**IN THE HIGH COURT OF SOUTH AFRICA,**
**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | ~~YES~~/NO |
| **Of Interest to other Judges:** | ~~YES~~/NO |
| **Circulate to Magistrates:** | ~~YES~~/NO |

Case number: 1629/2022

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA LTD** Plaintiff

and

**JACOBUS VERMEULEN** Defendant

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**CORAM:** AFRICA, AJ

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**HEARD ON:** 18 AUGUST 2022

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**DELIVERED ON:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 9h00 on 30 August 2022.

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**JUDGMENT**

## INTRODUCTION

[1] This is an application for summary judgment. The application stands opposed and the defendant has filed his affidavit resisting the application. Plaintiff is of the view that the defendant has raised no *bona fide* defence or triable issues.

## BACKGROUND

[2] According to the plaintiff's particulars of claim, on 17 June 2020, the plaintiff entered into a written settlement agreement with certain companies, including Karah Equity (Pty) Ltd, *(in liquidation)* (hereinafter referred to as "the principal debtor").[1]

In terms of the Deed of Settlement the principal debtor acknowledged to be indebted to the plaintiff in respect of 5 (five) account numbers and on the 2nd of July 2020, the settlement agreement was made an order of court.[2]

[3] The amounts due in terms of the deed of settlement were not paid and the principal debtor is indebted to the plaintiff in the amounts as set out in paragraph 8 of the particulars of claim.[3]

[4] On 19 November 2019 the defendant signed a written guarantee in terms of which the defendant unconditionally guaranteed and

[1] Paragraph 4, POC, page 7.
[2] Paragraph 7, POC, page 13.
[3] Paragraph 9, POC pages 15-16.

undertook the due, punctual and full payment of all debts which the principal debtor owes to the plaintiff. As a result of the indebtedness of the principal debtor, the defendant, as guarantor, is indebted to the plaintiff in the amounts set out in paragraph 12 of the particulars of claim.[4]

[5] The defences raised in the defendant's plea[5] can be succinctly summarised as follows:

[5.1] Defendant is not bound by the terms of the guarantee because it had been signed in error;

[5.2] At the time of signing same he was acting on behalf of the principal in concluding various agreements; he was presented with a bundle of documents comprising various contracts for signature on the assumption that it contained the terms of the agreement reached between the plaintiff and the defendant acting in his representative capacity only;

[5.3] When signing the guarantee, plaintiff and/or its duly authorised representative acting on its behalf negligently failed to disclose to him the fact that the bundle of documents contained a guarantee binding the signatory thereto as guarantee and undertaking therein an obligation independent of the principal;

[5.4] He never intended to bind himself as guarantee or to create personal liability by signing the guarantee, Annexure "POC6" to the particulars of claim.

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[4] Paragraph 12, POC, pages 18-19

[5] Paragraph 8, defendant's plea, page 3

[6] Plaintiff contends that there is simply no merit to the defences raised and that even on the defendant's version, does he not disclose a *bona fide* defence.

[7] The first bone of contention raised is that the defendant is not bound by the terms of the agreement because he was unaware that the bundle of documents contained a guarantee and thus signed it in error. In support of this notion, the defendant draws this court's attention to the fact that it is a policy in offices of Karah Equity (Pty)Ltd and its subsidiaries that directors do not put forth security. In abetment hereof, this court is referred to the confirmatory affidavit by a certain Mr Martin Walter.

[8] It is argued that the facts of this case at the least set up an "innocent misrepresentation" on the part of the plaintiff, when one accepts that it is conceivable that when the defendant so signed the ±500 pages, that a document could be signed in error.

[9] It is contended that essentially, the guarantee was not negotiated, nor pointed out to the defendant, and he was in the dark when signing the various documents and disputes that the guarantee was pointed out to him at all. Therefore, in the circumstances, it was required of the plaintiff and its personnel to duly point out the guarantee and to have informed the defendant thereof, which they did not do according to the defendant.[6]

[10] In refutation of this argument, plaintiff refers this court to the case of *Blue Chip Consultants (Pty)Ltd v Shamrock*[7] where the following is stated:

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[6] Paragraph 22, the defendant's heads of argument.
[7] 2002 (3) SA 231 (W) at 239E-F.

> "Secondly, I do not understand our case law to hold that a person will escape the consequences of his signature if it can be shown that he had not read the document in question. One is expected to read what one signs,"

Further, in the case of *Tesoriero v Bhyjo Investments Share Block (Pty)Ltd*[8] where the following was stated:

> "The general principle, where a person has signed a contract and wishes to escape liability on the ground of justified error as to the nature or contents of the document, is that he or she must show that he or she was misled as to the nature of the document or as to the terms which it contained by some act or omission of the other contracting party"

[11] The defendant, also placing reliance of the case of *Blue Chip (supra)*, drew this courts attention to the following extract"

> "The furthest the courts will go on a principle approach is to identify the issue as one of iustus error. See Sonap Petroleum (SA) (Pty) v Pappadogianis[9]. For the rest the approach is casuistic. It involves a consideration of the document itself and the nature of the transaction between the parties. By nature of the transaction, I do not mean its legal classification. I mean what transpired between the parties which led to the signing of the document and other relevant admissible evidence which assists in explaining the basis upon which the signature was placed. It would embrace instances where the party who presented the form was aware that the other party was illiterate. It would include misrepresentations made by the creditor or other conduct which a court considers sufficiently blameworthy so as to relieve a party from some, or all, of the ordinary consequences of his signature"

[12] Plaintiff argues that even on a cursory glance of the document in question, the defendant should have been alerted by the heading which is printed in bold letters:

"GUARANTEE"

Directly beneath that, once again in bold letters the following words appear:

"LIABILITY AND OBLIGATIONS OF THE GUARANTOR"

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[8] 2000 (1) SA 167 (W) at 175F.
[9] 1992 (3) SA 234 (A) at 239A – 240B and the cases cited

[13] Further the plaintiff states that prior to the defendant signing the guarantee, it was discussed with the defendant that the plaintiff required collateral in the form of a R10 000 000.00 guarantee to be signed by the defendant. The defendant agreed to sign the R10 000 000.00 guarantee where after the guarantee was sent to the Bloemfontein branch of the plaintiff by the Durban Collateral Centre under a collateral cover sheet. A copy of the collateral cover sheet dated 7 November 2019 is annexed hereto as Annexure "AS1". Prior to the defendant signing the guarantee he was informed that the document which he was signing constitutes the guarantee in the amount of R10 000 000.00 which plaintiff required as collateral.

[14] From the above, one gathers that the "discussion" between the parties was not a hastily affair, "AS1" dated 7 November 2019 indicates that the Collateral documents forwarded electronically contained the Guarantee Restricted to R10 Million. Why will defendant all of a sudden "slip-in" the guarantee documents into a bundle, when the signing of the guarantee formed the basis of the collateral required by plaintiff. Therefore, the impression created by the defendant that he was in the dark when signing the documents, falls to be rejected. More so when one has regard to the fact that each and every page of the Guarantee document had to be initialled and on the second last page, beneath the heading Guarantor No1, the defendant's full details appear, where he appended his signature.

[15] This court agrees with the submission that anyone reading the form should immediately have been put on his guard. Further, defendant failed to show that he was misled

as to the nature of the document or as to the terms which it contained by some act or omission by the plaintiff.

[16] In response to the argument raised by the defendant that the Guarantee was not pointed out or discussed with him at all, this court was referred by the plaintiff to the case of *Slip Knot Investments 777 (Pty) Ltd v Du Toit*[10] where the following was stated:

> "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. The court below came to the conclusion that the suretyship was "hidden" in the bundle, and held that the respondent was in the circumstances entitled to assume that he was not personally implicated. 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 a deed of suretyship."

[17] Further, the plaintiff argues that it is peculiar why the defendant will at no stage inform the plaintiff that there is this policy at Karah Equity, and its subsidiaries that directors will not put forth security, during the course of their ongoing negotiations. Plaintiff contends that the confirmatory affidavit deposed to by a certain Martin Walzer does not inform what his involvement is with Karah Equity, neither does it state whether he deposed to this affidavit as a director or subsidiary. Plaintiff contends that this defence is without merit.

[18] Another defence raised is that the deponent to the founding affidavit claims to have personal knowledge , though when the defendant dealt with the deponent when he signed the guarantee, the majority of the negotiations with plaintiff did not occur with the

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[10] 2011 (4) SA 72 (SCA) at 77H.

deponent.[11]Further that the deponent has no personal knowledge of the matter and he was not directly involved and only now draw knowledge from the files and documents in his possession.[12]

[19] In refuting this argument this court is referred to the case of *Appel* in *Rees and Another v Investec Bank Ltd*[13] where it was stated that where an applicant for summary judgment was a corporation, the deponent to its affidavit did not need to have first-hand knowledge of every I fact comprising its cause of action. The deponent could rely for its knowledge on documents in the corporation's possession. Here the deponent, a recoveries officer had had sufficient personal knowledge to swear positively to the facts. She had acquired her knowledge on a perusal of the documents relevant to the action, and had personally corresponded with the sureties' attorneys on the debtors' delinquent accounts, later writing them letters of demand, and receiving from them responses setting out the sureties' defences. It was unimportant that she had not signed the certificates of indebtedness sent to the sureties, and that she had not been present when the suretyship agreements were concluded.

[20] This court accords with the sentiments expressed above. It is clear from the case law that first-hand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and that, where the plaintiff is a corporate entity, the deponent may well legitimately rely on his or her personal knowledge of at least certain of the relevant facts and his ability to swear positively to such facts, on records in the company's possession.

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[11] Paragraph 6 of the affidavit resisting summary judgment.
[12] Paragraph 12 and 15 of the affidavit resisting summary judgment.
[13] 2014 (4) SA 220 (SCA) at page 221.

[21] The defence raised in this regard that the deponent, though present when the defendant signed the guarantee, was not a part of the majority of the negotiations with the plaintiff and thus has no personal knowledge of the matter and that he only draws knowledge from the files and documents in his possession, is without merit.

[22] In as much as the summary judgment procedure was not intended to deprive a defendant with a triable issue or a sustainable defence of his day in court, this court supports the view as expressed in the case of *Joob Joob investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[14] where it was held:

> "that summary judgment proceedings terrified only those who had no defence, and that the time had perhaps come to discard those labels such as 'extraordinary and 'drastic' and rather to concentrate on the proper application of the rule".

[23] It is the considered view of this court that no sustainable or *bona fide* defences had been put up by the defendant.

[24] In the result the following order is made:

Summary judgment is granted in favour of the plaintiff against the defendant for:

1. In respect of account number **403843570001:**

   1.1 Payment of the amount of **R48 416,86;**

   1.2 Payment of interest on the amount of R48 416, 86 at the rate of 7.750% per annum, calculated from 2 March 2022 to date of payment, both days inclusive.

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[14] 2009 (5) SA 1 (SCA) at 3D.

2. In respect of account number **403843490001:**

   2.1 Payment of the amount of **R61 197,41;**

   2.2 Payment of interest on the amount of R61 197, 41 at the rate of 7.750% per annum, calculated from 2 March 2022 to date of payment, both days inclusive.

3. In respect of account number **403843220001:**

   3.1 Payment of the amount of **R3 321,63;**

   3.2 Payment of interest on the amount of R3 321, 63 at the rate of 7.750% per annum, calculated from 2 March 2022 to date of payment, both days inclusive.

4. In respect of account number **071179300001:**

   4.1 Payment of the amount of **R250 609,71;**

   4.2 Payment of interest on the amount of R250 609, 71 at the rate of 8.00% per annum, calculated from 2 March 2022 to date of payment, both days inclusive.

5. In respect of account number **403843140001:**

   5.1 Payment of the amount of **R8 181 174,03;**

   5.2 Payment of interest on the amount of R8 181 174, 03 at the rate of 7.750% per annum, calculated from 3 March 2022 to date of payment, both days inclusive.

6. Costs of suit on an attorney and client scale.

**A. AFRICA, AJ**

**APPEARANCES**:

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| **COUNSEL FOR PLAINTIFF:** | Adv. Els<br>Instructed by:<br>Phatshoane Henney Inc. |
| **COUNSEL FOR DEFENDANT**: | Adv. Sander<br>Instructed by:<br>Peyper Attorneys |