of suretyship in terms of which the trust bound itself as surety and co-principal debtor, together with the three principal debtors (the companies) on three separate, but almost identical documents, for the payment of the amounts owed by them to the plaintiff.

[8] The three principal debtors also entered into reciprocal suretyship agreements. These were also signed by the first defendant. The first defendant was required to sign fifteen deeds of suretyship: in his capacity as trustee, director and in person. He testified that the multitude of documents placed before him for signature caused him to sign them without reading them which he said would not have done had he been properly alerted to the contents and effect thereof. The second defendant signed three deeds of suretyship binding herself in her personal capacity. The companies are presently in final liquidation.

[9] Having testified and made certain concessions in cross-examination, the first defendant consented to judgment, in the amount as claimed. Judgment was accordingly entered and the matter proceeded against the second defendant.

[10] The second defendant's defence was that she was unaware of what she was signing. She testified that she was simply requested by her husband, the first defendant, to come to Absa bank in order to sign some documents. Having arrived there and at a meeting with Van Niekerk, she said she was given a pile of documents, which she described as "a lot of paper work", which she was requested to sign. In cross-examination she conceded that a large pile of documents in fact was placed before the first defendant and that only the three documents which she was required to sign, were handed to her. Mr van Niekerk, she maintained, failed to advise her that by her signature she would bind herself to become personally and stated that if the consequences of appending her signature had been explained to her, she most certainly would not have signed the documents. In giving the reasons for signing the documents she professed her ignorance concerning the concepts of suretyship and warranties and further that she trusted Van Niekerk with whom she had prior business dealings when the alarm system was installed for him and his father. She added that she also had met Van Niekerk on some

occasions when discussions were held with Mr Sam concerning the business venture. At none of these meetings she said, was any mention made that she, or the first defendant would be required to sign personal suretyship agreements. Finally, she denied having any knowledge of the general practice observed by banks in requiring directors of companies to furnish personal security in respect of loans granted to such companies.

[11] Counsel for the second defendant submitted the parties were not *ad idem* when the suretyship agreements were concluded, and that in the absence of the second defendant's knowledge as to the contents thereof, the deeds of suretyship were not binding on her: a defence thus of *iustus error*.

[12] It is common cause that Van Niekerk had pointed out that the documents in question were suretyships in favour of the plaintiff, and that his assistant, Ms Joey van Niekerk, pointed out where the signatures had to be appended. The words next to the line where the second defendant appended her signature, clearly indicate that she signed in her own name. Of importance is the clause in the suretyship agreements providing for unlimited liability: the second defendant was specifically requested to sign in full (as opposed to only initialling it) next to the clause in all three documents, which she did. On her version this requirement should have caused her concern. It evidently did not and she made no attempt to obtain clarity as to the meaning of this clause. Her faint explanation was simply that she trusted her husband and Van Niekerk.

[13] In order to succeed in the defence of *iustus error* the second defendant must show that she was misled as to the nature of the deeds of suretyship or as to the terms which they contained, or by some act or omission on the part of Van Niekerk, if there was a duty on him to inform the defendants (in particular the second defendant) of the consequences of signing the personal sureties. Such duty would only arise where the document departed from prior representations as to the nature or

contents thereof (see *Tesoriero v Bhyjo Investments see Share Block Pty Ltd).*[1]

[14] It is true that Van Niekerk did not single out the personal sureties amongst the others in order to alert either of the defendants to the personal risks involved in signing those documents. It was moreover common cause that the second defendant was not present at all the meetings with Van Niekerk. It can safely be assumed that she was not as *au fait* as her husband concerning the details of the financial transaction. The question therefore arises whether Van Niekerk was in duty bound to explain to her the personal risks of signing the sureties.

[15] Ms *Enslin*, who appeared for the second defendant, placed reliance on the judgment in *Brink v Humphries*[2] in support of the defence raised by the second defendant. In that matter, the surety similarly maintained that at the time of signature of a credit application form on behalf of a debtor, he was unaware that it contained a personal suretyship obligation. The facts of that matter suggest that the form was indeed misleading and induced a fundamental and genuine mistake in the mind of the appellant: he thought he was signing a credit application form on behalf of a company, whereas it in truth was a personal surety. The surety obligation was accordingly held to be void, *ab initio*.

[16] In the more recent decision of *Slip Knot Investments 777 du Toit*[3]*,* the defence of *iustus error* was also raised where the omission of a third party (to inform the defendant of the nature of the document he was called upon to sign), was relied upon. The court *a quo* found that the respondent, a farmer, had nothing to do with the loan made in that matter, and had made a reasonable mistake, as he did not expect the suretyship he signed amongst the documents sent to him. The Supreme

[1] 2001 (1) SA 167 (W) at 175 F-H.

[2] 2005 (2) 419 (SCA).

[3] 2011 (4) SA 72 (SCA).

Court of Appeal in *Slip Not* recognized the principle that a party is permitted to rely on his or her own mistake in certain circumstances, except where the other party has not made any misrepresentations[4], as was held in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*[5]. The Court also deferred[6] to the decision in *Sonap Petroleum (SA) Pty Ltd v Pappadogianis*[7] where the 'decisive question' to be asked in these type of matters was summed up as follows:

> "(D)id the party whose actual intention did not conform the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that misrepresentation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"[8]

[17] In upholding the appeal in *Slip Knot* the court held that a person who was induced to sign a surety by the fraud or misrepresentation of a third party (in that case the respondent's brother who wanted a loan from the family trust for a business venture) will nevertheless be bound by the agreement if the lender is innocent and unaware of the surety's mistake. The lender would be entitled in those circumstances, to rely on the appearance of liability created by the surety's signature, thus precluding the surety from setting up his or her own mistake to escape liability.[9]

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[4] At 76 C-D.

[5] 1958 (2) SA 473 (A) at 479 H-G.

[6] At 76 E-F.

[7] 1992 (3) SA 234 (A)

See also: *South African Railways and Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715-16 where the principle was formulated that the law concerns itself with the external manifestations, and not the workings, of the minds of the parties to a contract.

[8] At 238 I.

[9] Paragraph [9] at 76 C-77 A.

[18] In formulating the aforesaid, Malan JA also relied on the principle formulated in *Constantia Insurance Co Ltd v Compusource (Pty) Ltd*[10], that a contracting party is generally not bound to inform the other party of the terms of the proposed agreement, but is required to do so where there are terms that could not reasonably have expected to be in the contract. The learned Judge, having applied applied the aforesaid to the facts in *Slip Knot,* continued as follows[11]:

> "I can find nothing objectionable in the set of documents sent to the respondent. Even a cursory glance at them would have alerted the respondent that he was signing at deed of suretyship".

It was further stressed that the farmer in that matter was a trustee who had dealt with his own trusts. Applying these considerations to the present matter "a cursory glance" at the deed of suretyship may have alerted the first defendant, but not the second defendant, if her professed ignorance was genuine.

[19] The second defendant had always been employed in the business sector, albeit in the marketing side. It is improbable that she had never heard of sureties or never signed any documents in her work situation. On this score the evidence of the second defendant was less than satisfactory: she reluctantly answered questions and became visibly agitated.

[20] The second defendant was the co-director, together with her husband, of the companies to be formed. Her husband had considerable business experience. The copies of the internal communications between Van Niekerk and the loan sanctioner (the manager who approved the financing in question), were presented in evidence. These communications clearly demonstrated that information was gathered about the two defendants which could only have been obtained from the defendants themselves, and which portrayed them as highly suitable business people. The defendants testified that the second defendant was appointed as a

[10] 2005 (4) SA 345 SCA paragraph [19].

[11] Paragraph [12] at 77 H-I and 78 A-B.

director to enable her to make independent decisions, as she was to bear the responsibility of purchasing textile items to be sold in the three Woolworths stores. She was a career woman who had always worked in the business sector. It happened to be in this very capacity that Mr van Niekerk first met her, *ie* when the 'Voice Alert' alarms were installed at his home and that of his father.

[21] Against this background Van Niekerk, in my view, had no reason to suspect the degree of ignorance relied upon by the second defendant.

[22] According to Van Niekerk, the only purpose for requiring the second defendant's presence at the signature meeting of 7 October 2008 was for her to sign the personal sureties. The second defendant did not make any effort to establish why she, as a director of the three companies concerned, was called upon to sign the documents which she maintains she did not read. The deeds of suretyship in any event, were not part of a pile of documents as the second defendant initially attempted to convey in her evidence.

[23] In my view, it would be almost inconceivable that a bank would not require security from directors in their personal capacity in circumstances such as these. The only other surety in this case was the Trez Trust which was a dormant trust. It was also established during cross-examination of the first defendant, (who conceded the point), that there were indeed insufficient securities, bar the personal sureties of the directors, to cover the amount of financing required. The requirement of personal sureties to be given by the directors in this matter is consonant with prudent bank practice. The fourth defendant, who was also the first defendant's accountant, conceded this point in his evidence. Van Niekerk testified that at the commencement of the negotiations (or about that time), he had informed the first defendant that personal sureties would be required.

[24] The surety deeds did not contain any unusual or unexpected clauses. The limitation clause, as I have mentioned, was pointed out to the second defendant and her full signature was required next to it. All three documents placed before her were surety deeds from which it was apparent that they had to be signed in her personal capacity. In the present matter, there is no basis to find, as was found in *Brink Humphries (supra),* that the document in question was "a trap for the unwary and that the appellant was justifiably misled by it".[12] If the principles enunciated in the cases I have referred to above, are applied, Van Niekerk was not under any duty to alert the second defendant of the risks involved in signing the surety agreements in question. As stated in *Langeveld v Union Finance Holdings (Pty) Ltd,*[13] the second defendant was no "babe-in-the-wood" where facts similar to the present matter were considered.

[25] In *Roomer v Wedge Steel (Pty) Ltd*[14] the suretyship was contained in a clause in a bold font, headed 'Agreement of Sale and Suretyship'. In that matter the defence of ignorance was rejected and the court held that the creditor reasonably relied on the surety's consent. In the *Langeveld* matter, the court applied the *'praesumptio hominis'* (popular presumption) in holding that there was a strong presumption that anyone who has signed a document had the intention to enter into the transaction contained in it, and the surety is burdened with the *onus* of convincing the court that he or she had not intended to enter into the contract. The maxim *caveat subscriptor,* then finds application. This principle in our law that a person who signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature, is still

[12] At 426 B-C paragraph [11].

[13] 2007 (4) SA 572 (W) at 575 H, paragraph [12], per Willis J.

[14] 1998 (1) SA 538 (N).

regarded as valid.[15] The second defendant's defence of a *iustus error,* is clearly trumped by the aforesaid maxim.

[26] In the circumstances, the second defendant's defence falls to be rejected. Judgment is accordingly entered in favour of the plaintiff against the second defendant, jointly and severally with the first defendant's liability in terms of the judgment granted against the first defendant on 17 February 2012, for:

1. Payment of the sum of R7 809 810.43.

2. Interest on the aforesaid amount at the rate of 10% per annum from 1 July 2010 to date of payment.

3. Costs of suit on the scale as between attorney and client.

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E REVELAS
JUDGE OF THE HIGH COURT

[15] See: *George v Fairmead (Pty) Ltd* (the *locus classicus)* 1958 (2) SA 465 A at 470 B-E. See also: *Brink v Humphries (supra)* at 421 G-I where Cloete JA held that the principle is still a sound one at 575 H-I.

Counsel for the Plaintiff: Adv A Beyleveld SC

Instructed by: Sandenberg Nel Haggard
Golden Isle
281 Durban Road
Belville
c/o
McWilliams & Elliot Inc
83 Parliament Street

Central
Port Elizabeth

Counsel for the First and Second Defendants:	Adv W Enslin
Instructed by:	Orelowitz Inc c/o Kaplan Blumberg Att. 1st Floor, Block A Southern Life Garden No. 70-2nd Avenue Newton Park Port Elizabeth
Dates Heard:	16-17 February 2012
Date Judgment Delivered:	23 February2012